

# If We Build It, They *Might* Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families

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*Litigation arising from separation and divorce creates significant challenges for courts, families, and communities. Not only is it a major contributor to already-overburdened state court dockets, but it also strains the emotional and economic resources of the families involved. Resolving disputes through litigation requires that courts regulate the daily lives of parents and children—matters best decided within the family. Litigation inflames family conflict, increasing the risk of negative emotional and educational outcomes for children. Litigation drains parents' emotional and economic resources, rendering them less effective as parents and less productive as employees and citizens. Litigation-based models of dispute resolution assume that parents will be represented by lawyers, yet most cannot afford to pay lawyers' fees.<sup>1</sup>*

*IAALS, the Institute for the Advancement of the American Legal System at the University of Denver,<sup>2</sup> created a model interdisciplinary center (the "Center") to promote alternative dispute resolution as the preferred method of family dispute resolution rather than an outlier relegated to the sidelines of the legal system.<sup>3</sup> The Center provided services to parents and children from 2013 to 2017, first at the University of Denver and then in the Denver community. Interdisciplinary teams of lawyers, mental health clinicians, and financial planners provided assessments, legal information, mediation, financial planning, therapy, and agreement drafting at the Center, based on individualized service plans for families. When the Center was located on the University of Denver campus, these services were provided by supervised students in law, social work, and psychology. Through collaboration with the Colorado court system, parents who used Center services to reach mediated agreements were granted divorces or decrees before a judge at the Center. For the first time in American history, parents could go through the entire divorce process, including any necessary court hearings, without having to set foot in a courtroom.*

*An empirical evaluation found that participation in Center services improved parental communication, reduced acrimony between parties involved, improved parents' and children's overall emotional health during a particularly stressful period of their*

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1. See *infra* notes 49–52 and accompanying text.

2. About, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, <http://iaals.du.edu/about> (last visited Sept. 20, 2018).

3. See Rebecca Love Kourlis & Janet Drobinske, *Out-of-Court Model for Separating and Divorcing Families*, IAALS, <http://iaals.du.edu/projects/out-court-model-separating-and-divorcing-families> (last visited Sept. 20, 2018).

*lives, and reduced time and expenses required for the separation and divorce process.<sup>4</sup> That evaluation also found that the Center provided a supportive environment in which law students could develop the interdisciplinary knowledge, values, and skills needed to practice modern family law. Despite external recognition for the Center, including the 2015 Lawyer as Problem Solver Award from the American Bar Association Section of Alternative Dispute Resolution,<sup>5</sup> the Center’s efforts to recruit families and create a sustainable business plan ultimately were unsuccessful.*

*This Article argues that the “Implementation Gap” between providing effective alternative dispute resolution (ADR) services and attracting families to participate in them can be bridged by educating parents, the legal community, and the general public about the value of ADR. These measures should focus on fostering long-term legal and cultural change and might include: (1) an educational campaign to inform separating and divorcing parents of their dispute resolution options and how to decide which are best for them; (2) requiring that lawyers and clients discuss the possibility of ADR; (3) mandating ADR participation by parents before commencing litigation in appropriate cases; (4) changing lawyers’ regulatory rules to encourage partnerships between law and mental health service providers; (5) allowing mediators to draft agreements; and (6) changing the law school family law curriculum to emphasize interdisciplinary collaboration and ADR. Long-term funding from innovative sources such as Social Impact Bonds could be used to support ADR programs long enough to secure clients and community support.*

CONTENTS

I.	Introduction: A Field of Dreams for Separating and Divorcing Families .....	28
II.	The Organization of this Article .....	32
III.	Litigation and ADR in Separating and Divorcing Families: Scope and Effects.....	33
	A. Separation and Divorce on State Court Dockets...	33
	B. The Reduced Role of Fault.....	34
	C. The Effects of Litigation-Related Conflict .....	35
	1. Impact on Children .....	35
	2. Impact on Parents and Communities.....	37

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4. See *infra* notes 96–98 and accompanying text.

5. See Natalie Anne Knowlton, *IAALS and Center for Divorcing Families Receive 2015 ABA Problem Solver Award*, IAALS BLOG (Mar. 26, 2015), <http://iaals.du.edu/blog/iaals-and-center-divorcing-families-receive-2015-aba-problem-solver-award> (last visited Jan. 20, 2019).

- D. Self-Representation, the Conflicted Role of Counsel, and Access to Justice ..... 38
  - 1. The Rise of Self-Representation ..... 38
  - 2. Problem Solvers and Litigators ..... 39
- E. The Varieties of ADR for Separating and Divorcing Families ..... 42
- IV. The Center Services Model ..... 46
  - A. Overview ..... 46
  - B. The Center’s History and Structure ..... 48
  - C. Profiles of Center Families ..... 50
    - 1. Case Study: The “A” Family ..... 50
    - 2. Case Study: The “B” Family ..... 52
  - D. Empirical Evaluation of the Center’s Impact on Families ..... 53
    - 1. On-Campus Center Services Evaluation ..... 53
    - 2. Community-Based Center Services Evaluation ..... 55
- V. The Sustainability of the Center and the Implementation Gap ..... 56
- VI. Bridging the Implementation Gap ..... 59
  - A. In-Court Information for Litigants about Dispute Resolution Options ..... 60
  - B. ADR Discussion Requirement Between Counsel and Client ..... 62
  - C. Requiring Participation in ADR ..... 66
  - D. Regulatory Reform to Encourage Innovation in Interdisciplinary Service Delivery ..... 68
    - 1. Lawyer-Mental Health Professional Partnerships ..... 68
    - 2. Drafting of Agreements by Mediators ..... 71
  - E. Changing the Law School Family Law Curriculum ..... 75
- VII. Sustainable Funding for Centers ..... 77
- VIII. Lessons Learned and The Future ..... 79

I. INTRODUCTION: A FIELD OF DREAMS FOR SEPARATING AND DIVORCING FAMILIES

In the 1989 fantasy baseball drama *Field of Dreams*,<sup>6</sup> an Iowa farmer hears prophetic voices intoning, “If you build it, they will

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6. See FIELD OF DREAMS (Universal Pictures 1989).

come.”<sup>7</sup> He believes the voices are commanding him to build a baseball diamond in his fields.<sup>8</sup> His wife and child support his dream, but friends and other family members are skeptical.<sup>9</sup> The farmer risks financial ruin but completes the field anyway.<sup>10</sup> The field attracts the ghosts of former baseball stars and the ghost of the farmer’s father, enabling the farmer and his father to repair their ruptured relationship by playing catch on the farmer’s field of dreams.<sup>11</sup> At the end of the movie, hundreds of cars are shown approaching the farmer’s baseball field, fulfilling both one man’s vision and the prophecy.

This Article is about the challenges we encountered in creating a “field of dreams” to provide services for separating and divorcing families. We are affiliated with the Institute for the Advancement of the American Legal System (IAALS), an independent national research center at the University of Denver that is dedicated to facilitating continuous improvement and advancing excellence in the American legal system.<sup>12</sup> IAALS created a center in Denver to provide divorcing and separating families with an alternative to litigation to determine their futures. In the litigation model, parents and children arrive at the courthouse fractured by disagreement. They leave stapled together by court orders at the expense of substantial emotional and financial costs. Parents cede their autonomy to make decisions for their children to judges who do not know their families.

In contrast to dispute resolution through litigation, the Center’s dispute resolution model focused on mediation, mental health services, financial planning, and facilitating parental collaboration. Through integrated services, the Center encouraged parents to determine the family’s future through mutual agreement rather than reliance on court orders. The Center supported parents in cooperatively maximizing families’ collective emotional and economic welfare as an alternative to fighting in court or negotiations about rights and wrongs.

The Center was to serve as a proof of concept for IAALS’s service delivery model, which could then be adopted by other communities. As discussed below, an empirical study found that the Center delivered high-quality services to the families who chose to participate.<sup>13</sup>

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *supra* note 2.

13. *See infra* notes 96–99 and accompanying text.

The evaluation's results reinforce prior evaluations of ADR services for separating and divorcing families, according to which participants report high satisfaction with ADR and broadly perceive it as user-friendly.<sup>14</sup> ADR processes encourage better parent-child and parent-parent relationships after divorce and separation.<sup>15</sup> They conserve emotional and economic resources that would be consumed by litigation.<sup>16</sup> Research suggests that with appropriate training, support, and protections for the vulnerable, ADR processes generally are a "safe, efficient and fair way to resolve many family disputes."<sup>17</sup>

Every silver lining has a cloud, however, and finding ways to pierce through the cloud that hovered over the Center is the focus of this Article. Outstanding service and better outcomes were not enough to develop a sustainable business model after grant funding ran out. Cars were not lined up to pay for admission to the Center. A broad advertising and outreach campaign did not attract enough families to enable the Center to achieve financial self-sustainability.<sup>18</sup> Not enough separating and divorcing families played ball in our ADR field of dreams.

Other commentators have observed the same general phenomenon—a disparity between quality of service delivery by ADR providers (high) and use of those services by separating and divorcing families (low)—and labeled it an "Implementation Gap."<sup>19</sup> A recent report by the Canadian Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters identifies two reasons for this Implementation Gap: (1) limited resources for family justice, and (2) "the culture of the justice system and its incomplete embrace of non-adversarial or consensual dispute resolution processes."<sup>20</sup>

We have learned that the Center model will not catch on merely because it works. Maximizing the number of families who use ADR to

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14. See *Meaningful Change for Family Justice: Beyond Wise Words*, ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS 33 (2013), <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> [hereinafter *Canadian Implementation Gap Report*].

15. See *infra* notes 75–81 and accompanying text.

16. See *id.*

17. *Canadian Implementation Gap Report*, *supra* note 14, at 33.

18. See *infra* notes 99–103 and accompanying text.

19. *Canadian Implementation Gap Report*, *supra* note 14, at 3.

20. *Id.*

resolve their separation- and divorce-related disputes requires cultural change, court approbation, resources, and marketing. Our recommended changes begin with the premise that ADR, rather than being an “alternative” to litigation, should be emphasized as the optimal and primary dispute resolution process for families in conflict. Although we use the term ADR in this Article because it is in common usage, we suggest replacing it with another term, such as “Primary Dispute Resolution” (PDR) or “Collaborative Dispute Resolution” (CDR). We suggest moving away from the idea that there is something “alternative”—and thus suspicious or unproven—about mediation, collaborative law, parent education, and the like. As the American Bar Association’s Commission on the Future of Legal Services noted in its 2016 Report, “[w]hat began years ago as an exploration of alternatives to litigation has become pervasive and grown to the point that it is no longer an ‘alternative,’ but a mainstay of legal services. The future of legal services likely will see greater growth in all of these areas.”<sup>21</sup>

New Jersey Supreme Court Justice and judicial administration expert Arthur T. Vanderbilt observed that “judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat.”<sup>22</sup> Vanderbilt’s observation is particularly applicable to the transition to ADR as the primary method for resolving disputes affecting separating and divorcing families. It took many years to replace the terms “child custody” and “visitation” with more inclusive, parent-friendly terms such as “decision-making responsibility” and “parenting time,” and in some jurisdictions those changes still have not taken hold.<sup>23</sup> The concepts of mental health arms of family courts and children’s attorneys are slowly entering into the standard nomenclature of family court services, but only as a result of ongoing

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21. *Report on the Future of Legal Services in the United States*, AMERICAN BAR ASSOCIATION, COMMISSION ON THE FUTURE OF LEGAL SERVICES 47 (2016) (emphasis added) [hereinafter *ABA Commission Report on the Future of Legal Services*].

22. Arthur T. Vanderbilt, *Introduction*, in *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION OF JUDICIAL ADMINISTRATION* xix (Arthur T. Vanderbilt ed., 1949). Vanderbilt continued: “Rather, we must recall the sound advice given by General Jan Smuts to the students at Oxford: ‘When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop.’” *Id.*

23. *Compare* ARIZ. REV. STAT. ANN. §§ 25-403–403.01 (2013) (listing detailed statutory factors for courts to use in determining “parenting time,” “joint” or “sole” parental decision making, and “parenting plans”), *with* N.Y. DOM. REL. LAW § 240 (McKinney 2017) (stating that courts should determine “custody” and “visitation” in light of the “best interests of the child”).

and uphill battles. It takes long-term investments of resources to effect fundamental changes in American legal culture—in this case, changes in the development and acceptance of healthy dispute resolution processes for families.

## II. THE ORGANIZATION OF THIS ARTICLE

This Article advocates for measures to bridge the Implementation Gap in ADR services for separating and divorcing families so that projects like the Center can more effectively serve parents and children.

Section III describes the IAALS's reasons for creating the Center by briefly surveying the evolving landscape of separation and divorce and its impact on courts, children, and parents, as well as ADR's role in separation- and divorce-related dispute resolution. Section IV describes the Center's service delivery model and its evaluation. Section IV also contains illustrative composite case studies of Center families; these are meant to complement more empirical evaluations of the Center by giving readers a qualitative sense of how real parents and children benefitted from Center services. Section V describes efforts made by the Center to create a sustainable business model. Section VI makes five specific recommendations for bridging the Implementation Gap:

- (i) That courts provide information for litigants on their dispute resolution options to support them in determining which are most appropriate for them;
- (ii) That lawyers be obligated by legal ethics rules to inform parent-clients of ADR options, and that administratively simple court rules be written to enforce that obligation;
- (iii) That parents be required to certify to courts that they have engaged in ADR processes before filing suit, unless doing so would jeopardize any of the parties' safety or would otherwise be futile (because of a parent's absence, for example);
- (iv) That the current ethics rules for lawyers be revised to encourage the development of innovative, multidisciplinary services for separating and divorcing families by:
  - a. Allowing partnerships between lawyers and mental health professionals in Multi-Disciplinary Practice (MDP) or Alternative Business Systems (ABS); and
  - b. Allowing mediators to draft agreements and file them with the court;



- (v) That law school curricula be revised to educate future family lawyers and practitioners about ADR and the need for interdisciplinary collaboration in order to better serve the complex needs of today's separating and divorcing families.

Section VII suggests that sustainable funding for projects like the Center will require innovative approaches such as the use of Social Impact Bonds. We conclude by summarizing the lessons learned from the Center and underlining our belief that this is a unique time in family law history—one with both great need and ample opportunity for implementing those lessons quickly and effectively.

### III. LITIGATION AND ADR IN SEPARATING AND DIVORCING FAMILIES: SCOPE AND EFFECTS

The Center was created to give separating and divorcing families an alternative to resolving their problems through litigation or the “shadow” (influence) litigation casts over negotiations.<sup>24</sup> Litigation treats divorce and separation much like a tort or contract action. Parties either settle their case or present their version of the facts and law to a judge through adversarial combat. Judge Learned Hand's observation that “[a]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death” was never more apt than when applied to litigation arising from separation and divorce.<sup>25</sup> Because of its high emotional and financial costs, relying on litigation as a primary dispute settlement process has serious consequences for courts, children, parents, and communities. Participation in ADR, by contrast, has proved itself as a productive option for most separating and divorcing families.

#### A. *Separation and Divorce on State Court Dockets*

Court statistics reflect approximately five million incoming domestic relations cases in 2016, accounting for 5.9 percent of the 84.2 million total incoming state court cases that year.<sup>26</sup> In that year, approximately 29 percent of the state court domestic relations caseload consisted of divorce filings.<sup>27</sup> If the matter is contested, the in-court

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24. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1973).

25. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

26. See NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, STATE COURT CASELOAD DIGEST: 2016 DATA 1, 7 (2016), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/National-Overview-2016/SCCD\\_2016.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/National-Overview-2016/SCCD_2016.ashx).

27. *Id.* at 8.

process can include temporary orders hearings, motions, status conferences, and final orders hearings. Forensic mental health experts may be appointed to help the court assess the best interests of any children involved, which can lead to a lengthy and costly investigation of family history and relationships.<sup>28</sup> “Complex cases often feature [forensic mental health] reports of up to one hundred pages in length at a cost of thousands of dollars.”<sup>29</sup> Discovery on disputed parenting and financial issues also can be expensive, time consuming, and complicated.

The use of complex procedures in court can result in significant delays in hearings and final resolutions, which increase anxiety and uncertainty at a time when parents and children need stability in order to reorganize their lives. Families incur litigation expenses at a time when their finances are strained by the financial consequences of separation and divorce.

### B. *The Reduced Role of Fault*

Litigation as a method of dispute resolution made sense when the fault of a marital partner was the key issue in separation and divorce determinations (adultery, cruelty, etc.).<sup>30</sup> Courts made determinations regarding moral blame, and the partner who was deemed not to be at fault for the marriage’s dissolution would get the divorce, custody of the children, and property, without having to pay alimony.

Today, fault has receded into the background of separation and divorce determinations,<sup>31</sup> replaced by no-fault divorce, equitable distribution, maintenance (as opposed to alimony), and parenting responsibility or time (as opposed to custody).<sup>32</sup> Instead of “adultery”

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28. Mary Elizabeth Lund, *The Place for Custody Evaluations in Family Peacemaking*, 53 FAM. CT. REV. 407, 408 (2015).

29. Tiffani DiPrizito, *Play By the Rules: Why States Should Adopt Uniform Court Rules for Forensic Psychologists in Child Custody Evaluations*, 54 FAM. CT. REV. 512, 518 (2016) (citing Andrew Shepard, Editorial, *Mental Health Evaluations in Child Custody Disputes*, 43 FAM. CT. REV. 187, 187 (2005)).

30. See ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 119–21 (4th ed. 2016) (“Fault was . . . an integral component of divorce law as it developed in the United States . . .”).

31. See generally HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988) (stating that the change from fault to no-fault divorce was a “silent revolution” not subject to significant political controversy).

32. OLIPHANT & VER STEEGH, *supra* note 30, at 412 (“Under the fault-based system, spousal support was seen as a kind of damages award because the other spouse had breached his or her marital obligation, and a wife who was found to be at fault generally forfeited any right to support.”). All states have now enacted no-fault divorce. *Id.* at 122–23. See also *id.* at 473 (describing limited role of fault in marital property distribution).

and “cruelty,” neutral legal standards such as the “best interests of a child,” “contribution,” and “need” dominate present-day family law discourse.<sup>33</sup> Modern determinations arising from separation and divorce are not designed to punish a marital offender, but rather to optimally reorganize families’ emotional and financial futures.

As a result, determinations in modern family law disputes differ significantly from those in traditional civil litigation. A breach-of-contract or tort case involves a determination of what happened in the past, who is responsible for the resulting harm, and what remedy—usually monetary damages—is appropriate. Modern family law determinations are more similar to bankruptcy reorganizations: they attempt to create a viable and future-oriented unit from what is left of the family’s original structure. However, unlike contract and tort determinations, a child custody or parenting determination reflects a prediction of what parenting arrangement is best for a child’s future based on past behavior and current conditions. This prediction is an educated guess at best. Separation and divorce determinations require flexibility; initial judicial determinations typically have to be modified when children’s needs change.

### *C. The Effects of Litigation-Related Conflict*

Litigation is an awkward vehicle for making future-oriented determinations regarding family law issues arising from separation and divorce. More significantly, litigation has substantial negative impacts on the parents and children involved because of the conflict and turmoil it generates.

#### *1. Impact on Children*

The single greatest negative impact that litigation may have on families is on children. The mismatch between the adversarial system and family cases is present whether or not the spouses have children, but it is most acute when children are involved. A legal victory often represents a defeat for the child due to lost access to the other parent, as well as the social capital and protective factors that the parent can provide throughout the child’s life. Although most parental litigation—like all litigation—is eventually settled short of trial,

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33. John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MAT. L. 411, 412, 428 (2011) [hereinafter Lande, *Revolution in Family Law Dispute Resolution*].

“the hostile and competitive attitude which prospective litigation creates pervades the entire process of negotiating a settlement.”<sup>34</sup> As one observer colorfully put it, “the formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.”<sup>35</sup>

Decades of research establish that the level of conflict between parents is one of the most important influences on how well children cope with the developmental challenges that separation and divorce present. Children caught in the crossfire of parental acrimony are at increased risk for myriad emotional, behavioral, and psychological problems.<sup>36</sup> They do worse in school, have higher rates of drug abuse and mental illness, and are more likely to have legal troubles.<sup>37</sup> While experts recognize that the magnitude and long-term effects of divorce vary from child to child, researchers concur that “[p]arents who engage in protracted and/or severe conflict that includes rejecting or undermining the other parent have a negative impact” on their children’s well-being.<sup>38</sup> The more pervasive and the higher levels of parental conflict to which children are directly exposed, the worse the effects of family dissolution.<sup>39</sup>

A group of social science and legal experts recently summarized the pervasiveness of the harm caused by parental conflict and the positive effects of cooperation as follows:

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34. *Recommendation of the Law Revision Commission to the 1985 Legislature Relating to the Child Custody Decision-Making Process*, 19 COLUM. J. L. & SOC. PROBS. 105, 120 (1985). See also ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION* 14 (2d ed. 2012).

35. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 132–33 (1997).

36. See, e.g., Robin Deutsch & Marsha Kline Pruett, *Child Adjustment and High Conflict Divorce*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 353 (R.M. Galatzer-Levy & L. Kraus eds., 2d ed. 2009); see generally Rena L. Repetti et al., *Risky Families: Family Social Environments and the Mental and Physical Health of Offspring*, 128 PSYCH. BULL. 330 (2002); Melissa L. Sturge-Apple et al., *Impact of Parental Conflict and Emotional Abuse on Children and Families*, 3 PARTNER ABUSE 379 (2012).

37. See ANDREW I. SCHEPARD, *CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 30–37 (2004) [hereinafter SCHEPARD, *CHILDREN, COURTS AND CUSTODY*].

38. Marsha Kline Pruett & J. Herbie DiFonzo, *AFCC Think Tank Final Report: Closing the Gap; Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 169 (2014) [hereinafter *AFCC Think Tank Report*].

39. See SCHEPARD, *CHILDREN, COURTS AND CUSTODY*, *supra* note 37, at 31 (summarizing studies).

Promotion of shared parenting [after separation and divorce] constitutes a public health issue that extends beyond a mere legal concern. Parents who collaborate in childrearing have a positive effect on their children’s development and well-being . . . . The potential for shared parenting is present for children regardless of the family structure in which they live, and it represents a key protective factor in (a) helping children adjust to separation and divorce and (b) establishing an ongoing healthy family environment in which to rear children and facilitate high-quality parenting.<sup>40</sup>

A 2017 British government Green Paper on children’s mental health prepared jointly by the Department of Health and Department of Education reached similar conclusions.<sup>41</sup>

## 2. *Impact on Parents and Communities*

Parents and the people around them also experience negative effects from divorce- and separation-related conflict. For example, workplace productivity may suffer:<sup>42</sup> “An employee in the throes of a domestic relations matter is not the ideal employee—distracted, angry, depressed, and absent from work more often. When the legal process drags on—perhaps for years—the employee is drained financially and emotionally and is simply less productive.”<sup>43</sup>

Vulnerable parties affected by domestic violence, drug and alcohol abuse, mental illness, and child abuse appear often in family cases,<sup>44</sup> which are sometimes fueled by conflict, impaired immune function, and addiction problems.<sup>45</sup> In turn, “[e]motional and personal problems are associated with increased absences, tardiness, on-the-job injuries, property damage, medical claims, and employee

40. *AFCC Think Tank Report*, *supra* note 38, at 160 (emphasis added).

41. See DEPARTMENT OF HEALTH & DEPARTMENT FOR EDUCATION, *TRANSFORMING CHILDREN AND YOUNG PEOPLE’S MENTAL HEALTH PROVISION: A GREEN PAPER 32* (2017).

42. See Mark A. Whisman & Lisa A. Uebelacker, *Impairment and Distress Associated with Relationship Discord in a National Sample of Married or Cohabiting Adults*, 20 J. FAM. PSYCHOL. ASS’N 369, 373 (2006) (noting that relationship discord “was associated with greater . . . work role impairment, greater general distress, poorer perceived health, and greater likelihood of suicide ideation”).

43. Rebecca Love Kourlis, *It Is Just Good Business: The Case for Supporting Reform in Divorce Court*, 50 FAM. CT. REV. 549, 549 (2012) (reviewing studies).

44. See SCHEPARD, *CHILDREN, COURTS AND CUSTODY*, *supra* note 37, at 90–96.

45. See Kourlis, *supra* note 43, at 550.

turnover.”<sup>46</sup> These personal issues are a significant public safety concern; “personal problems have been implicated in eighty to ninety percent of industrial accidents.”<sup>47</sup>

D. *Self-Representation, the Conflicted Role of Counsel, and Access to Justice*

1. *The Rise of Self-Representation*

Typical models of litigation assume that competent lawyers will represent parents in their odyssey through the legal system. That assumption is becoming increasingly unrealistic. Legal representation is beyond the financial reach of growing numbers of parents, who must instead represent themselves. Although exact statistics are hard to come by and vary from state to state, self-represented parents are a majority of the litigants in many family courts. A recent survey of domestic relations dockets selected for study by the National Center for State Courts reported that “72 percent of cases indicated that the petitioner and/or respondent was self-represented; however, this varied considerably by site, 33 percent to 86 percent. Petitioners were more likely to have retained counsel than respondents, 42 percent to 23 percent overall.”<sup>48</sup>

The main reason that self-representation is so prevalent is, regrettably, the lack of affordability of counsel.<sup>49</sup> The lower and middle classes often cannot afford legal representation in the face of other pressing needs. For example, a recent IAALS study of 117 self-represented litigants found that 43.4 percent of participants reported an annual individual income of under \$20,000; 27 percent reported an annual individual income of between \$20,000 and \$40,000; and 15.6 percent reported an annual individual income between \$40,000 and \$60,000.<sup>50</sup> Just over 90 percent of the participants indicated that financial issues influenced—if they did not determine entirely—their

46. *Id.*

47. *Id.*

48. *Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts*, NAT'L CTR. FOR STATE COURTS 22 (2018), <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/FJI-Landscape-Report.ashx>.

49. *See Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 12 (2016), <http://iaals.du.edu/honoring-families/publications/cases-without-counsel-research-experiences-self-representation-us> (last visited Jan. 17, 2019) [hereinafter *Cases Without Counsel*].

50. *Id.*

decision to represent themselves.<sup>51</sup> Just under one-quarter of the self-represented participants in the study expressed a desire to represent themselves, regardless of whether they believed they could do so adequately.<sup>52</sup>

Parents who cannot afford attorney representation or avoid it for fear of squandering their financial assets must instead go it alone. They learn about the divorce and separation process from the internet<sup>53</sup> or get information from a well-meaning but unabashedly biased friend or family member.<sup>54</sup> Those who begin the legal process with representation might burn through savings and children's education funds, going into debt or running out of funds before reaching a resolution. Turning to self-representation in light of other pressing needs such as medical care, rent, childcare, and food, litigants find that they have to navigate a jungle designed specifically for attorneys.

Self-representation leaves the litigant without critical information or support in an unfamiliar legal world that is the province of experts, who conduct business in a different language. IAALS's study of self-represented litigants confirmed that the court process is very difficult without legal help.<sup>55</sup> Surveys have found that "the complexity of litigation leaves many individuals feeling lost, confused and uninvolved."<sup>56</sup> For example, between 50 percent and 70 percent of participants in a nationwide study of custody cases in the mid-1990s characterized the litigation system as "impersonal, intimidating and intrusive."<sup>57</sup> Similarly, 71 percent of divorcing parents in a Connecticut study reported that the court process escalated their level of conflict and distrust "to a further extreme."<sup>58</sup>

## 2. *Problem Solvers and Litigators*

Addressing the needs of self-represented litigants does not necessarily mean that the litigation-based dispute resolution model needs

51. *Id.* at 12–15.

52. *Id.* at 18–20.

53. *Id.* at 26.

54. *Id.* at 29.

55. *Id.* at 2.

56. Bill Ezzell, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 124 (2001).

57. MARY R. CATHCART & ROBERT E. ROBLES, U.S. COMM'N ON CHILD & FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION (1996).

58. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

to be replaced. The problem of self-representation could be mitigated if all divorcing and separating parents were assigned a lawyer to provide full-service representation in the traditional litigation-oriented system. On this account, government funding for legal aid and pro bono services from the bar should pay for filling the gap in representation for poor and middle-class parties.

This approach, while attractive, is not a practical solution to the representation gap in separation and divorce. Despite commendable efforts in the legal community to increase pro bono representation and civil legal aid, for now and the foreseeable future there will not be enough resources to assign free lawyers to every family litigant who needs one.<sup>59</sup> Moreover, giving all self-represented litigants lawyers who subscribe to the adversarial ethos of litigation will not reduce the harm from prolonged conflict that the litigation process creates for parents and children. For that to occur, our basic model of dispute resolution must pivot from litigation to problem solving.

Limited evidence indicates that most family lawyers seek to defuse conflict and encourage clients to settle.<sup>60</sup> In recent summits on the future of divorce practice, the divorce bar itself expressed support for shifting its orientation from adversarial representation in litigation to facilitating problem solving.<sup>61</sup> One commentator, based on empirical studies, heralds the development of a “New Lawyer” who serves clients as a conflict resolver, not just as an advocate.<sup>62</sup>

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59. *ABA Commission Report on the Future of Legal Services*, *supra* note 21, at 13 (“Pro bono alone cannot provide the poor with adequate legal services. . .”); James D. Abrams & Ann Hancock, *The Justice Gap and Pro Bono Legal*, AMERICAN BAR ASS’N COMMERCIAL AND BUSINESS LITIGATION SECTION, <https://www.americanbar.org/groups/litigation/committees/commercial-business/spotlight/2017/justice-gap-pro-bono-legal.html> (last visited May 21, 2018) (“LSC’s statistics demonstrate the clear, unmet need for legal services in this country. LSC estimates there is only one legal aid attorney for every 6,415 low-income persons in the United States, while there is one attorney for each 429 persons in the general population. This means that a member of the general population has approximately 1500 percent more access to legal representation than a low-income person. The obvious conclusion is that the existing volunteer base of pro bono attorneys, while invaluable, is simply not enough to satisfy the profound need that exists.”).

60. See Lande, *Revolution in Family Law Dispute Resolution*, *supra* note 33, at 427. See also *Canadian Implementation Gap Report*, *supra* note 14, at 24 (reviewing studies).

61. See Natalie Anne Knowlton, *The Family Law Bar: Stewards of the Legal System, Leaders of Change*, 55 *FAM. CT. REV.* 12, 15 (2017); J. Herbie Di Fonzo, *Changing Matrimonial Practice in 21st Century New York: A Report of the 2017 Matrimonial Bar Summit*, 56 *FAM. CT. REV.* 626, 627 (2018).

62. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2d ed. 2017).



A smaller but troubling number of lawyers, however, take aggressively adversarial and litigation-oriented approaches to client counseling and representation, inflaming ongoing family conflict. Some research suggests that the divorce bar has a reputation among other lawyers for being more adversarial and less focused on problem solving than are other segments of the bar.<sup>63</sup> Usually, such highly adversarial representation occurs when the stakes are high in terms of money or parenting.<sup>64</sup> Highly adversarial lawyers are likely to cause their clients more long-term harm than good by prolonging litigation and conflict. They are also likely to create a public impression that aggressiveness in a divorce lawyer is associated with high-quality representation.<sup>65</sup>

Assigning lawyers to represent all separating and divorcing parents without some concrete definition of the objectives of that representation is not in those families' best interests.<sup>66</sup> While some parents may want and need aggressive litigation, the majority arguably would benefit most from a problem-solving orientation.

Triage principles suggest allocating available legal aid and pro bono resources to the cases that most need it. Some cases do need courtroom resolution, and each side should have a lawyer. Assessment, establishment, and enforcement of contested legal rights and safety issues require procedures consistent with due process—which, in turn, require lawyers to advocate on behalf of individual parents. This can be especially important when families are faced with concerns about one or both parents' safety because of intimate partner violence; concerns about children's health or safety because of neglect, abuse, or medically dangerous situations; a serious imbalance of power due to disparate educational backgrounds or economic circumstances; or where complex business arrangements are the subject of dispute or one parent suspects the other of fraud in hiding assets.

Even in some of these cases, adversarial, litigation-oriented lawyering is not necessarily warranted for all aspects of the dispute.

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63. See generally Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers are Really Doing When They Negotiate*, 44 FAM. CT. REV. 620 (2006).

64. See Lande, *Revolution in Family Law Dispute Resolution*, *supra* note 33, at 427.

65. See SCHEPARD, CHILDREN, COURTS AND CUSTODY, *supra* note 37, at 126–28.

66. See generally Rebecca Avril, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013) (arguing that providing lawyers for all parents in custody disputes may actually make things worse for significant numbers of families and children because what matters most for the welfare of families and children is not the parents having a lawyer but rather how the lawyer approaches representation).

ADR services can be instituted after those aspects of a dispute requiring adversarial representation are concluded (e.g., the court resolves a disputed legal issue about maintenance, and mediation is then used to facilitate a parenting plan). Unbundled legal services, in which lawyers represent a client for a discrete task (such as reviewing a draft agreement), are a valuable option for delivering low-cost legal representation to those who cannot afford full service representation.<sup>67</sup> Unbundled services can go hand in hand with ADR.

Our experience at the Center suggests that cases raising due process concerns that warrant providing a lawyer for both litigants may be relatively atypical rather than the rule. Center families generally felt that they did not need a lawyer to represent them separately for issues involving their children and were satisfied receiving legal information from a single, neutral source. Such informational resources should be capable of helping parents and legal service providers distinguish situations that require representation for each parent from situations that should be resolved through ADR and other legal services.<sup>68</sup>

#### E. *The Varieties of ADR for Separating and Divorcing Families*

Parents' and children's needs for ADR have not gone unnoticed by court systems or the organized bar. Because of litigation's harm to children, costs of legal representation, and the burden of litigation on courts' resources, family courts and lawyers have edged toward supporting programs and services that encourage collaboration and self-determination by parents.<sup>69</sup>

The result of this infusion of collaborative energy is that "the process of resolving family disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room."<sup>70</sup> Professor Jana Singer of the University of Maryland School of Law has called these developments

67. See generally NATALIE ANNE KNOWLTON, *IAALS BETTER ACCESS THROUGH UNBUNDLING: FROM IDEATION TO IMPLEMENTATION* (2018), [http://iaals.du.edu/sites/default/files/documents/publications/better\\_access\\_through\\_unbundling.pdf](http://iaals.du.edu/sites/default/files/documents/publications/better_access_through_unbundling.pdf) (report of national conference sponsored by IAALS and the ABA Standing Committee on Delivery of Legal Services); FORREST S. MOSTEN & ELIZABETH P. SCULLY, *UNBUNDLING LEGAL SERVICES: A FAMILY LAWYER'S GUIDE* (2017); FORREST S. MOSTEN, *UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE* (2000).

68. See *infra* notes 106–111 and accompanying text.

69. Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising From Separation and Divorce*, 51 *FAM. CT. REV.* 351, 362 (2013).

70. Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 *FAM. CT. REV.* 513, 516 (2006).

a “velvet revolution” in family dispute resolution.<sup>71</sup> She states that “[t]his paradigm shift has replaced the law-oriented and judge-focused adversary model with a more collaborative, interdisciplinary and forward-looking family dispute resolution regime. It has also transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system.”<sup>72</sup>

Many courts mandate parent education programs that encourage parents to understand the needs of their children and manage their conflicts effectively. A 2016 survey found “forty-six states . . . have mandated parenting education classes in effect.”<sup>73</sup> Such programs educate parents about the effects of divorce on children and the importance of responsible parental conflict management in helping children adjust favorably to family transition. This proliferation of parent education programs includes a wide variety of goals, teaching strategies, and settings for implementation.<sup>74</sup>

Mediation is a prime example of a successful, widely-used, and often-mandated ADR process.<sup>75</sup> As neutral third parties who facilitate negotiations, mediators stimulate parents’ consideration of their own interests and seek to find common ground and compromises that will result in creative solutions to apparent impasses. The mediator’s goal is to help families generate an agreement that satisfies each person’s diverse needs and interests to a degree that is acceptable to both.<sup>76</sup>

A recent qualitative review of family court processing and triage practices in 11 counties shows that mediation for child custody and visitation issues is the most common (and, more often than not, mandatory) dispute resolution service offered to divorce and separation litigants.<sup>77</sup> Mediation requirements are less common for property disputes, but some courts either mandate mediation for all

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71. Jana Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

72. *Id.*

73. Zoey Mayhew, Note, *Reforming Direct Evaluation of Court-Mandated Parenting Classes*, 2016 MICH. ST. L. REV. 1147, 1163 (2016).

74. See Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131 (2013).

75. See generally Thompson Reuters, *50 State Statutory Surveys: Family Law Divorce and Dissolution Mediation Requirements*, 0080 SURVEYS 12 (2017).

76. *Overview and Definitions*, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard IV (ASSN FAM. & CONCIL. CTS. 2000).

77. See *Family Justice Initiative: Qualitative Court Profile Research*, IAALS (2018), <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/FJI-Landscape-Report.ashx> (presenting a summary of the qualitative, contextual information collected as part of the National

disputed issues in domestic relations cases or have opt-in mediation services available for disputes over financial issues.<sup>78</sup> Parent education courses are mandatory in nearly every studied jurisdiction, though a few courts do not extend this requirement to unmarried parents in custody and visitation cases.<sup>79</sup>

Research suggests that mediation promotes parental self-determination, reduces the emotional and economic costs of resolving custody disputes, and improves parent-child relationships.<sup>80</sup> In addition, some evidence suggests that mediation promotes better outcomes for parents and children than does litigation.<sup>81</sup>

Other forms of ADR have sprouted from mediation. The term “mediation” has come to encompass an increasingly diverse variety of processes whose unifying principles are to promote settlement and collaborative planning. Early Neutral Evaluation (ENE) is designed to give parties a realistic view of their case, identify issues, expedite discovery, and encourage settlement.<sup>82</sup> ENE may be viewed as a blend of mediation with non-binding arbitration; such programs exist in many states. Parties meet with a neutral third party, who then offers a confidential opinion regarding the likely outcome of the case and the strengths and weaknesses of each side’s arguments. Settlement negotiations usually follow, with the ENE assessment being a key piece of data. If the parties do not settle, the ENE opinion is not disclosed to the court.<sup>83</sup>

Collaborative law is another ADR process that has become so widespread that it has been the subject of a uniform act sponsored by

Center for State Courts Family Justice Initiative); see also Paula Hannaford-Agor et al., *Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts*, NAT’L CTR. FOR STATE COURTS (2018), <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/FJI%20Landscape%20Report%20mb.ashx>.

78. Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service*, 35 WIL-LAMETTE L. REV. 485, 485 (1999).

79. See IAALS, *supra* note 77.

80. This research is summarized in SCHEPARD, CHILDREN, COURTS AND CUSTODY, *supra* note 37, at 62–66.

81. See EMERY, RENEGOTIATING FAMILY RELATIONSHIPS, *supra* note 34, at 207.

82. See generally Cindy M. Perusse, *Early Neutral Evaluation as a Dispute Resolution Tool in Family Court*, 41 COLO. LAW. 37 (2012); see also Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672 (2006); see generally Jordan Leigh Santeramo, Note, *Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321, 325 (2004).

83. See Santeramo, *supra* note 82, at 325.

the Uniform Law Commission, which has been enacted in 16 states.<sup>84</sup> While collaborative law can be used in any kind of dispute, it is most often used in divorce and separation. Family lawyers and clients who participate in collaborative law sign a participation agreement which requires that they engage in problem-solving negotiations and voluntary disclosure. The participation agreement also provides that if negotiations are terminated for any reason, collaborative counsel must disqualify themselves from representing the parties in subsequent litigation. The disqualification requirement is thus a significant incentive to settle the dispute. Experts from other disciplines such as psychology or asset valuation often participate in collaborative law but as neutrals not affiliated with any party. The Uniform Collaborative Law Act sets standards for the validity and enforcement of collaborative law participation agreements and creates an evidentiary privilege for communications made during collaborative law.<sup>85</sup>

Some family courts have taken steps to meet the needs of parents and children by adopting Differentiated Case Management (DCM). DCM starts from the “premise that cases are not all alike and the amount and type of court intervention will vary from case to case. Under this model . . . a case is assessed at its filing stage for its level of complexity and management needs and placed on an appropriate ‘track.’”<sup>86</sup> The State of Connecticut pioneered a combination of intake processes and service options that included mediation, a conflict resolution conference, a brief, issue-focused evaluation, and a full evaluation.<sup>87</sup> As a result, agreement rates between parents improved, cases were settled more quickly, and rates of parties’ repeat appearances in court dropped.<sup>88</sup>

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84. See UNIF. COLLABORATIVE LAW ACT (2009).

85. See generally *Uniform Collaborative Law Act*, 38 HOFSTRA L. REV. 421 (2009) (text and Reporter’s commentary on the UCLA; the symposium issue also contains commentary on the UCLA and collaborative law).

86. Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System Family Justice Program*, 36 FAM. & CONCIL. CTS. REV. 144, 163 (1998).

87. Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 743 (2007). See generally Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End For Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009); Hugh McIsaac, *A Response to Peter Salem’s Article “The Emergence of Triage in Family Court Services: Beginning of the End for Mandatory Mediation”*, 48 FAM. CT. REV. 190, 192 (2010).

88. See Marsha Kline Pruett & Megan Durrell, *Family Civil Intake Screen and Services Evaluation: Final Outcomes Report 9–11* (May 2009), <https://www.afcnet.org/Portals/0/PublicDocuments/CEFCP/ConnecticutFinalReport.pdf?ver=2013-08-21-072318-000>.

Overall, empirical evaluation and parents' reports of their experiences with ADR have been positive, leading an interdisciplinary group of experts to conclude that:

*ADR processes are markedly better than litigation for separating parents and their children.* Mediation is desirable for families who have not attempted ADR. These dispute resolution options are preferred to litigation, with the exception of some situations involving family violence or when a family member has been harmed or when one parent contends that the other is substantially interfering with his or her access to their child, all of which require a careful assessment before determining appropriate strategies.<sup>89</sup>

After a comprehensive review, a Canadian Task Force similarly concluded that parents respond positively to ADR interventions—that they are “widely experienced as ‘user friendly’ and participants tend to report high rates of satisfaction.”<sup>90</sup> In addition, evaluations of ADR processes convincingly establish that “with the appropriate support and protections, they are a safe, fair and efficient way to resolve many family disputes. . . . [T]hey are more affordable and better adapted to the needs of most separating families.”<sup>91</sup>

#### IV. THE CENTER SERVICES MODEL

##### A. Overview

The Center implemented best practices from ADR programs with the goal of establishing empirically that parents and children can benefit from coordinated, affordable, interdisciplinary, and problem-solving-oriented services. All of the Center's services were available from a single agency to achieve “one-stop shopping” for families undergoing separation and divorce. Services began with an in-depth intake process designed to assure appropriateness of service recommendations. It included a robust management process and interface with the court and its timelines, legal information, therapeutic services, mediation, and agreement drafting.

An overarching Center theme was that parents and children need support for collaborative planning and compromise from multidisciplinary professionals. The Center focused mostly on the process

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89. *AFCC Think Tank Report*, *supra* note 38, at 169 (emphasis added).

90. *Canadian Implementation Gap Report*, *supra* note 14, at 33.

91. *Id.*

of mediation. The Center's model was predicated on an understanding that parents need expertise from across many professional areas to help them reach mediated agreements and healthy outcomes:

- *From lawyers:* parents need education about the laws and the court system that regulate the family reorganization process (e.g., child support standards) to help them make informed choices. Parents also need help drafting legally binding agreements and filing official documents with courts to get a divorce.
- *From financial planners:* parents need information and counseling about budgets and how to manage two households with available funds. For example, planning finances for a child's college education, or debt management, may be important areas of concern.
- *From mental health professionals:* parents need assessment of their own mental health status and that of their children. Mental health professionals can also help children express their needs and have a voice in the dispute settlement process. They can help parents communicate and resolve concerns that hinder mediation and the overall resolution process, including those involved in dealing with the end of relationships, making decisions in mediation, coping with their own depression, and managing their children's difficulties in reaction to family transitions.
- *Together,* professionals across these domains can help parents establish viable parenting plans that optimize parent-child relationships.

The idea of "one-stop shopping" for services for separating and divorcing families parallels the idea of unified family courts, generally thought of as "one-stop judicial shops" for families and children.<sup>92</sup> Parents and children are already under great strain because of separation and divorce. The greater the coordination and efficiency with which the needed services are delivered, the more the family will benefit.

Because Center services were coordinated under one roof, parents and children provided information only once rather than having to tell their stories repeatedly to different service providers. The family received services in a coordinated plan and at appointment times

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92. See generally Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230 (2008).

that were generally convenient for them. Center staff shared information about the family's progress and generated coordinated solutions to challenges and problems. Families knew they had a single place to go for information, services, and support.

### B. *The Center's History and Structure*

The Center opened on September 3, 2013 on the University of Denver's campus (the "on-campus Center") and was named the Resource Center for Separating and Divorcing Families.<sup>93</sup> The on-campus Center was designed as a hub for training law students, social work students, and psychology students in interdisciplinary, collaborative family law practice and for research and advancement in the delivery of separation- and divorce-related services. It served parents and families at all income levels (initially free of charge, and later on a sliding-scale fee system based on the 2012–2013 Federal Poverty Guidelines). Many of the on-campus Center's client families were affiliated with the University of Denver, responding to extensive publicity in University publications.

The on-campus Center was a joint project of the Sturm College of Law, the Graduate School of Professional Psychology, and the Graduate School of Social Work at the University of Denver. Its planning and development were guided by multidisciplinary consultants and a multidisciplinary advisory board, as well as an on-campus steering committee that helped navigate the Center's compliance with university policies. Major stakeholders, including the judiciary, the divorce bar, the alternative dispute resolution community, domestic violence advocates, and legal services lawyers, were consulted during the Center's development phase. It operated successfully for two years on campus.

Funds raised from outside sources heavily supported the on-campus Center. However, we recognized that a heavily subsidized on-campus Center would be difficult, if not impossible, to replicate in other communities. In an effort to make the model financially viable in the long term, the Center evolved into a nonprofit, community-based, fee-for-service model (the "community-based Center") with the same core values and services as those of the on-campus Center. The community-based Center was named the Center for Out-of-Court Divorce and was housed in office space off campus. Professionals, rather

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93. See *Resource Center for Separating and Divorcing Families*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, <http://iaals.du.edu/tags/resource-center-separating-and-divorcing-families> (last visited June 19, 2018).



than students under supervision, provided services, though externs remained part of the service delivery model.

Center services for separating and divorcing parents and children in both the on-campus and community-based models included:

- Assessment and case management;
- Legal education, dispute resolution, agreement drafting, mediation, and help completing necessary forms and filing them with the court;
- Therapeutically oriented services, including child interviewing, co-parenting coaching, and discernment therapy, as well as adult individual and group counseling and child individual and group counseling; and
- Financial services, including financial education, assessment, planning, and mediation.

The process of fitting families to services began with intake interviews, followed by a joint legal/mental health team assessment that resulted in service recommendations to the parents. The parents then made the decision as to which parts of the recommended service plan they would pursue, which the Center staff then coordinated and delivered.

The Center assessment and intake process was also designed to identify parents who were able to prioritize their children's needs and had a basic capacity to plan collaboratively for the future. Consistent with the practice of mediation programs, parents were accepted as a co-parenting team, rather than as individuals, for Center services. The family was referred elsewhere if either or both parents had:

- No interest in collaborating or cooperating with a service plan;
- Extensive mental health issues;
- A history of serious substance use;
- A history of domestic violence or child abuse or neglect; or
- A lengthy history of parental litigation.

The Center had a working relationship with the Colorado district courts, which enabled electronic filing of documents from the Center, monitored timelines imposed by court rules, and provided for entry of final orders after mediation. Families could enter Center services before or even shortly after filing a complaint for dissolution of marriage or for separation. The Center also had the capacity to deal with post-decree disputes between parents. The Center staff would notify

the court that the case was pending, and the case would be assigned to the senior judge affiliated with the Center.

The end of the Center's process afforded even more significant collaboration with the court system. After Center staff prepared a written agreement resulting from mediation and forwarded it to the court, Colorado Senior Judge Robert Hyatt, and later Colorado Senior Judge Larry Naves, would hold a final orders divorce hearing at the Center, read the agreement into the court record, and compliment the parents on their focus on the best interests of their children in utilizing Center services. This arrangement with the Colorado court system for conducting the hearing at the Center was the first time in American history (of which we are aware) that judges held a required hearing approving the final divorce of a couple outside of a courthouse.

### C. *Profiles of Center Families*

The case studies that follow provide a sense of who the Center served and how it served them.<sup>94</sup>

#### 1. *Case Study: The "A" Family*

The A family consisted of a mother and father, each in their mid-forties, and their two children, ages 17 and 15. The father worked in the medical field and the mother worked part time in real estate. The parents earned an income of over \$150,000, identified as Hispanic, and described themselves as "somewhat religious."

The parents had been married for over twenty years and were separated at the time of intake. They arrived at the Center in severe distress. The mother initiated the divorce and the father was shocked, struggling to understand what had happened to his marriage. His initial goals for coming to the Center were to save his marriage. The mother was not open to working on the marriage and was ready to move on quickly. She came to the Center because she hoped to use its therapeutic services to improve the children's relationship with their father, who she described as "distant" due to his long work hours.

Both parents were worried about the children. The daughter refused to visit the father at his apartment and the son was testing

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94. The profiles of the families in this Section are based on actual Center families. The case studies have been edited so that the family members cannot be identified and to preserve the confidentiality of their communications.

boundaries. For example, he got a tattoo without permission and was failing several high school classes.

The initial goal of the Center was to help each parent understand where he or she was in the stage of grief arising from the separation and how this impacted their readiness to resolve their issues. The staff social worker carefully assessed the family's needs. Since the parents communicated infrequently and poorly, they relied on the Center staff to have difficult conversations.

Several pre-mediation and co-parent coaching sessions helped the parents negotiate interim parenting time agreements, work on presenting a "united front" with the children, and provide a space in which to communicate about their concerns. The Center further helped the parents develop a framework to have "business meetings" on parenting issues outside of the Center. The parents began to do this with moderate success.

Center staff interviewed the children to determine areas of concern. The daughter participated in two individual therapy sessions and in one family therapy session with her father. The goal of those sessions was to improve parent-child communication, engage the child and her father in a process of reconnection, and help the child adjust to spending time with her father at his new home. The mother attended the Center's support group for women. The father attended several sessions of individual counseling, which helped him to begin to work through his worries about his children and his grief at the loss of his marriage. The son had several individual sessions in which he expressed his anger at his parents and grief over their separation. Subsequent sessions with his parents helped them reassert parental authority while helping him adjust to changes in the family and reassuring him that both parents would stay involved in his life.

Unlike traditional adversarial models of divorce, which are driven by the court system, the Center maintained a family-centered focus. Center staff worked with the family through crisis points instead of sending them back to court. By working with, rather than against, the parents' emotional struggles, the Center was able to guide them through the legal process.

This meant that the Center sometimes had to let the parents guide the process—giving them more time, taking breaks of several weeks before continuing mediation, allowing for more in-depth discussions of the children's ongoing struggles and the parents' progress, allowing for setbacks when one parent began dating, and tolerating multiple changes to the agreements. Parental planning and financial mediations required many sessions and were often contentious and

difficult. A finalized financial agreement took several drafts and the mediation process survived several threats to “go back to court.” In the end, the parents completed their work and were divorced at the Center.

## 2. *Case Study: The “B” Family*<sup>95</sup>

The B family included a mother and father in their mid-thirties and their son (five years old) and daughter (two years old). The parents both worked in business, with individual incomes ranging from \$50,000 to \$70,000. They identified as Caucasian and both had higher education degrees.

The parents had been married for ten years and separated for one year before coming to the Center. They reported that the divorce was “mutual,” and they stated that they chose the Center because their son had a serious congenital heart condition requiring daily intervention. The couple had a history of intense, angry arguments that included “pushing and shoving” by “both of them.” They reported that these arguments had stopped since the separation. They tried to navigate the divorce process on their own and reported that their case was dropped because they could not get the paperwork completed for the court. They wanted more support through the process and greater help in staying focused on what was best for their children.

The parents were carefully assessed regarding their ability to safely utilize the Center’s services, given their recent volatility. (A more traditional approach may have sought to separate the parents during the process of delivering services.) The Center’s multi-disciplinary approach enabled the staff to focus on safety while working toward a co-parenting relationship. Center staff mediated with the parents in the same room but encouraged them to utilize therapeutic services with different providers within the Center. Center staff believed that working with the couple in this way would give the couple a better chance of working through and reducing the anger and mistrust that inhibits productive co-parenting and inflames conflict.

The father joined the Center’s men’s group. He was able to gain support from other fathers and talk about practical aspects of his changing family role. The mother utilized an individual counselor to think about what she wanted most out of mediation. Play therapy provided the son with a place to process the changes going on in his family and mitigate the troubling potential effects of being exposed to parental conflict, including poor coordination of his medical needs.

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95. See *supra* note 94.

The parents worked hard to come to agreement in several different areas, especially in the mediation related to their son's medical care and its impact on the parenting plan. This issue brought up many stresses related to parenting a child with a serious medical condition and fears that "something would fall between the cracks" related to his care.

The parents successfully reached agreements in all areas, including financial arrangements. The parents reported significant improvement in their interactions when the mediation was completed. They also developed a more positive co-parenting relationship that provided for their son's care and a different parenting time schedule for his younger sister—one that allowed her some exclusive time with each parent so that her brother's medical concerns and special needs did not overshadow her relationship with her parents.

#### D. *Empirical Evaluation of the Center's Impact on Families*

##### 1. *On-Campus Center Services Evaluation*

IAALS built a systematic evaluation into the plan for the Center from the outset. The first evaluation was of the on-campus Center. In total, 82 families, comprising 164 parents and 160 children, utilized Center services during its two years of on-campus operation. The evaluation of these families' experiences at the on-campus Center was derived from multiple data sources: parents, staff, Center leadership, and community partners. The longitudinal evaluation was conducted before, during, and after service delivery. It included information from questionnaires, focus groups, and individual interviews. The comprehensive evaluation report is briefly summarized below.<sup>96</sup>

The parents who participated in on-campus Center services were:

- Largely educated;
- Primarily lower-middle to middle class, though there was an economic spread;
- Generally employed full-time, though 13 percent were unemployed; and

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96. See Logan Cornett et. al., *Out-of-Court and In Collaboration: Evaluating An Interdisciplinary Model for Separation and Divorce in a University Campus Setting*, IAALS (2016), [http://iaals.du.edu/sites/default/files/documents/publications/rcsdf\\_out\\_of\\_court\\_and\\_in\\_collaboration.pdf](http://iaals.du.edu/sites/default/files/documents/publications/rcsdf_out_of_court_and_in_collaboration.pdf) (last visited Jan. 20, 2019). The evaluation was designed by Marsha Kline Pruett along with Corina Gerety, then IAALS Director of Research and Logan Cornett, IAALS Research Analyst. All data in the above Section is summarized in the evaluation report.

- Fairly racially diverse, with 29 percent being people of color.

Despite being a low-to-moderate-conflict group, on-campus Center parents were at risk for mental health difficulties. About one-third of parents were depressed half or more of the time, and 20-25 percent of parents had domestic violence concerns. Parents said that they used the on-campus Center so that their children would be supported through family reorganization. They came to work out financial issues, obtain information about the divorce and separation process, work on parenting schedules, reduce their conflict, improve their communication, and facilitate a smooth family transition for their children.

Parents who participated in on-campus Center services showed statistically significant decreases in:

- Parental depression, anxiety, and stress;
- Acrimony between the parents;
- Parenting stress (parental distress, parent-child dysfunctional relationships, and perceptions of children as difficult); and
- Parental perceptions of their child's social isolation (no other child behaviors changed significantly).

Parents who participated in on-campus Center services showed statistically significant increases in:

- Co-parenting decision-making skills;
- Improvements in communication skills (including increased collaborative style and decreased violent style);
- Confidence in their ability to co-parent; and
- Appropriate emotional expectations of their children.

Overall, parents rated Center services as "highly favorable" in terms of their impact on their children (82%), themselves (85%), and their families (87%). Parents gave their highest ratings based on their perceptions that participation in Center services kept their children's interests protected, maintained concern for their children, and resulted in fewer co-parenting problems.

The average time to divorce was five months overall (including involvement in services), with about four months on average spent resolving the conflicts required to reach a mediated agreement.

## 2. *Community-Based Center Services Evaluation*

IAALS also evaluated the impact of community-based Center services on the families it served. Although some changes were made to the instruments used for collecting data when the Center transitioned to a community model, the evaluation strategy remained virtually identical to that employed at the on-campus Center.<sup>97</sup>

Like the parents at the on-campus Center, the parents who participated in community-based Center services were:

- Largely educated;
- Primarily lower-middle to middle class, although there was an economic spread;
- Generally employed full-time, with 15 percent unemployed, and 14 percent employed part time; and
- Mostly Caucasian, with only eight percent of respondents identifying as persons of color.

Community-based Center parents, like those at the on-campus Center, were at risk for mental health difficulties. About one-third (36%) of parents reported feeling very sad or depressed at least half of the time; about half of parents indicated that they felt very sad or depressed occasionally. Additionally, about one-fifth (21%) of parents reported concerns about mental health issues; and about one-third (34%) of parents expressed concerns about the other parent having mental health issues.

The most commonly cited reasons for coming to the community-based Center were to get help with children's adjustment to the separation, to resolve financial issues, and to establish child support. Other common areas of concern for parents included their own adjustments to separation, spousal support, decision-making responsibilities with respect to children, and allocation of shared time with children.

Parents who participated in community-based Center services showed statistically significant:

- Improvements in communication skills (e.g., increased collaborative style and decreased violent style);
- Increases in confidence in their ability to co-parent;
- Decreases in parenting stress; and
- Decreases in their perceptions of their child's social isolation (no other child behaviors changed significantly).

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97. See Logan Cornett, *Untitled*, IAALS (forthcoming 2019).

As with reports from the on-campus Center, parents rated the community-based Center services as having a “good” effect in terms of the impact on their children (81%), themselves (87%) and their families (88%). Parents were most satisfied with the ways that community-based Center services:

- Maintained parents’ control over their decisions;
- Informed them about available legal options;
- Enabled them to make informed choices;
- Kept their children’s interests protected;
- Maintained concern for their children;
- Considered respondents’ parenting role; and
- Resulted in fewer co-parenting problems.

The average time to divorce for parents at the community Center was about seven and one-half months (including involvement in services).

#### V. THE SUSTAINABILITY OF THE CENTER AND THE IMPLEMENTATION GAP

Parents’ overall evaluation of the Center is a testament to the value of coordinated interdisciplinary services for families in transition. The Center’s value was affirmed again when the American Bar Association’s Dispute Resolution Section awarded the Center its 2015 *Lawyer as Problem Solver Award*.<sup>98</sup> Despite excellent services and recognition, however, the Center could not sustain itself with a fee-for-service model.

The cost of running the out-of-court Center was significant.<sup>99</sup> Families used an average of forty-one hours of services, spanning case management, therapy, legal information, mediation, drafting, and court hearings. Services were provided by experienced professionals or by students supervised by experienced professionals. These services were costly. In the community model, rent, utilities, insurance, and marketing expenses added to the total cost. Overall, services delivered to each family in the community-based model cost about \$6,000, including personnel and overhead costs.

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98. See *Lawyer as Problem Solver Award*, AMERICAN BAR ASSOCIATION (Jan. 17, 2018) [https://www.americanbar.org/groups/dispute\\_resolution/awards\\_competitions/lawyer\\_as\\_problem\\_solver\\_award.html](https://www.americanbar.org/groups/dispute_resolution/awards_competitions/lawyer_as_problem_solver_award.html) (listing the award recipients).

99. Interview with Sue Carparelli, Exec. Director, Center for Out-of-Court Divorce, in Denver, Colo. (Mar. 15, 2018). All cost estimates in this Section are from this interview.



The community-based Center created package pricing for services ranging from \$1,500 to \$4,500, customized for families' needs and interests. The Center's goal in formulating the package of services was to make the Center financially self-sustaining while still offering generous financial scholarships to families who needed them. The \$1,500 package was for separating parents of whom one or both were not yet ready to proceed with divorce and may have needed more time, education, or counseling to determine a path forward. Potential services in this package included:

- Discernment therapy (helping the parents figure out whether they were ready to move forward with separation or divorce);
- Individual parent counseling;
- Mediation and drafting; and
- Financial and legal education.

The community-based Center's more comprehensive transition support program cost \$4,500 and was aimed at couples with children who were ready to develop plans for their family's transition and receive support while doing so. Services included:

- Family counseling;
- Interviews with the child (offered with the permission of their parents);
- Individual adult and child counseling;
- Co-parent planning and preparation;
- Financial education and budget planning;
- Legal education;
- Divorce mediation, including parenting plan mediation and financial agreement mediation;
- Legal document drafting; and
- Divorce support groups for parents and children.

The community-based Center engaged in an aggressive outreach and marketing effort.<sup>100</sup> The outreach campaign included a website, brochure, search engine optimization, pay-per-click advertising, advertising on bus tails, advertising on Colorado Public Radio, posts on social media outlets, a blog, and videos emphasizing the Center's child-centered approach to separation and divorce services. The community-based Center outreach campaign included referral sources

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100. See Letter from Sue Carparelli, Exec. Director, Center for Out-of-Court Divorce, to Center Grantor 2-3 (Dec. 15, 2017) (on file with the authors).

such as mental health clinicians, health care providers, schools, unions, and large employers. Finally, the community-based Center explored possible bundled employee health benefit programs.

The community-based Center received many more inquiries from families than it actually served.<sup>101</sup> The greatest number of referrals came from internet research (34%). Other sources included street signs (13%), family members or friends (12%), radio ads (7%), therapists (6%), and former clients (5%). Notably, only three percent of referrals came from the courts and about five percent came from lawyers, including Denver University Legal Services.

The community-based Center's financial plan required that it enroll an average of eight new families each month,<sup>102</sup> but it only enrolled an average of half of that number. Given that the Center was unfamiliar to the public, we estimate that it likely would have taken five to seven years of funding to achieve financial sustainability, and maybe half of that time to achieve a substantial number of referrals from previous clients.

One reason interested families expressed for not enrolling in the Center was the program's overall cost.<sup>103</sup> We believed that the Center provided parents with a cost-effective alternative to buying legal, therapeutic, and agreement drafting services separately—particularly when compared with the costs of extended litigation—but our belief was not convincing to parents with no experience in purchasing services in the divorce and separation marketplace.

The "Implementation Gap" is the difference between the quality of services provided by the Center or providers of other ADR services and the number of families who actually use those services.<sup>104</sup> The recent Canadian Task Force Report on Canada's Implementation Gap states that:

The reasons for this under-implementation are multiple. One reason is simply that limited resources are available for the family justice system . . . . The implementation gap is also, to a certain extent, a function of the culture of the justice system and its, as yet, incomplete embrace of CDR [the Report's term for ADR]. The family law reports are forceful and virtually unanimous in recommending that priority be given to non-adversarial family dispute resolution processes and that the courtroom be

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101. *Id.* at App. B, C.

102. *Id.* at App. A.

103. Interview with Sue Carparelli, Exec. Director, Center for Out-of-Court Divorce, in Denver, Colo. (Oct. 20, 2017).

104. See *Canadian Implementation Gap Report*, *supra* note 14, at 33.

treated as a valued but secondary resource. A great deal of progress has been made by governments, lawyers and judges in moving toward this reality. At the same time, however, it is clear that the potential of non-adversarial programs and processes in family law has not yet been fully exploited.<sup>105</sup>

The costs of the Implementation Gap to divorcing and separating families are not easily visible, but are nonetheless real. Parents and children who could benefit from a collaborative, out-of-court ADR process are instead shoehorned into courtroom-based litigation when they cannot settle their disputes. ADR has the potential to resolve the underlying problems presented in litigation. As we have already indicated, shrinking court budgets come under greater stress to deal with cases that need not be there in the first place. Parents run a much greater risk of depleting their economic and emotional capital through exacerbated, litigation-related conflict. Their children run the increased risk of emotional and educational problems associated with continuous parental conflict. More parents are relegated to self-representation because they do not have the resources to hire lawyers. Litigants are increasingly frustrated because they feel trapped in a litigation system they do not understand and see no way out. Employers suffer a decrease in productive workers and communities suffer a decrease in productive, engaged citizens, whose energies are diverted to family court.

## VI. BRIDGING THE IMPLEMENTATION GAP

One necessary step in bridging the Implementation Gap is familiarizing divorcing and separating families, stakeholders, and the community at large with ADR and its benefits and costs as compared to litigation. The Center devoted a great deal of time and resources to outreach but ran up against 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. This understanding can only be changed by a long-term strategic plan to educate all stakeholders about how the options for resolving separation and divorce disputes compare and contrast. In addition, we believe that it would be valuable to ease regulatory restrictions created by the legal system on the delivery of ADR services to allow for greater public engagement with interdisciplinary, problem-solving-oriented dispute resolution and innovation in service delivery.

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105. *Id.* at 9.

Lawyers and judges are gatekeepers for public perception of how family disputes can be resolved, and they should play a major role in educating the public about ADR. In recent meetings about the future of divorce practice, lawyers and judges expressed support for the Center. Nonetheless, the Center received few referrals from these sources. Explicit and extensive support and referrals from the legal community for ADR programs would help legitimize ADR as a public good. This Section discusses specific suggestions for bridging the Implementation Gap.

A. *In-Court Information for Litigants about Dispute Resolution Options*

Litigation can be initiated by one parent without the consent of the other; a reluctant parent can be compelled to participate in litigation without his or her consent. In contrast, participation in Center services requires—as do most non-mandated mediation programs—that both parents consent to participate. Getting both parents to agree to Center services was often a challenge because parents generally are not familiar with the Center model. Parents often expressed suspicion about whether a collaborative model protected their legal rights. The lack of familiarity with and suspicion of ADR reflects the dominance of the litigation model in public consciousness, and posed a barrier to parents working with the Center. Available empirical evidence supports the view that litigants are generally uninformed about ADR options, even when those options are offered by the court in which the parties are litigating. Professor Donna Shestowsky of the University of California Davis School of Law surveyed litigants with a case in court, some of whom were represented by counsel and some of whom were not, in judicial districts that had both mediation and arbitration programs. She found that only one-third of eligible litigants reported knowing that the court offered those options.<sup>106</sup>

Courts can help legitimize ADR in parents' minds by providing them with information about what options are available and how to decide which option is right for them. Courts might even partner with community stakeholders such as physicians, mental health professionals, teachers, and domestic violence advocates in providing such information to parents.

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106. See generally Donna Shestowsky, *When Ignorance is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017).

There are precedents for courts providing information about ADR options to parent-litigants. The Supervising Judge of Los Angeles County's Superior Court's Family Law Division has issued a letter advising such parties that they have other dispute resolution options, such as mediation and collaborative law. The letter describes mediation as "faster, easier, and less expensive than going to court."<sup>107</sup> It further states that litigants "have the right to a court hearing and to have [their] case decided by a judge. But many parties, especially if they have children, find it much less stressful to solve all or part/s of their case outside of court. A mediator can explain and explore [those parties'] options."<sup>108</sup>

Some court-based information programs are more elaborate. As of 2016, about 500 court-based self-help centers existed.<sup>109</sup> Such centers provide users with live assistance, pro bono referrals, document support, and the like. They can provide detailed and understandable information to parents about their choices for dispute resolution.<sup>110</sup>

Technological innovation can also increase the court's ability to provide the public with information about dispute resolution options and to help them match options to their particular situation. The Legal Services Corporation's *Report of the Summit on the Use of Technology to Expand Access to Justice* recommends that each state create a unified "legal portal" that utilizes an automated triage process to direct persons to the most appropriate form of legal assistance and guide self-represented litigants through the entire legal process.<sup>111</sup> The recommendation highlights an important feature of public education efforts. Not only can they provide information to parents about ADR options, but they can also help parents evaluate which option is best for them. Systematic delivery of accurate information about ADR options to parents would be a step forward in bridging the Implementation Gap.

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107. Thomas Trent Lewis, Supervising Judge, Family Law Division, Los Angeles County Superior Ct., Message from the Family Law Division Supervising Judge, [http://www.lacourt.org/division/familylaw/pdf/English\\_SJ\\_Letter.pdf](http://www.lacourt.org/division/familylaw/pdf/English_SJ_Letter.pdf) (last visited Feb. 13, 2018).

108. *Id.*

109. *ABA Commission Report on the Future of Legal Services*, *supra* note 21, at 19.

110. *Id.*

111. *Report of the Summit on the Use of Technology to Expand Access to Justice*, LEGAL SERVICES CORPORATION 4–5 (2013), <https://www.lsc.gov/media-center/publications/report-summit-use-technology-expand-access-justice> (last visited Jan. 20, 2019).

## B. ADR Discussion Requirement Between Counsel and Client

Lawyers, too, can be part of the education campaign to emphasize the importance of ADR to their family law clients. They are in the best position to help the parents they represent determine whether to turn to ADR. They are also opinion leaders in their communities. Lawyers should have an ethical requirement to discuss ADR options with parents before initiating litigation, unless ADR is not appropriate because of safety, futility, or client competence concerns.<sup>112</sup>

An ethical obligation to discuss ADR with parents is consistent with the counseling orientation to which family lawyers aspire. Limited data indicate that most family lawyers facilitate problem-solving and compromise.<sup>113</sup> Family lawyers increasingly indicate that they want the public to recognize their role as negotiators and problem-solvers, not just as adversarial advocates.<sup>114</sup> However, the available data, which do not focus on family law clients, indicate that lawyers are not effectively educating clients about ADR options. As mentioned above, Professor Shestowsky's recent survey found that only one-third of litigants knew that the court in which their matter was being litigated even offered a mediation and arbitration program. More significantly, she also found that legal representation made no difference in litigants' familiarity with ADR options: "[R]epresented litigants were not significantly more likely to correctly identify either court-connected program [of mediation or arbitration] compared to those who were not represented."<sup>115</sup>

An ethical "ADR discussion requirement" would make the lawyer responsible for advising the parent of existing ADR options in the community. Such a requirement could also make the lawyer responsible for facilitating client decision-making about whether any of the available ADR options are suitable for the client's particular circumstances. The lawyer could also make a recommendation as to whether and how to participate in ADR.

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112. One of the authors has previously argued that a divorce lawyer should have an ethical duty to discuss with and refer parents to alternative dispute resolution processes. See generally Andrew Schepard, *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*, 27 *PACE L. REV.* 677 (2007).

113. See *supra* notes 60–62 and accompanying text.

114. See *supra* note 61.

115. Shestowsky, *supra* note 106, at 217.

Creating an ADR discussion requirement is justified by the potential harm litigation can cause the children of separation and divorce. Current law, however, is largely silent about whether a divorce lawyer for a parent has any kind of duty to the children of his or her client. Divorce lawyers periodically get sued, but seldom lose, in malpractice actions brought by or on behalf of the children of divorce. Court decisions spanning the last two decades have held that divorce lawyers bear no duty to protect the interests of their clients' children as beneficiaries of life insurance policies, inheritances, child support, or custody arrangements.<sup>116</sup>

The American Bar Association's *Model Rules of Professional Conduct* do not mention the word "children," address the harm to the child that can result from parental conflict, or require counseling about the benefits and costs of ADR. Without focusing on separation and divorce, they do, however, leave motivated lawyers room to provide advice to parents about protecting their children from conflict without requiring them to do so. The *Model Rules* state that "lawyers shall explain [matters] to the extent reasonably necessary to permit the client to make informed decisions,"<sup>117</sup> and that, "in rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>118</sup> While these provisions obviously have potential applicability to the problems of placing children in the middle of parental conflict, they do not explicitly refer to separation and divorce. Essentially, discussing ADR options with parents is left to the discretion of the individual lawyer.

The American Academy of Matrimonial Lawyers' (AAML) *Bounds of Advocacy*, an aspirational code of ethics created specifically for divorce lawyers, partially fills that gap. It provides that "[a]n

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116. See, e.g., *Strait v. Kennedy*, 13 P.3d 671 (Wash. App. 2000) (finding that attorney representing one party in a marital dissolution action does not owe any duty to the client's children, heirs apparent of the client's estate, to timely finalize the client's divorce, because the children were merely incidental, not intended, beneficiaries of a marital dissolution action that was not intended to serve as an estate planning device); *McGee v. Hyatt Legal Services*, 813 P.2d 754 (Colo. App. 1990) (holding that a law firm representing a mother in a divorce and child custody action had no duty to the client's child, because there was no attorney-client relationship between the firm's attorneys and the child); *Scholler v. Scholler*, 462 N.E.2d 158 (Ohio 1984) (ruling that mother's divorce attorney owed no legal duty to her child to obtain adequate child support, because the fact that child support provisions are within a separation agreement does not compel the conclusion that an attorney employed by a spouse also represents the interests of minor children of the marriage).

117. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2018).

118. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018) (emphasis added).

attorney representing a parent should consider the welfare of and seek to minimize the adverse impact of the divorce on, the minor children.”<sup>119</sup> It also provides that “[a]n attorney should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution.”<sup>120</sup>

The *Bounds of Advocacy* recognizes the harm parental conflict can inflict on children and addresses the need for lawyers and clients to consider ADR. It is not, however, applicable to all lawyers; many lawyers handle family cases without being members in the AAML. Additionally, the *Bounds of Advocacy*'s provisions are discretionary. While the code says that attorneys “*should*” consider effects on children, it does not require that lawyers do so. Therefore, there are no enforcement mechanisms for the AAML's aspirational code. Some states have enacted ethical provisions codifying an ADR discussion requirement for all lawyers, many leaving some room for lawyers not to follow the rule.<sup>121</sup> Amending the *ABA Model Rules* to include such a requirement would make it mandatory for all lawyers to engage in discussions related to ADR options with their clients.

Administratively simple procedures can be created to ensure that divorce lawyers raise ADR options with parents and provide a record thereof to reduce the risk of malpractice suits for claims of failure to do so. For example:

- Drawing an analogy from medicine, client consent forms can verify that the attorney has in fact discussed ADR with the client.<sup>122</sup> Attorneys can develop forms with standard language attesting that a discussion regarding ADR has taken place and that the attorney has provided input regarding ADR's potential to resolve the client's case.
- Family lawyers can create client videos and brochures that discuss ADR options and help clients decide whether a particular ADR process is appropriate for them.

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119. BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS R. 6.1 (AM. ACAD. MAT. L. 2000).

120. *Id.*

121. See Becky L. Jacobs, Note, *Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse*, 22 HARV. NEGOT. L. REV. 1, 5–11 (2016).

122. See, e.g., Thomas Vu, Note, *Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with Their Clients*, 47 FAM. CT. REV. 586, 593 (2009) (recommending consent forms similar to those used in medical practice).



Pleading requirements can also serve as an administratively simple way to “police” the lawyer-client discussion requirement. Under current rules, before commencing a court action, a lawyer must conduct enough legal and factual investigation to establish that the underlying claim in the client’s complaint is not “frivolous.”<sup>123</sup> The lawyer’s signature on the complaint certifies that she has fulfilled that requirement.<sup>124</sup> A similar signature requirement could certify that lawyers have discussed ADR with their clients before commencing litigation. Signatures could also certify that lawyers believe that ADR is inappropriate in a particular case for an identifiable reason such as domestic violence.

Requiring that lawyers discuss ADR with client-parents may be good for lawyers’ businesses. Many parents do not believe that divorce- and separation-related legal services are affordable and fear that involving lawyers will increase conflict and expense. An ADR discussion requirement can change that perception by making parents aware of how to control their legal fees by coupling ADR options with unbundled representation.<sup>125</sup> More representation by lawyers, rather than less, may follow.

Creating a discussion requirement between lawyers and their clients would not require that lawyers *recommend* ADR to parent-clients. A lawyer may well discourage a client who is a victim of domestic violence or suffering from mental illness from participating in mediation. Nor would a discussion requirement guarantee a certain level of *quality* of conversation about ADR between lawyers and their clients. A lawyer so inclined could still disparage ADR to a client in such conversations. The requirement of an ADR conversation would, however, give lawyers an opportunity to provide information to clients about dispute resolution processes with which those clients might be unfamiliar, and which have demonstrated potential to help those clients’ children adjust to the challenges of separation and divorce. Mandated dialogue between lawyer and client on how to protect children from parental conflict is better than none at all. It ultimately remains the client’s choice whether to pursue ADR; lawyers should be able to help clients determine when ADR is appropriate and when it is not.

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123. FED. R. CIV. P. 11(b).

124. *Id.*

125. See FORREST S. MOSTEN & ADAM B. CORDOVER, BUILDING A SUCCESSFUL COLLABORATIVE FAMILY LAW PRACTICE (2018); FORREST S. MOSTEN et al., *Educating the New Lawyer: Teaching Lawyers to Offer Unbundled and Other Client-Centric Services*, 123 DICKINSON L. REV. 801, 806 (2018).

### C. *Requiring Participation in ADR*

A farther-reaching procedural innovation to bridge the Implementation Gap would be to *require* parents to attempt ADR, assuming it is appropriate to their situation, from an accredited provider. Creating such a requirement would eliminate the problem of one parent being able to veto participation in ADR. Of course, parents would not be required to agree to anything substantive—just to participate in an ADR process.

This is not as radical an innovation as it might seem. As previously discussed, many states have implemented a mandatory mediation requirement already, albeit in different forms.<sup>126</sup> California, for example, has a longstanding program of mandatory mediation for parenting disputes, showing that it is feasible to create a program in a very large jurisdiction.<sup>127</sup> Researchers have found that among separating families mandated to use mediation to develop family-related plans in California,

[t]his kind of issue-focused mediation attains full resolution in one-half, and partial resolution in two-thirds, of all custody and access disputes that enter into court. This solidly researched ‘success rate’ of mediation supports the philosophy that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences, with the relatively limited help of a mediator who focuses on specific issues.<sup>128</sup>

Looking abroad, Australia mandates that parents engage in ADR before litigating. An Australian parent who wishes to make an application to the court must provide a written certificate from a registered family dispute resolution provider confirming that the parents

126. See *supra* notes 75–77 and accompanying text.

127. See CAL. FAM. CODE § 3170 (2018) (effective Jan. 1, 2018–Jan. 1, 2020); CAL. FAM. CODE § 3170 (2020) (effective Jan. 1, 2020) (“If it appears on the face of a petition, application, or other pleading . . . that custody, visitation or both are contested, the court shall set the contested issues for mediation.”); see generally Isolina Ricci et al., *Profile: Child Custody Mediation Services in California Superior Courts*, 30 FAM. CT. REV. 229, 230 (1992) (stating that while mediation of custody disputes is mandatory, county mediation programs vary in the name of the mediation service, how it is provided, and its scope).

128. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 451, 471 n.50, 471–72 (2000) (citing numerous studies). See also *id.* at 471 n.50 (“In California, about 20–30% of the total population of separating families file in court to resolve their disputes over care and custody of their children and are mandated to use mediation.”).

made an attempt at mediation before the court action is commenced.<sup>129</sup> However, the certificate is not required if the case is urgent or the court suspects that there has been or there is currently a risk of child abuse or family violence.<sup>130</sup> Neither is the certificate required if a party cannot participate effectively in family dispute resolution or if the application is related to an order that was made within the prior 12 months and disobeyed by a parent who “has behaved in a way that shows a serious disregard for his or her obligations under that order.”<sup>131</sup>

An ADR requirement need not become an unreasonable barrier to accessing the courts simply because competent dispute resolution professionals are in short supply. States that implement an ADR requirement would, of course, need to certify enough qualified ADR providers to allow parents to complete the requirement at a reasonable cost and in a reasonable time, which would require funding for ADR programs.<sup>132</sup> An ADR requirement would also offer lawyers another business model in which to expand their practice, as they can be trained as qualified dispute resolution professionals or provide unbundled legal services in support of the mandated ADR service.

Australia created the infrastructure to support its mediation certification requirement in 2004 by creating a network of government-supported Family Relationship Centres (FRCs) to ensure compliance among a large population.<sup>133</sup> The FRCs are publicly funded but privately-operated community centers.<sup>134</sup> They offer a range of services, depending upon location and need, but the fundamental service is free mediation (for a limited number of hours) for families.<sup>135</sup> The families need not have filed for divorce, they need not be married, and

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129. See FAMILY CT. OF AUSTRALIA, FEDERAL CIRCUIT COURT OF AUSTRALIA, FACT SHEET, COMPULSORY FAMILY DISPUTE RESOLUTION—COURT PROCEDURES AND REQUIREMENTS, [http://www.federalcircuitcourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac197cce3bf6e8d5/FSCompFDR\\_0313V2.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT](http://www.federalcircuitcourt.gov.au/wps/wcm/connect/5e84f9bf-62bf-4083-ac197cce3bf6e8d5/FSCompFDR_0313V2.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5e84f9bf-62bf-4083-ac19-7cce3bf6e8d5-ltK1YUT) (last visited May 22, 2018) (describing the requirements for mandatory ADR before filing application of an order regarding a child).

130. *Id.*

131. *Id.*

132. See *infra* notes 170–176 and accompanying text.

133. For more information about the actual operations of the Relationship Centres, see generally GOVERNMENT OF AUSTRALIA, OPERATIONAL FRAMEWORK FOR FAMILY RELATIONSHIP CENTRES (revised Sept. 2017), <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/Operational-Framework-for-Family-Relationship-Centres.pdf> (last visited May 22, 2018).

134. *Id.*

135. *Id.*

they need not have filed papers in the court; they can be grandparents as well as parents.<sup>136</sup> The FRCs are housed in the community in pleasant and comfortable settings.<sup>137</sup>

Professor Patrick Parkinson of the University of Sydney Law School cites research confirming that services provided by FRCs have resulted in decreased court filings in cases about children—a thirty-two percent reduction from 2005 to 2010.<sup>138</sup> Professor Parkinson also suggests that FRCs have provided services to people who otherwise may not have been able to afford an attorney or counseling services.<sup>139</sup> The overall satisfaction rating for people who went to an FRC was seventy percent, which is particularly noteworthy because many of these parents have mental health, addiction, or high-conflict issues prevalent in their relationships.<sup>140</sup>

The Australian experience suggests that requiring parents to try ADR before filing a lawsuit can help parents reach agreements and may prevent them from filing suit altogether. The advantages of early intervention should be kept in mind in shaping mandated ADR programs. A plan for continuous research and development devoted to establishing best practices would support continuous program improvement and monitoring.

#### D. *Regulatory Reform to Encourage Innovation in Interdisciplinary Service Delivery*

##### 1. *Lawyer-Mental Health Professional Partnerships*

The Center experience demonstrates that separating and divorcing families can be well-served by interdisciplinary collaboration. The Center's services model created a partnership between lawyers and other disciplines—particularly mental health professionals—in delivering services to parents and children. Neither lawyers nor mental health professionals were “in charge”; they worked together to provide the best possible service to the family. The community-based Center charged parents a single fee for case management, legal information, lawyer-provided mediation, and mental health services. The Center sought an opinion from the Attorney Regulation Counsel, who affirmed that they were not in violation of any ethics rules.

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136. *Id.*

137. *Id.*

138. See Patrick Parkinson, *The Idea of Family Relationships Centres in Australia*, 51 FAM. CT. REV. 195, 208 (2013).

139. *Id.* at 209.

140. *Id.*

Despite the benefits of collaboration with other disciplines, the *ABA Model Rules* currently prohibit business structures, typically called Multidisciplinary Practice (MDP) or an Alternative Business Structure (ABS), in which lawyers partner with other professions by sharing fees and operational control.<sup>141</sup> Ethical rules in some states also explicitly prohibit lawyers from sharing fees and control with a psychologist to provide services to separating and divorcing families.<sup>142</sup> To encourage innovations like the Center and facilitate even greater interdisciplinary collaboration, these rules would need to change.

As a profession, lawyers are not hospitable to sharing recognition, control, or money with practitioners in other professions. The hostility to other professions is reflected in nomenclature. Lawyers are the only profession that characterizes every other profession as “non-lawyers,” which encompasses doctors, psychologists, accountants, business consultants, and anyone else without a J.D. degree. There is no such thing as a “non-doctor” or “non-accountant.” The ABA Commission on the Future of Legal Services stated in 2016 that “[the] legal profession continues to resist change, not only to the public’s detriment but also its own.”<sup>143</sup> The current ethical rules prohibiting lawyers from sharing fees or control with other professions in a single entity are the subject of vigorous debate at both the national and state levels in the legal profession. On one side are what might loosely be called “traditionalists,” who believe that the current rules preserve the independence of lawyers’ judgment. On the other side are what might be called “innovators,” who believe that rules against ABS and MDP prevent innovation in the delivery of coordinated services to clients’ detriment.<sup>144</sup>

The rule against fee and control sharing with other professions has repeatedly been reaffirmed by the ABA. Challenges to it nonetheless persist. In 2016, the ABA Commission on the Future of Legal Services comprehensively revisited the subject, studying the limited

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141. See MODEL RULES OF PROF'L CONDUCT r. 5.4(a), (c) (AM. BAR ASS'N 2018).

142. See, e.g., Formal Opinion No. 2005-101 [Revised 2015] (Or. Bar Ass'n 2015) (stating that lawyers and psychologists cannot create partnerships to provide mediation services); Opinion No. 85-3 (Mass. Bar Ass'n Mar. 1985) (same).

143. ABA Commission Report on the Future of Legal Services, *supra* note 21, at 17.

144. See generally ABA Commission on the Future of Legal Services, *Comments on Alternative Business Structures Issues Paper*, AMERICAN BAR ASSOCIATION, <https://perma.cc/5T7J-XKT8> (last visited Jan. 17, 2019) (comments by ABA affiliated groups, sections, and outside groups, as well as numerous individuals on proposals to liberalize restrictions on ABS).

development of ABS within the United States as well as the extensive growth of ABS outside the United States. The Commission stated:

The Commission's views were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers' ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that 'the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised.' Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS. At the same time, the Commission also found little reported evidence that ABS has had any material impact on improving access to legal services.<sup>145</sup>

A few states have liberalized their anti-ABS rules without negative effects on the bar's core values. The most notable is the District of Columbia Bar's Rule 5.4, which provides in part that "[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients . . . ." <sup>146</sup> Comment [7] to D.C. Rule 5.4 supports innovations such as the Center:

As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule *permits* economists to work in a firm with antitrust or public utility practitioners, *psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients . . .* In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) [which generally requires non-lawyers to adhere to the Rules of Professional Conduct and lawyers who have a financial interest in the entity to be responsible for the conduct of non-lawyers] are met.<sup>147</sup>

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145. *ABA Commission Report on the Future of Legal Services*, *supra* note 21, at 42.

146. DISTRICT OF COLUMBIA BAR RULES OF PROF'L CONDUCT r. 5.4 (b) <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule5-04.cfm> (last visited Dec. 24, 2018).

147. *Id.* (emphasis added).

Experience with interdisciplinary practice at the Center supports the innovators over the traditionalists. It suggests that lawyers and mental health professionals can work together smoothly in sharing fees and control without fear of deteriorating ethics or harming clients. Quite the contrary is true: Center clients and legal professionals benefitted from coordinated, interdisciplinary teamwork.

## 2. *Drafting of Agreements by Mediators*

Lawyers or supervised law students serving as mediators drafted mediation agreements for parents at the Center. Many parents came to the Center because the mediators could draft an agreement and associated documents arising from mediation that would satisfy court requirements. Center mediators informed parents that they could also hire their own lawyers to draft agreements. They advised clients that even if they decided to have the mediators prepare the draft, they should have their agreement reviewed by counsel of their choosing. Several parents took advantage of that option. Some parents utilized unbundled legal services, through which clients hired lawyers for the limited purpose of reviewing the mediator-drafted agreement.

The Center was fortunate to be located in Colorado, a state which allows mediators to draft agreements arising from mediation.<sup>148</sup> In many states, however, mediators cannot draft such agreements, even with informed client consent and advice as to the possibility of outside review of the draft agreement by counsel for the parties. For example, a recent law review article describes Illinois and Texas as states where ethics opinions do not allow mediators to draft settlement agreements.<sup>149</sup> In those states, regulators interpret legal ethics codes to mean that mediators who draft an agreement and file it with the court are subject to prosecution for the “unauthorized practice of law.”<sup>150</sup> According to this view, each party is required to hire its own

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148. COLO. MEDIATORS & ARBITRATORS, *MEDIATION RULES OF PROCEDURE* (2013), [http://coma.com/sites/default/files/rules\\_mediation\\_11012013.pdf](http://coma.com/sites/default/files/rules_mediation_11012013.pdf) (Jan. 20, 2019) (“When parties attend mediation pro se or when the parties do not jointly agree that an attending attorney draft the MOU, the mediator acts as a scribe for the parties to reduce specific agreements achieved in mediation to writing. The parties shall be present, either in person or via teleconference, during the drafting of the terms and conditions of the agreement. The quality and completeness of such agreements is the responsibility of the parties prior to executing the agreement through signing the document.”).

149. Robert Kirkman Collins, *The Scrivener’s Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 *CARDOZO J. CONFLICT RESOL.* 691, 699 (2016).

150. See *id.* at 692; Calvin Lee, Note, *May Mediators Draft Settlement Agreements?*, 54 *FAM. CT. REV.* 501 (2016).

lawyer to conduct the drafting process, which effectively prohibits mediators from drafting. Such an approach raises the transaction costs of the divorce process and makes the process more adversarial, draining, and cumbersome.

Some background will help to illuminate the problem. Under traditional views of legal ethics, each parent must retain his or her own lawyer to provide representation in a divorce.<sup>151</sup> AAML's *Bounds of Advocacy* sums up the traditional view:

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes . . . . However, *it is impossible* for the attorney to provide impartial advice to both parties. Even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody. A *matrimonial lawyer should not attempt to represent both husband and wife, even with the consent of both.*<sup>152</sup>

The traditional view assumes that negotiation of a divorce settlement is a zero-sum game (for example, more parenting time or money for one parent means less for another) and that parents will inevitably be antagonists. In legal ethics, clients can waive potential conflicts of interest (e.g., representing both spouses by drafting both their wills) if the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing.”<sup>153</sup> But as the position of the *Bounds of Advocacy* demonstrates, such waivers are strongly discouraged for joint representation of husband and wife in a divorce because the profession assumes that conflict between the clients is inevitable and intractable. Each parent must therefore hire his or her own lawyer.

Mediation is not prohibited by the rule against joint representation because it is not representation at all, but rather facilitation of settlement. The mediator has no client,<sup>154</sup> and must maintain neutrality between mediation participants.<sup>155</sup> Because the mediator does

151. See Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099 (2014).

152. BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS R. 3 CMT. (AM. ACAD. MAT. L. 2000) (emphasis added).

153. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1), (4) (AM. BAR ASS'N 2018).

154. *Id.* r. 2.4 (AM. BAR ASS'N 2018) (“A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute . . . that has arisen between them. Service as a third-party neutral may include service as . . . a mediator . . .”).

155. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard IV (ASS'N FAM. & CONCIL. CTS. 2000), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.174-1617.2001.tb00598.x> (last visited Jan. 20, 2019) (“A family mediator shall conduct the mediation process in an impartial manner. . . . Impartiality means



not represent any party, the mediator has strict limits on what legally-oriented services he or she can provide to participants; the mediator can only provide legal information, not legal advice.<sup>156</sup> That line is a murky one and puts the mediator at risk for sanctions for unauthorized practice of law if he or she crosses it.<sup>157</sup> For example, a mediator can provide copies of statutes and cases to participants and state in general terms what he or she understands to be the governing law on a given issue (e.g., the legal standards by which courts award parenting responsibility or maintenance). Most characterizations of providing legal advice, however, prohibit a mediator from applying the general law to the facts of the parents' situation or using it as a basis for providing advice or guidance to parents on what decisions they should make.<sup>158</sup>

In general terms, parties who want a divorce must file a formal written agreement with the court and seek the court's approval.<sup>159</sup> Only after a divorce agreement is approved by the court can the parties remarry. Suppose that the parties in mediation have reached a verbal agreement on the terms of a divorce. In many states, the mediator would be unable to draft the agreement because regulators take the position that drafting an agreement entails the application of

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freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.”).

156. AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION COMM. ON MEDIATOR ETHICAL GUIDANCE, SODR 2010-1 2 (2010).

157. See AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, STATE DEFINITIONS OF THE PRACTICE OF LAW App. A (2003), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model\\_def\\_migrated/model\\_def\\_statutes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_def_migrated/model_def_statutes.authcheckdam.pdf) (last visited May 22, 2018).

158. See, e.g., *Legal Information Versus Legal Advice: What Is the Difference?*, CENTRE FOR PUBLIC LEGAL EDUCATION ALBERTA, <https://www.cplea.ca/wpcontent/uploads/LegalInfovsLegalAdvice.pdf> (last visited Jan. 17, 2019) (“Legal information explains the law and the legal system in general terms. The information is not tailored to a specific case. Legal advice applies the law, including statute and case law and legal principles to a particular situation. It provides recommendations about what course of action would best suit the facts of the case and what the person wants to achieve.”); *May I Help You?: Legal Advice Versus Legal Information: A Resource Guide for Court Clerks*, JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, ACCESS AND FAIRNESS ADVISORY COMM. 3 (2003), <http://www.courts.ca.gov/documents/mayihelptyou.pdf> (last visited Jan. 17, 2019) (“Analyzing a litigant’s particular fact situation and advising him or her to take a certain course of action based on the applicable law is a job for a lawyer, not for court staff [which is prohibited from providing legal advice to litigants].”).

159. See Margaret Ryznar & Angelique Devaux, *Viola: Taking the Judge Out of Divorce*, 42 SEATTLE U. L. REV. 161, 176–177 (2018) (“American courts have been involved in divorce cases since the earliest cases. While methods have been developed to simplify the American divorce, it is not possible to fully exclude judicial involvement in divorce.”).

facts to governing law and thus is the practice of law.<sup>160</sup> The mediator could try to avoid prosecution for unauthorized practice of law by asking the clients to consent to the mediator's transformation from neutral dispute resolution facilitator to a lawyer for one or both of the parties. As previously discussed, the governing doctrine in many states strongly discourages joint representation of divorcing spouses, viewing it as creating a conflict of interest. One spouse could hire the mediator as a lawyer to represent that spouse to draft the agreement, leaving the other one unrepresented. Another option would be for the parties to draft their own agreement and attempt to get it approved by the court without counsel. Alternatively, the parties could hire two new lawyers, tell them each the facts separately, and have one develop a draft on which the other will comment and hopefully agree.

None of these solutions is satisfactory. Self-represented parties tend to have difficulty drafting legal documents.<sup>161</sup> Leaving one party unrepresented reduces legal expenses but leaves that party without counsel and thus at a legal disadvantage. Inefficiency and extra costs can result if a newly hired lawyer has to be informed of the background of the negotiations and the family situation. Hiring two lawyers substantially increases the transaction costs for processing the divorce. Additionally, it introduces the risk of undoing the mediated agreement reached by the parties because of the possibility of adversarial conflict over the proposed terms of the agreement.

The best solution remains the one prohibited by rules against the unauthorized practice of law: having a neutral mediator who is already familiar with the facts and the background of the parties draft the agreement and recommend to the parties that they seek their own counsel to review it. It is hard to justify requiring each parent to have a lawyer for the drafting process when research suggests that neither can afford one, that parents do not want to engage in further adversarial bargaining after they have reached a settlement, and, above all, that parents are satisfied with keeping the drafting process in the mediator's hands.

Wisconsin recently amended its rules of professional responsibility to allow lawyers serving as mediators to draft and file agreements

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160. See Collins, *supra* note 149, at 699.

161. *Cases Without Counsel*, *supra* note 49, at 2 ("The paperwork can become overwhelming. Forms, while helpful, are not sufficient because many are unclear about the appropriate content to include when completing them. The cycle of litigant mistakes and court rejections is taxing for both.").

and related documents with the court under carefully defined conditions.<sup>162</sup> The parties must provide informed consent to the mediator drafting and filing the necessary documents, and the mediator must maintain neutrality in the drafting process, must not provide legal advice, and must recommend that the parties retain their own counsel to review the draft.<sup>163</sup> While the mediator can file documents with the court, the mediator cannot make court appearances on behalf of either party. The Wisconsin rule allows for greater flexibility in the delivery of services to separating and divorcing families and reduces costs of compliance with legal requirements. We recommend that other states follow Wisconsin's lead.

#### E. *Changing the Law School Family Law Curriculum*<sup>164</sup>

We further recommend incorporating the kind of education provided to law students at the Center into the law school family law curriculum as a centerpiece of a long-term strategy to bridge the Implementation Gap. What is taught in law schools today sets the agenda for family law practice in the future. A family law system moving in an interdisciplinary, collaborative direction will need a supply of future family lawyers (some of whom will eventually become judges, legislators, and bar leaders) to understand and embrace it.

The Center provided an educational environment for law students consistent with the *Carnegie Report's* call for reform of legal education in general,<sup>165</sup> and the Family Law Education Reform Project's call for reform of family law education in particular.<sup>166</sup> The

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162. See WIS. SUP. CT. R. CH. 20 R. 20:2.4(c) (2018).

163. *Id.*

164. This Article is directed at a legal audience and focuses on change in the legal system and in legal education. This Article's focus on lawyers is not meant to downplay the importance of change in the education of future mental health professionals who will serve separating and divorcing families, and who will work with lawyers and in the legal system. Future mental health professionals are often unfamiliar with the standards and procedures of the legal system and the possibilities for using their training to positively impact families involved with it. They, too, will benefit and learn from interdisciplinary education and collaboration, which promotes a deeper understanding of the legal system and a more positive view of working with lawyers.

165. See WILLIAM M. SULLIVAN ET. AL, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

166. See Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Project: Final Report*, 44 FAM. CT. REV. 524 (2006).

evaluation of the on-campus Center included an assessment of student learning.<sup>167</sup> Interns at the on-campus Center—graduate students in law, psychology, and social work, supervised by qualified professionals—demonstrated increased knowledge in relevant substantive areas, such as divorce law, parenting plans, counseling, and family dynamics. Student interns also reported increased levels of comfort in accomplishing professional tasks, including problem solving, negotiating agreements, and drafting field-appropriate professional documents. The student interns responded positively to working as part of an interdisciplinary team and to gaining real-world experience working with families.

Comments made by law students at the Center extend the value of educating lawyers, psychologists, and social workers together into skills lawyers need to represent family law clients. For example, students felt that they became better interviewers and counselors by observing mental health interns doing that work. In their view, understanding more about family processes and dynamics enhanced the likelihood of resolving conflict successfully and with buy-in from clients.<sup>168</sup>

Law students who worked at the on-campus Center learned the substantive knowledge and skills required for their professions to serve separating and divorcing families. But even more significantly, they learned the “why” and “how” of being part of an interdisciplinary team.<sup>169</sup> They provided good service to their clients while simultaneously becoming prepared for the future practice of family law. Bridging the Implementation Gap will require training many more future family lawyers in a similar manner, and achieving that goal will require law schools and relevant stakeholders in the family law system to collaborate in building a future curriculum.

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167. See Marsha Kline Pruett et al., *Law Students on Interdisciplinary, Problem-Solving Teams: An Empirical Evaluation of Educational Outcomes at the University of Denver's Resource Center for Separating and Divorcing Families*, 56 *FAM. CT. REV.* 100, 105 (2018). For qualitative perspectives from Center students and supervisors, see Melinda Taylor et al., *The Resource Center for Separating and Divorcing Families: Interdisciplinary Perspectives on a Collaborative and Child-Focused Approach to Alternative Dispute Resolution*, 53 *FAM. CT. REV.* 7 (2015).

168. See Melinda Taylor et al., *supra* note 167, at 12, 14, 17 (providing a description by law student intern at on-campus center of what she learned during her work there).

169. See Forrest S. Mosten & Lara Traum, *Interdisciplinary Teamwork in Family Law Practice*, 55 *FAM. CT. REV.* 437 (2018) (discussing the application of principles for effective teamwork to matrimonial practice).

## VII. SUSTAINABLE FUNDING FOR CENTERS

Creating sustainable funding for ADR projects like the Center is perhaps the single biggest obstacle to bridging the Implementation Gap. Many family court budgets have been slashed in recent years, and in the best of circumstances, budgets have held steady without significant increases.<sup>170</sup> In the state courts, where virtually all family-related matters are filed, the composition of dockets has changed radically over the last few years. State court dockets contain fewer complex cases with attorneys on both sides, more family cases with self-represented litigants, more small claims cases—such as debt collection and landlord/tenant cases—and rising criminal dockets.<sup>171</sup> All of these developments impose demands on the courts' personnel and budgets. On top of normal operating expenses, courts also must pay for technological innovation: online tools for self-represented litigants, case management systems, interactive forms, and e-filing. Funding any court innovation is a challenge in this fiscal environment. The cost of running an out-of-court center is significant,<sup>172</sup> and the Implementation Gap makes it likely that it will run at a loss for a substantial period of time—five to seven years—before enough families are attracted to it to operate at a profit. Finding sources of funding for ADR projects like the Center may require finding sources outside of the judicial budget.

Social Impact Bond (SIB) funding offers a practicable approach to sustainable funding. An SIB is a contract with the public sector in which private investors invest funds for improved social outcomes that are expected to result in public sector savings. If the program is successful, the government entity benefitting from the savings repays the bond. As described by the Center for American Progress, “a social impact bond, or SIB, is an innovative financial tool that enables governmental agencies to pay for programs that deliver results.”<sup>173</sup> SIBs are an extension of the investment decisions that many individuals, not to mention foundations and other non-profit donors, make every day. The fundamental concept is that backers invest money in ways

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170. See *Budgets & Funding*, NAT'L CTR. FOR STATE COURTS, [http://www.ncsc.org/information-and-resources/budget-resource-center/budget\\_funding.aspx](http://www.ncsc.org/information-and-resources/budget-resource-center/budget_funding.aspx) (last visited June 11, 2018).

171. See PAULA HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* iii–vi (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> (last visited Jan. 20, 2019) (reviewing trends in civil litigation in state courts).

172. See *supra* note 99 and accompanying text.

173. CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org> (last visited June 11, 2018).

that represent their values and contribute to future innovation that they aim to create and sustain.

The first example of an SIB is from the United Kingdom:

In 2011, Peterborough Prison issued one of the first social impact bonds anywhere in the world. The bond raised 5 million pounds from 17 social investors to fund a pilot project with the objective of reducing re-offending rates of short-term prisoners. The relapse or re-conviction rates of prisoners released from Peterborough will be compared with the relapse rates of a control group of prisoners over six years. If Peterborough's re-conviction rates are at least 7.5% below the rates of the control group, investors receive an increasing return that is directly proportional to the difference in relapse rates between the two groups and is capped at 13% annually over an eight-year period.<sup>174</sup>

The Peterborough bond holders were repaid the full amount of their investment and a three percent per annum return on investment. The program funded by the SIB reduced reoffending by nine percent, two percent more than the target set by the government.<sup>175</sup> Since the Peterborough SIB, the concept has generated interest internationally.<sup>176</sup>

SIBs are most appropriate for innovative, government-sponsored interventions with proven track records, such as the Center model. Although SIBs have been used in early childhood areas, delinquency prevention, and other areas involving children and the courts, SIBs have not yet been used for separation and divorce family court innovations. It is possible to imagine how an SIB could be created to fund a Center. Suppose that a jurisdiction wants to make ADR the focus of dispute resolution for separating and divorcing parents. The jurisdiction takes measures (e.g., implementing an ADR discussion requirement, revising the ethics rules prohibiting lawyer-mental health partnerships, etc.) to bridge the Implementation Gap. Through outreach, it attracts a group of investors impressed by the jurisdiction's commitment to ADR and its benefits for courts, parents, and communities. They purchase SIBs to fund the opening of a Center, expecting a return over five or ten years, providing enough time for the Center

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174. *Social Impact Bond*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/social-impact-bond.asp> (last visited Sept. 21, 2018).

175. See David Ainsworth, *Peterborough Social Impact Bond Investors Repaid in Full*, CIVIL SOCIETY (July 27, 2017), <https://www.civilsociety.co.uk/news/peterborough-social-impact-bond-investors-repaid-in-full.html> (last visited Dec. 25, 2018).

176. See *Social and Development Impact Bonds (Results-Based Financing)*, UNITED NATIONS DEVELOPMENT PROGRAMME, <https://www.undp.org/content/sdfinance/en/home/solutions/social-development-impact-bonds.html> (last visited June 11, 2018).

to establish itself in that jurisdiction. The investors' return would be calibrated based on how much money the Center could save the courts and, perhaps, other institutions that would be affected by the innovation (e.g., schools, delinquency programs, etc.).

Some key questions would have to be answered, however, before SIBs could become a viable option for funding Centers. For example:

- How would the Center measure success for the purpose of repaying bondholders? The easiest approach would be to assign some number of hours and a dollar value to every case that the Center successfully completed in terms of the cost-savings to the courts. But a focus solely on court caseload does not measure positive changes that improve the lives of parents and children (e.g., reduced acrimony and better mental health); this would require additional evaluation and calculation of return on investment.
- Assume cases diverted from the courts is the measure of success for investment repayment. Would the legislature allocate other funds for repayment, or would it debit the court budgets on a dollar-for-dollar basis? Can the courts afford to give up or transfer any funding, even for an entity that produces better outcomes?
- What kind of data would need to be maintained over the life of the SIBs to justify a rate of return? Perhaps the question should be (or another question should be): what kind of return is needed over the life of the SIBs to support and popularize the investment?

For present purposes, it is sufficient to note that finding sustainable funding for ADR projects like the Center is an essential part of a strategic plan to bridge the Implementation Gap. Additional elaboration by future scholarship may be required and is strongly encouraged.

## VIII. LESSONS LEARNED AND THE FUTURE

We conclude by identifying a few hard-earned lessons from building our "field of dreams" for separating and divorcing families, which we hope others will apply in building their own in the future.

The first is that we should have confidence in ADR and an interdisciplinary approach to delivery of services to separating and divorcing families. The Center experience shows that we know how to

design a service delivery system to produce better outcomes for separating and divorcing families and create a viable alternative to litigation that meets their needs. We should reject efforts to marginalize ADR by characterizing it as a mere experiment or an exception to a system based on litigation. Those characterizations serve no purpose except to maintain a dysfunctional litigation-oriented dispute resolution status quo. The critical challenge facing the legal system and the larger community is not to find alternatives to litigation and prove that they work, but rather to make ADR services available to the greatest number of families possible by bridging the Implementation Gap.

The second lesson is that the Center will not catch on just because it works; the long-term success of implanting ADR within the dominant litigation system requires coordinated strategic planning, legal reform, culture change, court approbation, and marketing. Courts, legislatures, and the bar can take concrete steps to facilitate legal and cultural change, including judiciary-led public education; an ADR discussion requirement between lawyers and clients; mandatory ADR participation in appropriate cases; changes in lawyers' regulatory rules to encourage partnerships between law and mental health service providers; and revision of the law school family law curriculum to emphasize interdisciplinary collaboration and ADR. ADR advocates should encourage communities to take those steps and anything else that will help shift public consciousness about divorce and separation dispute resolution from litigation to collaboration.

Our third lesson is that evaluation and measurement tools should be built into the Center's development plan from the outset. Program evaluations assess program success along various dimensions—for whom, in what ways, and so on. Evaluations also create agendas for program improvement. Empirical proof of success can also be helpful in convincing funders and stakeholders of the merits of ADR. Planning for such proof should be standard operating procedure in Center development.

Finally, Centers require longer-term funding in order to allow them to take hold in communities. Funding for Centers should not be thought of as taking away from the already-strained judiciary budget. The legal profession should explore other innovative funding sources, such as Social Impact Bonds. Foundations and socially conscious entrepreneurs should be part of the funding process.

This is a unique moment in family law history and development. Substantive family law has changed its focus from marital fault to



making decisions based on criteria that emphasize the need for collaborative family planning for the future. The harm to children and parents from reliance on litigation to resolve disputes is increasingly apparent. The needs of families are driving them into the court system in record numbers without legal services to support them or facilitate courts' operations. The status quo cannot be sustained when we have a better and empirically tested way of delivering services that families need.

This confluence of circumstances creates an opportunity for family law judges, lawyers, mental health professionals, financial planners, and educators to reinvent the family law system and incorporate developments that are part of twenty-first century culture: technological advances, the growth of private sector services, and budgetary constraints in the courts. Concerned citizens and stakeholders should call for new types of dispute resolution services that rely on collaboration, interdisciplinary skill sets, and promotion of public health. The weeds of the litigation system should not strangle the planting of fields of dreams for separating and divorcing families. If enough centers offering these kinds of dispute resolution services are created and carefully tended, we can create a problem-solving-oriented family law system that serves adults and children across the socioeconomic spectrum. If we build them, and if families do come, family law can lead the way toward greater and more effective access to justice in the twenty-first century.

