



Family Court ADR Program Best Practices





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preface

This document was developed by Maryland Circuit Court Family Division and Family Services Program family support services coordinators, administrators, and ADR professionals along with members of Maryland's Mediation and Conflict Resolution Office (MACRO). A smaller subset of the larger group, originally convened in January, 2003, met over the next 11 months to discuss key issues and identify best practices which were then submitted to the larger group for comment. Finally, the Committee on Family Law of the Maryland Judicial Conference reviewed the document and made changes.

These best practices are intended to guide Maryland Circuit Court Family Divisions and Family Services Programs in developing and administering court-based family alternative dispute resolution (ADR) programs.

Maryland courts offer a broad range of ADR programs to address the needs of families in transition. These range from child access and marital property mediation to volunteer attorney settlement panels, child dependency mediation, parent-teen mediation, and facilitator programs. This document is intended to provide guidance to courts in managing all of these various programs. For this reason, the recommended practices have been left broad enough to permit courts to implement them in a variety of programs.

This document does not offer guidance on how to promote the quality of individual mediator performance or mediator certification. That initiative is being addressed by MACRO's "Mediator Quality Assurance" initiative. This document also does not address how mediation programs should be evaluated. MACRO is currently working on an evaluation protocol for all mediation programs which should enlighten that topic.

This document is intended to assist courts in offering quality programs that are well run, effective, and that meet the goals outlined in the *Performance Standards and Measures for Maryland's Family Divisions*. In some cases these practices represent the ideal. Some of the solutions recommended may require the courts to employ additional resources. Where those resources are available, these goals will be more achievable. The Department of Family Administration at the Administrative Office of the Courts is available to assist courts in implementing these best practices and will provide technical assistance to any court upon request. The Department of Family Administration will likewise continue to partner with MACRO in planning for and promoting the use of ADR to serve the needs of Maryland families and children.

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1

Access to the Courts and Information about Court Alternative Dispute Resolution Programs

The Maryland Judiciary recognizes the need to provide meaningful access to the courts and to the family decision-making process for persons of varying backgrounds and skill levels, including children and persons with special needs.

The best practices detailed below suggest ways that courts can design ADR programs to provide this level of access. These practices also recommend ways to disseminate information about ADR programs and practices to all court customers effectively.

1A. Education of the Parties

All parties who participate in ADR programs need to be educated in:

- i) the ADR program and process and how to participate effectively in it;
- ii) their legal rights and remedies and how those might be affected by decisions they will make during the ADR process; and
- iii) for programs focusing on child-related issues, how to understand the needs of their child, and how to remain child-focused in their decision-making.

To achieve these objectives, **good programs will:**

- ☆ Ensure participants attend and complete co-parenting education prior to the first session of child access mediation.
- ☆ Include a session in co-parenting education that specifically focuses on what participants can expect in child access mediation and how they can participate most effectively.
- ☆ Integrate family court ADR programs with the court's self-help program to ensure that self-represented litigants have an opportunity to meet and consult with counsel prior to an initial ADR session, during mediation, and in order to evaluate any proposed agreement.
- ☆ Request ADR professionals review or reaffirm what the participants should have learned about the ADR process by providing a brief orientation before proceeding with ADR.
- ☆ Provide information and education about the ADR program and process in a variety of forms, e.g., brochures and written materials, web-based information, videos, etc. Materials will be provided in a variety of locations in the courthouse including clerks' offices.

1B. Education of the Bar

Attorney knowledge, understanding and support is important to ensure that ADR programs are successful. **Good programs will:**

- ☆ Provide attorneys the opportunity to meet, get to know, and network with the program's ADR professionals.
- ☆ Provide opportunities for attorneys to sit in on and observe ADR sessions, even if those are cases in which they are not involved, so that they can learn firsthand about the program and the ADR process. When attorneys are permitted to observe cases in which they are not involved, good programs will require that attorneys sign an agreement acknowledging that they will respect the confidentiality of the process.

- ☆ Provide information to attorneys about educational opportunities where they may learn about the ADR process or learn how best to prepare their clients for the ADR process.
- ☆ Inform attorneys promptly about anticipated changes in the program, its policies, or how it might affect the management of their cases.
- ☆ Provide attorneys the opportunity to provide feedback to the bench, court administration, and ADR professionals about the program.

1C. Education of the Judiciary

To run effective family ADR programs, it is essential that judges, masters, and court staff are knowledgeable about those programs and understand how those resources can best be used to enhance the experience of families and children that come before the court.

Good programs will:

- ☆ Ensure that judges, masters, and court staff have a working knowledge of the ADR programs operated by or utilized by the court.

1D. Fees

The imposition of a fee may be a practical necessity to ensure ADR programs can be maintained. The payment of a fee can also become an obstacle impeding equal access to ADR programs for all court customers.

To ameliorate this potential problem, **good programs will:**

- ☆ Assess the parties' ability to pay before requiring the payment of a fee for ADR services.
- ☆ Extend the reach of its services by taking advantage of volunteer resources to the extent that can be done without compromising the quality of service provided. This may take the form of requiring panel mediators to provide services *pro bono* in one or two cases per year. It may also include the development of entire programs utilizing volunteer professionals, where that is feasible. Programs can encourage volunteer participation by tracking *pro bono* hours for the professionals involved and developing a volunteer recognition program.
- ☆ Ensure that a party's inability to pay for ADR services does not become an obstacle impeding their access to service.
- ☆ Develop and follow a fee collection policy and procedure and communicate that policy to participants.
- ☆ Provide sufficient information in writing about fees at the time of the referral, and before ADR is initiated.
- ☆ Provide information to litigants about the availability of fee waivers, and provide the forms they will need to apply, if appropriate.

1E. Participation

A well-defined program will articulate who should participate in ADR sessions and why their participation is appropriate. It is important that the court communicate clearly its policies in this regard. **Good programs will:**

- ☆ Develop and follow a policy regarding the participation of children in the ADR process.
- ☆ Develop and follow a policy regarding the participation of third parties (spouses, stepparents, grandparents, others) in the ADR process.
- ☆ Develop and follow a policy regarding the participation of attorneys in the ADR process.
- ☆ Ensure that participation policies address the potential power imbalance that may occur when one party is represented and another is not.
- ☆ Permit the local bar to participate in the development of policies regarding attorney participation in mediation or other ADR processes.
- ☆ Ensure that parties are informed about who will attend prior to each session, so that they can be adequately prepared and will not be surprised when they arrive at the session.

1F. Terminology

Use of consistent terminology is important to ensure that court-based programs are operated uniformly across the state.

To this end, **good programs will:**

- ☆ Use terminology in naming programs, developing policies, and communicating with the program that is consistent with Maryland Rules 17-102 and 9-205.

1G. Forms

Statewide forms can aid the courts in managing programs consistently across the state, and can facilitate the collection of data about program performance. **Good programs will:**

- ☆ Use statewide program management forms or templates to ensure that programs collect consistent data and handle key functions in a similar manner. These forms are to be developed by the Administrative Office of the Courts for use in the following areas:
 - ▶ Referral Form - for referring the case to the ADR program. The form will provide uniform information about the parties and the case to the ADR professional.
 - ▶ Disposition Form - to be submitted by the ADR professional at the conclusion of the case, with copies to counsel. This should be extremely simple and should not convey unnecessary information that might prejudice the parties who may have decided not to participate in the ADR process.

- ▶ Order Incorporating Agreement
 - ▶ Participant Feedback Survey. Any form developed by the AOC will be reviewed by a panel of ADR professionals to ensure the form does not violate the ethical principles that govern the process.
- ☆ Permit a panel of ADR professionals to review forms developed for use locally, to ensure those forms do not violate the ethical principles that govern the process.

1H. Participation of Self-Represented Litigants

Court-based family ADR programs should take into account the increasingly large percentage of self-represented persons appearing in family cases. **Good programs will:**

- ☆ Ensure that the ADR process is available to all litigants regardless of representational status.

1I. Facilities

It is important to offer court-based family ADR services in facilities that enhance the accessibility of the program. **Good programs will:**

- ☆ Provide court-based family ADR services in facilities that are ADA-accessible.
- ☆ Unless otherwise agreed to by the parties, offer ADR services at a neutral site, accessible by public transportation, within that jurisdiction.
- ☆ Provide services in a site that is safe for participants and has adequate security.
- ☆ Accommodate the needs of participants by offering services at various times of day or various days of the week.
- ☆ Provide a site for ADR services to take place, when appropriate, in a public facility such as at the courthouse and/or elsewhere in the community.

1J. Role of Child Counsel in the ADR Process

Although not appointed in all cases, counsel for children play a key role in resolving child access issues. Their perspective can ensure that a decision reached through the ADR process is truly child-focused and in the child's best interest.

For these reasons, **good programs will:**

- ☆ Permit counsel for children, when appointed, to review a proposed agreement, ideally during the same time period that the ADR participants are reviewing the agreement with their counsel, and in sufficient time to permit child counsel to recommend modifications to the agreement. The feedback provided by child counsel should be provided in a timely fashion so that the parties can return to the ADR process and incorporate any recommendations if appropriate.

2

Balancing the Needs of Families, ADR Professionals, the Community and the Court in Designing ADR Programs

Courts need to manage cases in a timely and efficient manner, while maintaining a continuum of services to meet the needs of families and children. In designing family ADR programs, the courts recognize that sometimes the court's case management needs must be balanced with the needs of families, the ADR professionals involved, as well as the community.

2A. Cases Referred to ADR

Ideally courts will make maximum use of ADR resources by referring all appropriate cases, while ensuring that cases that are not appropriate for ADR are screened out. To achieve these objectives, **good programs will:**

- ☆ Screen all cases for family violence issues, preferably in person, in a confidential setting outside the presence of the other party.
- ☆ Ensure that screeners are adequately trained in how to identify family violence issues, and in identifying appropriate cases for ADR.
- ☆ Establish a policy that presumes that all contested cases are appropriate for ADR, unless a screener has designated otherwise, even when the parties represent that all issues have been resolved. In this way, the ADR process can be used to verify points of agreement and ensure that a complete and appropriate agreement has been reached.

In addition to these measures, refer to Section 5A for best practices that may assist the courts in ensuring that ADR participants have sufficient capacity to participate effectively.

2B. Confidentiality

Courts must manage and evaluate ADR programs in a way that ensures that the court has the information it needs about program performance, without compromising the privacy and confidentiality interests of the participants.

To ensure that this goal is met, **good programs will:**

- ☆ Develop policies about what ADR practitioners must report back to the court, which permit the practitioners to comply with the *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*.
- ☆ Manage program files to maintain confidentiality. Confidentiality is essential to ensure that the privacy of the parties is respected, to protect victims of family violence, and to ensure that inappropriate material is not placed in a court file.

2C. Court Support

Adequate support from the Bench and the Bar can help ensure program success. The court can enhance this support by providing

opportunities for judges, masters, and attorneys to become familiar with the program. **Good programs will:**

- ☆ Work with judges and masters to promote appropriate referrals to the program.
- ☆ Hold regular joint meetings for judges, masters, and ADR professionals.
- ☆ Hold appreciation events for volunteers or program participants with judges and masters in attendance.

2D. Timing and Order of Events

ADR is more effective when supported by other court services and resources. Courts should think carefully about the flow of family cases to ensure that the case is in the best posture and the parties are adequately prepared when the referral is made. **Good programs will:**

- ☆ Require parties to participate in co-parenting education or some form of ADR orientation to ensure they are prepared before having them participate in the ADR session.
- ☆ Send parties to ADR in child access cases as soon as possible after appropriate screening and preparation.
- ☆ Encourage its practitioners to raise the issue of considering using ADR to resolve any future disputes prior to litigation.

2E. Coordination between Courts

Litigant satisfaction and access to justice can be improved when courts take advantage of the resources available in other courts. Toward that end, **good programs will:**

- ☆ Maintain information about programs available in other courts and collaborate with those courts to make and accept referrals for ADR services or parent education which are convenient for the participants.

2F. Compensation for Practitioners

Courts can attract quality professionals by adopting practices that ensure the compensation provided for practitioners is competitive, without being over-burdensome on the parties. **Good programs will:**

- ☆ Review the compensation schedule on a periodic basis to ensure it is competitive.
- ☆ Incorporate in its budget sufficient funds to compensate ADR professionals when a fee waiver is granted.
- ☆ Adopt a policy that if the parties consent to continue beyond the sessions ordered by the court for the same issue, that the mediator still be required to charge a rate not more than the rate established by the court. If the parties elect to expand the mediation to other issues, the parties and mediator may negotiate an agreed rate.

2G. Liability

Courts often order litigants to participate in ADR processes that are held outside the courthouse, often in practitioners' private offices. Courts must also accept responsibility for ensuring that mediators to whom they are referring cases are competent. While neither liability insurance nor malpractice insurance is required for mediators under the Maryland Rules, **good programs will:**

- ☆ Adopt policies requiring all practitioners to maintain both liability insurance and malpractice insurance.



3

Promoting Family Self-Determination and Empowerment

One goal of court-based family ADR programs is to promote responsible parenting and to assist parents in creating long-lasting solutions for families. To achieve this, programs should be designed to help parents be informed decision-makers. Programs should also support and promote the development of a systemic approach to resolving family conflict.

3A. Outreach

Programs can enhance their effectiveness by promoting public awareness of ADR processes and of their specific program. **Good programs will:**

- ☆ Educate the community about the benefits of ADR and about specific ADR programs in use by the courts.

3B. Agreements

Litigants should be provided every opportunity to make a final, informed decision about whether or not to enter into an agreement. Toward this end, **good programs will:**

- ☆ Require the ADR professional to reduce the proposed points of agreement to writing and forward it to counsel of record and the parties.
- ☆ Ensure that self-represented litigants are given information at the conclusion of the ADR process about resources they can use to assist them in assessing and finalizing the proposed agreement.
- ☆ Monitor cases after ADR is concluded to ensure that any agreement that was reached is finalized and submitted to the court, or, if no agreement has been reached, to ensure that next steps are taken to keep the case moving forward.
- ☆ Adopt a policy that permits the parties sufficient time to consult with counsel regarding proposed agreements.



4

Safety for all Participants

On a variety of levels, family court ADR programs attempt to ensure that mediation takes place in an environment that is physically and emotionally safe for all participants. Cases are screened appropriately, and professionals are adequately trained and prepared to address family violence and safety issues when they arise despite screening efforts. Solutions crafted promote and safeguard all whose lives are affected by those decisions.

4A. Screening

It is important that each court develop a mechanism for identifying complicating issues before referring cases to ADR programs. See Section 2A for a list of best practices that will assist the court in meeting this goal. Courts also have an ongoing obligation to ensure that only appropriate cases are referred for mediation. Toward this end, **good programs will:**

- ☆ Create a mechanism for terminating or aborting mediation when the court obtains information that suggests mediation would be inappropriate. For example, if the parties have been referred for mediation, but during the course of a custody evaluation a court professional learns information that suggests mediation would be inappropriate, the court can be notified and the process aborted, if it has not already taken place.

4B. Domestic Violence Awareness

When courts order individuals to participate in ADR processes, they may impact the safety and well-being of individuals in that process. A victim of family violence cannot reasonably be expected to challenge or act in contravention of a court order to preserve their safety. It is therefore essential that courts ensure first that cases are appropriately screened, and secondly that ADR professionals are attentive to family violence issues so that they can respond effectively when a case has been referred to ADR that perhaps should not have been. Towards this end, **good programs will:**

- ☆ Ensure court staff are sensitive to family violence issues and know how to respond appropriately.
- ☆ Ensure ADR professionals are sensitive to family violence issues and know how to respond appropriately.

4C. Facilities

Emotions run high in family cases. Even when other precautions have been taken, sometimes the conflict can get out of hand. The facility where ADR programs operate should be designed to facilitate the safety and security of participants. See Section 1I for best practices in providing facilities for ADR programs.

4D. Child Maltreatment Awareness

When intimate details of a family's life are discussed in ADR, other issues, including child maltreatment, may come to light. Such revelations may require special action on the part of the ADR professional.

Good programs will:

- ☆ Ensure ADR professionals are sensitive to child maltreatment issues, know how to respond appropriately, and are aware of and comply with any mandatory reporting requirements.

4E. Security

When working with high conflict families, sometimes very simple steps can be taken to minimize the level of conflict and ensure the safety of all involved. **Good programs will:**

- ☆ Encourage practitioners to develop office procedures and safety plans that maximize their own safety and that of the participants.



5

Quality
Processes

Courts should take the time necessary to evaluate court-operated family ADR programs and to ensure that all participating professionals provide quality service to court customers.

5A. Mental Capacity

To participate in ADR processes effectively, parties need to have sufficient mental capacity. To ensure that parties who are referred meet this threshold, **good programs will:**

- ☆ If the court suspects that an individual's mental capacity is in question, make reasonable efforts to confirm that clients referred to ADR processes have the mental and emotional capacity to participate effectively in ADR.
- ☆ Ensure ADR professionals are sensitive to the capacity limitations of their clients, including substance abuse, mental health issues, and cognitive functioning.

5B. Standards

The Maryland Judiciary has developed and adopted standards governing the performance of ADR professionals. **Good programs will:**

- ☆ Require ADR professionals to be knowledgeable about and comply with the *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*.

5C. Grievance Procedures

In managing effective programs, courts need to listen to and be responsive to feedback provided by program participants. To enhance these efforts, **good programs will:**

- ☆ Develop and maintain a clear procedure for responding to complaints and grievances about individual practitioners or the ADR program.
- ☆ Ensure that documents related to the grievance are not placed in the court file.
- ☆ Ensure that the court responds promptly to the complaining party through someone other than the trial judge.
- ☆ Provide an ADR practitioner against whom a complaint has been lodged the opportunity to respond in some way to the complaint.
- ☆ Maintain the confidentiality of the parties in handling the complaint, unless that confidentiality is waived by the parties, recognizing that pursuant to Maryland Rule 17-109(d)(2) and Standard V of the *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*, a mediator may make disclosures necessary to respond to allegations of misconduct or negligence.
- ☆ If no final agreement has been reached when a complaint arises, provide the participants an opportunity to continue the ADR process with a new practitioner.

5D. Continuing Education

The field of ADR is an evolving one. Even experienced practitioners may benefit from hearing about the experience of others, learning new techniques, or participating in programs that offer critiqued role plays or other forms of peer review. To capture these benefits, **good programs will:**

- ☆ Provide opportunities for continuing education for ADR professionals.

5E. Evaluation

Evaluation is an important component of program management. Regular evaluations can assist the court in justifying requests for additional resources. **Good programs will:**

- ☆ Use surveys or other means to obtain stakeholder feedback as part of a regular evaluation cycle.
- ☆ Recognize program success is measured by more than just a settlement rate. A good evaluation protocol examines many factors to get a good picture of the program.
- ☆ Provide a quality assurance mechanism to assist ADR professionals in improving their skills.
- ☆ Participate in any statewide initiative to collect consistent uniform data on ADR processes.

5F. Program Goals

Before initiating a program of any type, courts should have a good sense of what objective they are trying to achieve in establishing the program. **Good programs will:**

- ☆ Articulate a mission, vision, values or goals to help focus participants to achieve the objectives for which the program was designed.

5G. Selection of Neutral

Maryland Rule 17-103 provides that the parties may select their own neutral. If so involved, parties are more likely to be invested in the process. Toward that end a **good programs will:**

- ☆ Permit the parties to select their own neutral if they so choose.
- ☆ Develop a mechanism for selecting neutrals for a particular case that incorporates a range of factors including but not limited to:
 1. Whether there is a neutral agreed upon by the parties
 2. Location and convenience to the parties
 3. Sensitivity or special training to handle identified issues
 4. Cultural competency
 5. Neutral's availability and caseload
- ☆ Recruit a diverse panel of ADR practitioners who are capable of meeting the needs of various litigants.
- ☆ Provide opportunities for judges, masters, and court staff to get to know practitioners so they can make appropriate referrals to those individuals.