

# THE IMPORTANCE OF USING ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES AND PROCESSES IN THE ETHICAL AND INFORMED REPRESENTATION OF CHILDREN

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## I. INTRODUCTION

The participants at the recent *UNLV Conference on Representing Children in Families* crafted well-written, professional and ethical recommendations for attorneys and other professionals who work with children.<sup>2</sup> Although the *UNLV Recommendations* add important layers of family, context and culture to the original *Fordham Recommendations*,<sup>3</sup> the new recommendations lack an appreciation of the important benefits of alternative dispute resolution (“ADR”) techniques and processes for children and families. A frequent theme in the *UNLV Recommendations* is that legal systems, attorneys and other professionals are failing children and families through too much or the wrong kinds of intervention,<sup>4</sup> yet there was scant recognition of the collaborative and inclusive ADR processes that currently provide superior outcomes for families.<sup>5</sup> ADR

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<sup>2</sup> The conference participants were brought together to create recommendations that would advance the understanding of how best to represent children in families. See *Representing Children in Families Conference Concept Paper*, August 16, 2005 (unpublished paper on file with author).

<sup>3</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996) reprinted in 6 *NEV. L.J.* 1408 (2006).

<sup>4</sup> See *Report of the Working Group on the Role of the Family*, 6 *NEV. L.J.* 616 (2006); MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* (2005); Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 *NEV. L. J.* 805 (2006).

<sup>5</sup> In some of the *UNLV Recommendations* there are references to alternative processes, but there are no cohesive statements. Group 1 makes specific mention of the importance of considering ADR and alternative decision-making, not a surprise since Susan Brooks and the author were members of that group. Other groups refer to the training that attorneys should receive (Working Group on Sex and Sexuality), that there should be effective representation (Working Group on Representing the Whole Child), and that there should be a community focus (Working Group on Representing Children as Members of Communities). None of these recommendations say enough about the power and benefits of ADR for families.

helps courts, agencies and professionals to identify and provide appropriate services for families and to resolve cases. Significantly, for the recommendations, ADR also has great potential to assist attorneys to develop a contextual and cultural understanding of their child clients. It is crucial, therefore, that attorneys who represent children are knowledgeable about alternative dispute techniques and processes and are willing to advocate for and collaborate in the appropriate resolution processes for their clients.

This response paper will briefly describe ADR, compare the problems that families face in traditional adversarial litigation with the benefits of ADR processes and discuss the essential role that attorneys for children should take in analyzing, supporting and when appropriate, requesting and participating in ADR processes in child welfare, delinquency and child custody cases.

## II. ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND TECHNIQUES

The most common alternative dispute resolution processes for families are mediation and family group conferences.<sup>6</sup> Collaboration, information sharing and issue development are key aspects of both of these voluntary and confidential processes. In mediation, an impartial third party assists the parties, including parents, attorneys, and other professionals, to exchange information, develop underlying issues from stated positions, discuss their concerns, collaborate and potentially create their own solutions.<sup>7</sup> Family group conferences (“FGC”) are family-focused, strengths-oriented, and community-based processes where parents, older children, extended family members, social service professionals and others gather and act collectively to work on problems and make decisions for and with families.<sup>8</sup>

Mediation nurtures creative resolutions that work for all the participants and for the agency or court.<sup>9</sup> Mediation techniques help the parties to communicate with one another in new ways, to tell their stories, identify issues and

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<sup>6</sup> There are multiple resources available for courts and professionals who wish to learn more about these processes and how to establish these programs. Many family courts and child welfare agencies have been using alternative programs for decades. See, *Dependency Resources*, in *ADR HANDBOOK FOR JUDGES*, 324-328 (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter *ADR Handbook*; Kelly Browe Olson, *Lessons Learned From a Child Protection Program: If at First You Succeed and Then You Don't . . .*, 41 *FAM. CT. REV* 480 (2003) [hereinafter *Lessons Learned*].

<sup>7</sup> *ADR Handbook*, *supra* note 6, at chapter V (Abuse, Neglect and Dependency Cases in Juvenile Court) [hereinafter *ADR Dependency Chapter*].

<sup>8</sup> Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy in Practice*, 42 *FAM. CT. REV* 216 (2004); Paul Adams & Susan M. Chandler, *Building Partnerships to Protect Children: A Blended Model of Family Group Conferencing*, 40 *FAM. CT. REV* 503 (2002). See also DR. MARIE CONNOLLY, *A PERSPECTIVE ON THE ORIGINS OF FAMILY GROUP CONFERENCING* (American Humane FGDM Issues in Brief 2004), [http://www.americanhumane.org/site/DocServer/fgdm\\_FGC\\_Origins\\_New\\_Zealand.pdf?docID=1901](http://www.americanhumane.org/site/DocServer/fgdm_FGC_Origins_New_Zealand.pdf?docID=1901) [hereinafter *FGDM Issues in Brief*]. The American Humane Association has many additional resources on FGC and Family Group Decision Making (“FGDM”) processes, [http://www.americanhumane.org/site/PageServer?pagename=pc\\_fgdm](http://www.americanhumane.org/site/PageServer?pagename=pc_fgdm).

<sup>9</sup> There are many sources for information on family mediation processes, including the *ADR Handbook*, *supra* note 6, and, generally, JAY FOLBERG, ANN L. MILNE & PETER SALEM, *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS*, (2004).

concerns, develop ideas and eventually craft agreements with the support of the professionals. Family mediation was initially used in divorce cases and moved to other family related cases as legal and social work professionals saw positive results for families and the courts. When the participants were involved in the decision making process, they became invested in the resolution.<sup>10</sup> When parents created their own parenting plans in domestic relations cases, or helped to develop a case plan and appropriate services in dependency proceedings, they took ownership of the plan and have been more likely to comply with it.<sup>11</sup>

The concept of FGC was developed in New Zealand when the government made some much-needed changes to social policies based on traditional Maori principles of family.<sup>12</sup> FGCs emphasize the positive aspects of families and helps families to acknowledge and work on their weaknesses. Many of the FGC processes emphasize alone time, a period when the family works together on issues and solutions without any professionals; others have a professional remain in the room throughout the process.<sup>13</sup> In the numerous models currently in use in the United States and Europe, the decision making process is supported by, but not dictated or directed by the professionals.<sup>14</sup> The number of communities in the United States with family conference programs grew from five in 1995 to over one hundred by 2000.<sup>15</sup> Drawing on family and

<sup>10</sup> Steve Baron, *Dependency Court Mediation: The Roles of the Participants* 35 FAM. & CONCILIATION CT. REV. 149 (1997).

<sup>11</sup> Nancy Thoennes, *An Evaluation of Child Protection Mediation in Five California Courts*, 35 FAM. CONCILIATION CT. REV. 184 (1997).

<sup>12</sup> The original conferences were created to improve how child related cases were handled by the government agencies in New Zealand. There were overwhelming numbers of Maori children in the New Zealand juvenile system, especially considering the percentage of Maori in the overall population. The Maori brought their tradition of extended family centered meetings to the child welfare system. This increased understanding of Maori traditions and cultures among the professionals who handle these cases. Family conferences are now an integral part of the child welfare system and law in New Zealand and the number of Maori children brought into care has receded. Individuals and organizations brought these concepts from New Zealand to the United States and Canada. Family group conferences, family unity meetings and family group decision making are models of family meetings that are used by child welfare agencies and juvenile courts. This concept is currently being used in many U.S. states, all over Canada and in several countries in Europe. The models that are used here are sometimes hybrids of the original processes. See *FGDM Issues in Brief*, *supra* note 8.

<sup>13</sup> Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J. L. REFORM 57, 69 (1997). All of the models focus on increasing the involvement, responsibility, and compliance of parents with the case plans in child welfare cases. These processes are also used in juvenile delinquency and victim offender mediation programs. The original concept called for the family to spend time alone and for them to come up with a plan to address the concerns that brought the group together. Some U.S. models do not have that private time.

<sup>14</sup> *Id.*

<sup>15</sup> Denise Kane, *Child Welfare Innovations in Practice: Task-Centered and Mediation Strategies* (August 2001) (unpublished Ph.D. dissertation, University of Chicago) (on file with the author). Kane, the Inspector General of the Illinois Department of Children and Family Services ("D.C.F.S"), created the ?Illinois Family Conference Model. The model applies task-centered and mediation strategies to work with several well-defined categories of maltreating families before children are brought into D.C.F.S custody. Active participation of extended family in the development and implementation of child protection plan is a key feature of the approach. See also Davis Stuart Crampton, *Making Sense of Foster Care: An*

community strengths, family conferences empower parents and children to take an active role in the decision-making processes.

Mediation and FGC are successful interventions because all the participants take sufficient time to exchange information, develop issues related to the unique competencies and deficiencies of the family and work together to create solutions that work for the child, family and the legal system.<sup>16</sup> In these processes, the parties learn to communicate, exchange information and work together voluntarily and confidentially. This leads to quicker resolution of cases, less time in court, earlier permanence for children in child welfare cases,<sup>17</sup> less hostility between parents and social work professionals in dependency cases, less hostility and animosity between parents in custody cases,<sup>18</sup> and more room for creative solutions in delinquency cases.<sup>19</sup>

Active listening, paraphrasing, reframing and neutralizing techniques help the mediator or facilitator and the participants to really hear what the others say and mean. During most conversations, people take turns talking and do not really listen. Other techniques that have an important impact on the parties and their relationships include empowerment, collaboration and the focus on children, strengths and individual families. Parents and non-legal professionals often feel excluded from the adversarial process and are made to feel inferior. When the alternative processes use collaboration, they value the contributions of everyone at the table. This empowers the participants and increases their participation. The child-focused process allows the group to center the discussion on what is best for the child, not on individual disagreements or systematic problems.

Both types of ADR processes move through similar stages. First, the mediator or facilitator makes the parties comfortable and tells the parties about the process. The parties are given the opportunity to explain why they are there and what they would like to accomplish. Next the parties finish gathering and sharing information, then the parties move to issue development and finally to problem solving. When parties share information, the mediator may need to clarify what they have said or help move the process along. The family and professionals sometimes assume that everyone has the same information. Many times parties do not have information that they need; however, someone else at the table has this information or knows where to find it. Once information is shared across the table, then the parties can turn to issue development. Problem solving begins after the mediator and the parties have gathered enough information about available resources, strengths, weaknesses, support systems,

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Evaluation of Family Group Decision Making in Kent County, Michigan, (2001) (unpublished Ph.D. dissertation, University of Michigan) (on file with the author) [hereinafter *Crampton Dissertation*].

<sup>16</sup> *ADR Dependency Chapter*, *supra* note 7. See generally Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004).

<sup>17</sup> See FOLBERG, ET AL., *supra* note 9.

<sup>18</sup> Nancy Thoennes, *Mediating Disputes Including Parenting Time and Responsibilities in Colorado's 10th Judicial District: Assessing the Benefits to Courts*, CENTER FOR POLICY RESEARCH (2002).

<sup>19</sup> See *infra* note 55 and accompanying text.

etc. and have started to talk about what is important to the participants. An appropriate and creative solution is crafted after the parties have been able to focus on the unique nature of the case. In addition to resolving the disputes that brought them to the table, these processes frequently provide families with the tools to work out other disputes, thus reducing the need for courts to be involved in their family in the future.

### III. THE PROBLEMS WITH TRADITIONAL ADVERSARIAL LEGAL SYSTEMS AND THE BENEFITS OF ADR FOR CHILDREN AND FAMILIES

The use of ADR is more appropriate than litigation in child-centered cases for a multitude of reasons. The adversarial system will never be able to adequately address the needs of children and families.<sup>20</sup> The adversarial system focuses on adjudication of past disputes, punishment for past wrongs and is based on the rights of the parties. It does not adequately address the nature of family disputes that usually exist in the past, present and have tremendous implications for the future. In ADR the voluntary and confidential character of the processes, the collaborative nature and the key elements of information gathering, issue development and problem solving and the future focus are appreciably different from most adversarial litigation processes. The adversarial processes rely upon authoritarian problem solving and imposition of decisions on families, often without sufficient information, cultural context or direction for the future. There are times in the traditional court processes when the professionals only focus on the family's inadequacies and rely upon their knowledge of other, similarly situated families, because they have not had an opportunity to get to know this child or her family. This is usually due to a large caseload and inadequate resources.<sup>21</sup>

Mediations and FGC allow the families and the professionals to concentrate on the idiosyncratic nature of each individual family's issues and the concerns of the professionals for this family and children.<sup>22</sup> The facilitator or mediator helps the parties to communicate, to take turns talking, to work together and to move from a lack of understanding and the problems of inadequate information sharing to positive and creative problem solving. The processes work best when there are extended families, community members or professionals who are willing to work with the family.<sup>23</sup> Some families need additional help before they are able to collaborate.<sup>24</sup> It helps families when

<sup>20</sup> Huntington, *supra* note 16; Firestone & Weinstein, *supra* note 16, at 203-215.

<sup>21</sup> See Guggenheim, *supra* note 4; Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L. J. 692 (2006).

<sup>22</sup> Thoennes, *supra* note 11.

<sup>23</sup> Crampton *Dissertation*, *supra* note 15, at 216. The dissertation also argues that child welfare reform efforts will not succeed because of what the author calls "taken for granted ambiguities." He claims that conflicts take place because policymakers, social workers, and taxpayers do not agree on the causes and effects of child maltreatment and therefore will never agree on how to ameliorate child maltreatment or how to evaluate efforts to prevent and reduce child abuse and neglect. If the professionals disagree on the cause, effects and responses, there is no way the adversarial system can help families.

<sup>24</sup> Therapy and services may help the family to learn how to work together. One of the Illinois Mediation Pilot Projects is a program in the North Lawndale area of Chicago, Illinois

processes allow them to acknowledge the past and to successfully move forward by making mutual decisions for the future.<sup>25</sup> Even where there is not a settlement or resolution in the alternative processes, participants are still more satisfied with the process than with litigation and they are more likely to settle than if there had not been an ADR process.<sup>26</sup>

There are some terrific recommendations from the *UNLV Conference* on how attorneys can and should do more to see their client in context. It is important for the attorney to work with their client in context, but it will not be enough to help their client if the system continues to fail to address that context. The primary legal systems that involve children, child welfare, delinquency and divorce, all function better when there is information of and general awareness about the particular circumstances within the context of the family. However, legal systems are not built to obtain, retain or base decisions on these details. The systems are set to deal with the most general scenarios not individual families.<sup>27</sup>

One of the articles in this volume that propose changes to the current legal systems focuses on how to bring families much more deeply into the representation through concepts very closely related to ADR. Professor Brooks advocates for a family systems theory model for family cases.<sup>28</sup> She uses therapeutic jurisprudence and preventative law to emphasize the benefits of drawing on family systems theory,<sup>29</sup> and much of her discussion applies to traditional ADR as well.<sup>30</sup> The techniques that are used in many alternative dispute resolution processes and decision-making processes draw from family systems theory. She points out that alternative approaches, like mediation and FGCs are important steps in the move toward a more therapeutic legal system.<sup>31</sup> In her article, she challenges attorneys to think about the system of representation differently. While starting from a therapeutic viewpoint is helpful for families, it is not enough because of the parameters of the current system.

ADR techniques enable the mediator to work with the parties in very different ways than judges do in family cases. The mediator is impartial and helps the parties work together toward a resolution, creating partnerships for the future. By asking questions, slowing things down, reframing, translating and

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neighborhood called I AM ABLE, run by Rev. Joseph L. Miller. This program has used an approach that combines therapy and family group meetings and prepares the family to work together. The model calls for the use of facilitators called family consultants who are trained to empower families employing both casework and family systems approaches. Family assessment information is collected during the information-gathering phase. The completed assessment is distributed to the family during the information-sharing phase. The family then develops a plan that addresses clinical and service needs during their private time. FGDM Programs Around the World, Illinois, [http://www.americanhumane.org/site/PageServer?pagename=PC\\_fgdm\\_programs\\_illinois](http://www.americanhumane.org/site/PageServer?pagename=PC_fgdm_programs_illinois) (last visited April 9, 2006); see also, *Crampton Dissertation*, *supra* note 15, at chapter V, VI.

<sup>25</sup> Susan L. Brooks, *Representing Children in Families*, NEV. L.J. 724 (2006).

<sup>26</sup> Thoennes, *supra* note 11.

<sup>27</sup> See generally Huntington, *supra* note 16.

<sup>28</sup> See generally Brooks, *supra* note 25.

<sup>29</sup> *Id.* at 725-26.

<sup>30</sup> *Id.* at pt. V.

<sup>31</sup> *Id.*

moving parties from their positional behaviors to collaboration, the mediator can help the parties to focus on information gathering, to take the time for issue development and to wait for progress in these steps before moving to problem solving. A judge is limited to the evidence presented and the court rules and laws. It is not a collaborative process and will not be without substantial changes to the system.

In mediation and FGC, all the relatives or friends interested in or involved with the child may participate.<sup>32</sup> The environment is informal and non-threatening. There are no "rules" that must be followed except those established by the parties. An impartial third party is present to facilitate communication and help address the questions and issues that the attorney must raise. In court, professionals and the judge are required to focus on the inadequacies of the family and often rely on their past experiences of other families, as stated earlier, because they do not have enough time or information to thoroughly evaluate this particular family. This may cause delays in referrals for services and even placements, especially where there has not been sufficient investigation into potential kinship caregivers. Reunification or alternative forms of permanence occur faster through alternative processes.<sup>33</sup>

The importance of family involvement, recognition and empowerment for the family, a focus on strengths, and the collaboration in all these pieces create an ideal environment for successful resolutions.<sup>34</sup> The processes allow the participants to collaborate. This is a big change from the traditional roles of the legal professionals and the family<sup>35</sup> and allows everyone to focus on timely decisions that are in the best interests of the child. This helps the children, the family, the professionals and the court. These benefits make ADR an essential tool in child custody, child welfare and delinquency cases.<sup>36</sup>

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<sup>32</sup> See *ADR Dependency Chapter*, *supra* note 7.

<sup>33</sup> JENNIFER RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 10 (2004).

<sup>34</sup> See *ADR Dependency Chapter*, *supra* note 7.

<sup>35</sup> One of the problems that currently exists in the child dependency system is the lack of respect that some lawyers have for the other professionals who work in the system. It was suggested by Professor Anita Weinberg, during workgroup discussions, that while it is important that attorneys recognize the importance of a child's family to the representation, attorneys must also recognize and value the role of social work and other professionals. ADR processes provide an excellent forum for this.

<sup>36</sup> See also Bernie Mayer, *Conflict Resolution in Child Protection and Adoption*, 7 *MEDIATION Q.* 70 (1985); *Court Approved Alternative Dispute Resolution: A Better Way to Resolve Minor Delinquency, Status Offense and Abuse/Neglect Cases*, Report of the Key Issues in Curriculum Enhancement Project, Faculty Consortium National Council of Juvenile and Family Court Judges (NCJFCJ) (1989); Marilou T. Giovannucci, *Understanding the Role of the Mediator in Child Protection Proceedings*, 35 *FAM. & CONCILIATION CTS. REV.* 143, 143-48 (1997); Allan E. Barsky, *Why Parties Agree to Mediate: The Case of Child Protection*, 35 *FAM. & CONCILIATION CTS. REV.* 164 (1997); Steve Baron, *Dependency Court Mediation: The Roles of the Participants*, 35 *FAM. & CONCILIATION CTS. REV.* 149 (1997).

#### IV. THE ROLE OF THE CHILD'S ATTORNEY IN ALTERNATIVE AND TRADITIONAL PROCESSES

How and why should a child's attorney advocate for, actively pursue and responsibly participate in these alternative processes? When an attorney has been assigned, in any capacity, as an advocate for a child in a legal context, her role in ADR processes is crucial. ADR will not succeed unless the advocates are engaged and willing to participate on behalf of their clients.<sup>37</sup> When attorneys collaborate with the family and the other professionals, they can see their clients in context, work on appropriate services and agreements, and help their clients to be seen within that context or to achieve permanency faster.

The role of attorneys in ADR is to assist their client, protect their client's rights and to help to develop a contextual plan for the future. The child's attorney must focus on the best interests of the child, advocate for the child's safety, and decide whether the child should participate in the process. These duties are not different than in litigation; however, it is easier to fulfill them in ADR.

One focus of the *UNLV Conference* was the proper role of the attorney when working with a child. While there was a lot of discussion and some disagreement about what the role of the attorney for the child should be,<sup>38</sup> there was agreement that the attorney's representation should be informed by the family and the child in the context of the family. In all cases, no matter the role or the type of proceedings involved, the attorney needs to develop insight into a child and that child's family to understand the child and represent the child. ADR allow attorneys to learn this information in ways that traditional litigation does not. The more information an attorney has, the easier it is to provide competent representation.

Another important way that alternative processes help attorneys is the timely exchange of information and focus on collaboration. In ADR, social work and legal professionals have to work together. The professionals, the child client and usually the family work together to develop a plan. The confidentiality and collaborative nature of the process allows parents and their attorneys to ask for services, to participate in working out a targeted case plan, or to arrange visitation or family counseling. This is much easier when everyone is in the same room. The beneficial aspects of ADR work anytime a child or family is involved with a court or an agency process.

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<sup>37</sup> Baron, *supra* note 36. See also, *Lessons Learned*, *supra* note 6. The attorney for the child often plays a large role in the ultimate outcome of the proceedings. In several cases in her mediation clinic program at UALR, the author has seen situations where the strong connection between an attorney for the Department of Human Services and the attorney ad litem creates situations where the ad litem appears to advocate for the agency instead of the child. This would support Professor Guggenheim's argument in his article for this volume and his book, see *supra* note 4, that attorneys for children are sometimes working against their clients' interests.

<sup>38</sup> Guggenheim, *supra* note 4; Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L. J. 1240 (2006).

### A. Child Welfare

In child welfare cases, it is imperative that agencies, service providers, professionals and the family to work together.<sup>39</sup> The reasons that ADR techniques and processes work well in child welfare cases is that cases are so dependent on interdisciplinary cooperation. These cases create ongoing and overlapping responsibilities, rules and procedures. The cases are governed by child welfare agency protocols, legal statutes and court rules. Social work professionals work with families to keep children safe in the home or to find an appropriate alternative placement for the child and create a plan to return the children to the home, all within the boundaries of agency policies and procedures.<sup>40</sup> In the legal arena, the attorneys work with the information provided by the social workers to determine the proper legal remedies for the situation. With one group looking at social work guidelines and best practices and the other at legal recourse and remedies, overwhelming numbers and a lack of adequate compensation for the work on these cases, families are often lost in the shuffle. Children and their families cannot recover by themselves. Social workers, attorneys and other service providers need to learn to work together to help families. The primary experts on a particular family are not the legal or social work professionals, they are the family members themselves. It is important for the child's attorney to help the child navigate the system and quite often that means helping the system to work for the family and the child.

In child welfare cases, the child's attorney should be informed about the child's environment. This includes family, school, friends, and all the aspects of the child's life and culture. One of the easiest ways for the attorney to be adequately informed about the child is through ADR. Mediations and FGCs allow the professionals to take the time to concentrate on specific children within the context of their family, look at the strengths and challenges that the family face and make a plan that addresses all of these issues.<sup>41</sup>

In *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, Jean Koh Peters suggests that attorneys ask themselves seven questions to keep their representation client-focused.<sup>42</sup> The first and seventh questions seem especially relevant to the discussion of the role of the attorney and ADR.

1. In making decisions about the representation, am I making the best effort to see the case, from my client's subjective point of view, rather than from an adult's point of view? . . .

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<sup>39</sup> NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, 27 (2000) [hereinafter *Adoption and Permanency Guidelines*].

<sup>40</sup> See *Crampton Dissertation*, *supra* note 15. In his dissertation, Mr. Crampton does a thorough evaluation of the foster care system and family group decision-making program in Kent County, Michigan. Efforts like FGDM that are used to prevent and reduce child abuse and neglect cannot thrive when observers measure the results with different standards.

<sup>41</sup> See Thoennes, *supra* note 11.

<sup>42</sup> JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 79-83 (2d ed. 2001). Professor Peters notes that the attorney must start the representation "where the client is." It is a frequent mediation mantra to start where the participants are, not where the mediator or the parties want to be. The mediation process has the flexibility to support this.

7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?<sup>43</sup>

These are hard questions for the uninformed attorney to answer. ADR techniques of active listening, reframing, brain storming could all help the attorney to figure out the answers. ADR processes surround the client with the people who know him and are important to him, making it much easier to understand the client's subjective point of view, to see the child in his family and culture and to know what is unique about this child. It becomes much easier to answer these questions when attorneys have the right tools.

In child welfare cases, it is essential for the caseworker to craft an individualized case plan that addresses the unique strengths and weaknesses of the family. It is just as important for the attorney to construct a client centered representation plan. In litigation, cookie cutter type plans are sometimes used that do not fit the situation or the family and create more problems than solutions.<sup>44</sup> In ADR, when attorneys and other professionals have an opportunity to listen and really hear what a child and family wants and needs and what the family thinks family members are able or not able to do, they are able to work with the family to order services and create a targeted plan to meet these needs.<sup>45</sup> A family is more likely to participate in services when they help to create a case plan.<sup>46</sup>

In 2000, the National Council of Juvenile and Family Court Judges published *Adoption and Permanency Guidelines: Improving Court Practices in Child Abuse and Neglect Cases*. These guidelines presented alternatives that courts should consider in helping to find permanent placements for children in a timely fashion. The study suggested that mediation should be used to expedite permanency because mediation:

- provides parents with factual information that offers a realistic prospect of trial outcome and help to separate personal issues and biases from factual information;
- gives parents a sense of participation in future planning for the child and a sense of significance and closure with dignity that will no longer be available if the case goes to trial;
- helps the child, parents, and relatives to understand the importance of one stable home for the child and to overcome objections to terminating parental rights, and opening the door to adoption by relatives; and

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<sup>43</sup> *Id.*

<sup>44</sup> A former client, a mother of two girls, twelve and thirteen, was cited by the judge for not attending parenting classes even though the class she had been mistakenly assigned to deal with preschool age children and infant home safety.

<sup>45</sup> Joan Smith, *A Child-Centered Jurisprudence*, in CHILDREN AS EQUALS, EXPLORING THE RIGHTS OF THE CHILD 155 (Kathleen Alaimo & Brian Klug eds., 2002). Smith also says:

If the law were to support responsible decision-making in the interests of the child, every courthouse would make mandatory mediation programs available . . . A United States legal system founded on a jurisprudence of the child-centered family would emphasize the interests of children. It would recognize their need for affiliation and support, for nurture and care, for respect and encouragement to grow into responsible adults. Such a system would encourage joint decision-making, negotiation and mediation . . .

*Id.* at 157.

<sup>46</sup> Thoennes, *supra* note 11.

- provides a forum to discuss the appropriateness of adoption with the potential foster parent and to develop a proposed plan for the foster parent.<sup>47</sup>

The guidelines also state that “mediation has the best chance of achieving all these results” and they suggest that mediations that do not produce agreements are still a benefit because they narrow the focus of the trial and help parties prepare for trial.<sup>48</sup> The NCJFCJ guidelines also discuss the value of family conferences:

To avoid the dynamic of the system telling the family what they need to do to fix their problems and the family resisting the intrusion, family decision-making [FGC] builds communication, cooperation and collaboration between family, the child’s tribe, when applicable, and the child welfare professionals.<sup>49</sup>

For research purposes, for the first two years of the Arkansas dependency/neglect mediation project, cases were randomly assigned to mediation. In the first year of the program, even with reluctant attorneys and randomly assigned cases, the numbers were impressive. On average, there were 553 days between the initial case filing and permanent placement for non-mediated cases and 295 days for mediated cases.<sup>50</sup> Children were out of the system over 250 days earlier through mediation. Even given these results, some attorneys did not initially support the program.<sup>51</sup>

Martin Guggenheim states in his article for the *UNLV Conference*:

The ease with which children enter foster care and the needless time they are forced to endure in foster care should be among the highest concerns of the children’s bar.<sup>52</sup>

ADR can be used both to keep children out of the foster care system, by providing preventative FGC, and used to move children through the system faster through FGC or mediation. The child’s attorney should make sure that his client has access to these programs. Granted, once there is an attorney, the child is usually already in the system. Depending on the particular circumstances of this family, the child’s attorney should push for the child to stay home, or go home with a support system in place, try to have the case closed, argue for an appropriate kinship placement or try to convince the state to move the case through alternative processes that shorten the time the child is out of a permanent placement. These processes have great potential to help with these issues, if the attorneys are willing to seek them out. Even if the processes are unavailable, the techniques used in the processes, like collaboration, focusing on the individual needs of a particular child or family, move the discussion out

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<sup>47</sup> See *Adoption and Permanency Guidelines*, *supra* note 39.

<sup>48</sup> *Id.*

<sup>49</sup> See *Adoption and Permanency Guidelines*, *supra* note 39, at 13.

<sup>50</sup> Court-Referred Mediation of Dependency-Neglect Cases: A Study of the First Year, U.A.L.R. School of Social Work, MidSOUTH Training Center at 24 (2000) (on file with the author). In the first year of this pilot program, there was less money paid out of the system for care, less judicial resources used and permanency occurred at a rate higher in mediated cases than in non-mediated cases.

<sup>51</sup> An attorney who transferred out of the Pulaski County courtroom where the pilot program took place because she did not want to be forced into mediation has become a strong advocate for the program. She speaks to judges across the state on the benefits of mediation. Her change of heart came after she was allowed to choose mediation and was able to organize timely and targeted services for her client.

<sup>52</sup> Guggenheim, *supra* note 4 at 835.

of a legal or rights frame of reference and into a problem solving frame.<sup>53</sup> By using the techniques, the attorney will really be able to connect with the client and the case.

The rewards of successful dependency ADR include children who return to safety and permanency in less time than through court processes alone, social workers who develop a positive working relationship with their clients and the attorneys who represent them, more information gathered and shared at crucial times in a case, less court time spent per case in court and by the agency and legal personnel on the case, and finally a more interdisciplinary process that includes parents and families in the decision making and dispute resolution aspects of these cases.<sup>54</sup> All this in a process that keeps children safe and follows guidelines established by the federal government for improving court practice in child protection cases.

### B. Delinquency Cases

ADR processes help children and families in delinquency cases through multiple programs that exist to help children and families stay out of court. There are diversionary programs that take children and young adults out of the juvenile court system before they are charged. There are also victim offender mediation programs that work after a court case, pleading, or judgment. In New Zealand, when the government instituted family group conferences, they immediately started using them for delinquency matters as well as child welfare. Children facing prosecution for their offending behavior were referred to a Youth Justice Coordinator for an FGC prior to the commencement of legal proceedings against them. As a diversion from the court system, the Youth Justice FGC became the legal mechanism for holding children and young persons accountable for their offending, and providing the means through which they could make amends to their victims.<sup>55</sup> FGC has been shown to reduce offending behavior, as well as a process to support the young adults and their families with support and assistance.<sup>56</sup>

When discussing the use of alternative dispute resolution processes in delinquency cases, it is important to address questions of confidentiality, due process rights and process selection. ADR processes are typically confidential by statute but an advocate should know what the state law is in his state. The question of due process rights is trickier, and will depend on the particular program, process or court policies. Professor Henning's article<sup>57</sup> stresses the significance of the relationship between an adolescent and their parent as well as the struggles that go on in these cases. Struggles over who directs the deci-

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<sup>53</sup> Huntington, *supra* note 16.

<sup>54</sup> Thoennes, *supra* note 11.

<sup>55</sup> *FGDM Issues in Brief*, *supra* note 8.

<sup>56</sup> Jennifer Michelle Cunha, *Comment: Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States* 13 EMORY INT'L. L. REV. 283 (1999). See also Allison Morris, *Youth Justice in New Zealand*, 31 CRIME & JUST. 243, 260-68 (2004) (describing in detail how juvenile offenders move through New Zealand system and are sent into conferences).

<sup>57</sup> Kristin Henning, *Takes a Lawyer to Raise a Child?: Allocating Responsibilities among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836 (2006).

sion-making, what the role of the parent is or should be, and how much influence the attorney should have on their client and their client's decisions.<sup>58</sup> Henning points out that poor communication and high conflict at home is viewed by experts as a cause of delinquent behavior, that it is important to "improve problem-solving, communication, and other interpersonal skills in the parent-child dyad."<sup>59</sup> This is not something that typically happens in litigation. ADR processes allow the family to work together on all three skills. In the diversionary program that handles delinquency cases at the UALR William H. Bowen School of Law, one of the primary goals of the program is teaching the participants how to resolve disputes in the future.<sup>60</sup> The mediator works with the young adults and their families to think about how to avoid similar problems or situations and how to act, not react. Modeling communication skills such as active listening, paraphrasing, reframing, neutralizing language and fostering collaboration in mediation has helped to have lower recidivism rates among the students who go through the mediation program compared to students who are in the juvenile justice system and have not gone through mediation.<sup>61</sup>

Alternative processes can also help with the relationships between the attorney children, and their family. Professor Henning states that given the importance of the parents' place in modern juvenile justice policy, it is important for the child's attorney to collaborate with the parent and the child. When the representation is informed by the parents' opinions and ideas, the child and his lawyer are likely to make better-informed and culturally competent choices in juvenile cases.<sup>62</sup> Henning also talks about the importance of empowering parents,<sup>63</sup> something that is an essential part of ADR. All of these pieces that Henning points to as necessary for competent representation for children in juvenile justice matters are important in ADR as well. In this context, it is extremely important that attorneys investigate to see which if any of the alternative processes will work for their client. If the processes are unavailable or inappropriate, it is still a good idea to use the process techniques to learn more about the client in context.

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citing Janet Gilbert et al.); *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1167, 1179, 1184 (2001); Barbara J. Burns et al., *Comprehensive Community-Based Interventions for Youth with Severe Emotional Disorders: Multisystemic Therapy and the Wraparound Process*, 9 J. OF CHILD & FAM. STUD. 285 (2000).

<sup>60</sup> As part of the delinquency mediation process at the UALR program, we allow the young adults to write agreements in their own words. I sometimes wonder what the intake officers at Juvenile Court, to whom we return agreements think of language like, "J.D. promises to show J.C. nothing but love in the halls," and "A promises not to 'dis' B in front of his girl."

<sup>61</sup> In 2002, there was a lower recidivism rate (twelve percent) among the teens who are referred to mediation at UALR, than among the teens who enter the Pulaski County juvenile court system without a referral (thirty-nine percent). Information on file with the author. This data is skewed because the mediation program does not except felony referrals.

<sup>62</sup> Henning, *supra* note 57, at 26.

<sup>63</sup> *Id.* at 45.

### C. *Child custody*

ADR has a proven track record in domestic relations cases. Especially in custody cases, mediation has in many places become an integral, sometimes mandatory part of the court process. Custody battles are not like other court cases. Litigants are not trying to resolve a long-standing dispute and go their separate ways. Parents usually have to find a way to resolve the custody dispute and all the little disputes that crop up as their children are raised. Some parents inevitably and unfortunately drop out of the situation. If they are taught about the effects of divorce on children and taught about how to co-parent and if they participate in a process that empowers them to start making decisions about schedules and parenting time, they are more likely to stay involved.<sup>64</sup> Judges have been sending cases to mediation in child custody cases longer than in any other child related legal arena. It was child custody mediators in Santa Clara County, California who originated that county's long-standing dependency mediation program.<sup>65</sup> One irony of the legal system is that while juvenile courts have become more adversarial and litigious, family courts have started to rely more and more on alternative processes to resolve family cases.<sup>66</sup>

In these cases, again, there is debate over whether or not an attorney should be appointed to represent a child. In high conflict cases, lawyers are appointed when the judge has no confidence in either parent's ability to speak on behalf of their child. Putting aside the discussion of whether or not an attorney should be appointed for the child, once they are appointed, they have a responsibility to see that the parents are given the option of participating in mediation. While the participants in a high conflict case may think that they are incapable of sitting down and discussing options, if the benefits to the child of having both parents involved outweigh the negatives, then it will help the parents if the attorney pushed for processes where the parents learn how to resolve conflicts. Mediation is an appropriate option for families who are not experiencing ongoing domestic violence,<sup>67</sup> where there are no insurmountable power imbalances and where the parties want to reach some type of settlement. The child's attorney should help the mediator to decide whether or not the child should participate in the mediation. If the child will participate, a decision that usually rests on the age and maturity of the child as well as the subject matter of the mediation, the attorney has to prepare the client for the mediation. Preparing a client for mediation is different and harder than preparing them to testify because the client usually has a larger role and the attorney doesn't have as much control as they might in the courtroom.

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<sup>64</sup> Thoennes, *supra* note 18. The assessment showed that two years post decree, mediated cases were twice as likely as other cases to have stayed out of court. *Id.* at 25.

<sup>65</sup> Baron, *supra* note 10.

<sup>66</sup> See FOLBERG, ET AL. *supra* note 9 at 155. The *Working with Children in Mediation* Chapter by Donald T. Saposnek should be required reading for children's attorneys who work with children in custody cases. See also AFCC website, [www.afccnet.org](http://www.afccnet.org) (last visited May 18, 2006).

<sup>67</sup> See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

In post decree divorce cases it is especially appropriate for the child's attorney to encourage the use of alternative dispute resolution. Parents that continue or renew their custody battles after a judgment or settlement are not usually acting on behalf of their children and may lack the skills to resolve conflicts on their own. The child's attorney should help to bring the child or children's voices to the table and encourage the parents to mediate with the best interests of their children in mind.<sup>68</sup> If the parents are unable to work together, the techniques discussed above that are typically used in ADR will also be helpful when the attorney is dealing with the parents. Attorneys for children are sometimes forced to act as impromptu mediators between high conflict parents.

In 2000, the American Bar Association held a conference on family law and invited experts to make some determinations about important goals for custody cases.<sup>69</sup> These goals include: reduce conflict, assure physical safety, provide adequate support, reduce harm to children and to enable the family to manage its own affairs. Judges, lawyers and mental health professionals need to adopt new models for resolving family disputes that focus on the welfare of children.<sup>70</sup>

Also:

Judges, lawyers and mental health professionals need to work together to more effectively identify and resolve high conflict custody cases. Must encourage cooperative parents to resolve their disputes and not burden them with unnecessary intervention.<sup>71</sup>

Families are better able to manage their own affairs, work together and resolve disputes through ADR. There are many different types of alternative processes available in child custody cases. It is important for attorneys to consider what process will work best for their clients.<sup>72</sup> Mediation is a great opportunity, not only for the parents to say what they want to have happen, but to focus on how they will resolve conflict in the future and to make a flexible

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<sup>68</sup> See GUGGENHEIM, *supra* note 4. While I disagree with Professor Guggenheim's assertions that in most cases children are better off without attorneys, he rightly points out how disingenuous adults are when they use the rights of children to make their own arguments. As he points out, while a parent or pseudo parent may make the argument that they are fighting for custody for the child's sake, the child does not really have a right to demand that the adult spend time with them. If a parent or grandparent or parent like figure wants to see a child and there is some type of arrangement in place, it works. But any time that the adult chooses not to exercise that right, or fails to fight for the right if it is being denied, the child cannot force the adult to visit with him. *Id.* at 132.

<sup>69</sup> ABA Center for Children and the Law, <http://www.abanet.org/child/wingspread.html> (last visited May 18, 2006).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The recent Family Law Education Reform Project from the Association of Family and Conciliation Courts shows that there is a real disconnect between the practice of family law and what is taught in law school family law courses. One of the recommendations in the report is to require that family law courses include ADR components. As part of the implementation of the report, modules will be created to help family law professors teach their students about the alternative processes that exist for their clients. The report may be accessed at the AFCC website, [www.afccnet.org](http://www.afccnet.org).

parenting plan for their child that will adapt to the child's needs as the child matures.<sup>73</sup>

Just as in the areas of child welfare and delinquency, in custody cases, the techniques and processes of ADR help families to work together, create a plan for the future and learn new ways to communicate.

## V. CONCLUSION

In some of the *UNLV Recommendations*<sup>74</sup> there are references to ADR, but there is no comprehensive recommendation that suggests making these processes an integral part of representation of children. Given the complex issues discussed and important debates that took place on the role of the attorney, it is insufficient to have ADR mentioned only briefly. ADR, or at least the techniques used in these processes, should be central to the representation of children in all legal processes. All professionals connected to these cases should know the value of ADR; however, the attorney for the child is in a unique position in many cases to promote these processes for the benefit of their client and the client's family. In many legal contexts ADR does a better job of addressing the needs of children and their families than litigation.<sup>75</sup> It is one of many responsibilities of the child's attorney to advocate appropriately for these alternatives.<sup>76</sup>

In order to be an ethical and informed attorney, an attorney should attempt to understand her client within the client's family and cultural context, know what her client wishes to accomplish and develop a representation plan with her client that uses this information and helps her client achieve her goals. These steps are hard to accomplish in the adversarial system yet easily achieved through ADR techniques and processes. Attorneys have a responsibility to advocate for ADR processes for their clients, their client's families and the system.

It is important that all ADR processes emphasize and protect the rights of the participants.<sup>77</sup> ADR may not be the right choice in a particular situation. Attorneys have a responsibility to effectively advocate for their clients, and that means they need to ensure that they only allow their clients to take part in processes appropriate for their specific circumstances. An attorney plays an

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<sup>73</sup> Chandler & Giovannucci, *supra* note 8, at 216.

<sup>74</sup> *See Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592 (2006).

<sup>75</sup> JENNIFER RENNE, LEGAL ETHICS IN CHILD WELFARE CASES, (2004).

<sup>76</sup> *Id.*

<sup>77</sup> Brooks, *supra* note 28. Professor Brooks proposes five basic principles that are important for attorneys to consider. The UNLV Recommendations of the Working Group on the Role of the Family modified her list to apply to ADR processes:

1. respect the dignity and rights of all individuals and families;
2. treat all children as members of families;
3. appreciate individual, family, and cultural differences; and
4. focus on identifying and utilizing strengths to empower children and families.

*Report of the Working Group on the Role of the Family*, 6 NEV. L.J. 616, 622 (2006).

Finally, all such processes must be voluntary and emphasize meaningful participation of the child, family, and other individuals important to the child.

essential role in supporting or derailing an ADR process and should take their role seriously.

One concern that is expressed about ADR processes is that they infringe upon the due process rights that have been garnered for parents and children through the years. While the adversarial legal system may serve to protect these rights, these rights are not enough to protect families or children from a broken system or to keep families together. The increasingly adversarial nature of these cases cannot foster an environment of problem solving, rehabilitation, or collaboration. One expert has called for the juvenile court to return to "the paternalistic, informal institution it was prior to Gault" while retaining "fundamental fairness and due process" if the court wishes to remain an important part of how society handles child abuse and neglect.<sup>78</sup> Until the procedures and attitudes within this adversarial system are changed or evolve to value the family and protect rights, ADR techniques and processes will continue to be the best options for children and families.

The current adversarial legal systems that surround families need to be changed to reflect the importance of family, the strengths and benefits of families and how the system can support children safely within their families. Lawyers need to be better informed to make contextual child centered decisions with input from the child. Until such time as the courts involved in these cases truly appreciate and incorporate the contributions of the families and all the professionals, start to help parties to work collaboratively to keep children safe and out of foster care, and strive to offer families appropriate and timely services, the system will continue to fail families. ADR works through confidentiality, listening skills, collaboration, problem solving, information exchange and a future focus. ADR should have a larger role in the *UNLV Recommendations*, just as it should have a larger role in all court systems that impact children and families.

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<sup>78</sup> John E. B. Myers, *Children's Rights' in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POLICY 267 (2004).