

Redefining Resolution: How Early Dispute Resolution (EDR) Is Re-Shaping Modern Family Law Practice

by
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In the evolving landscape of family law, the traditional litigation mechanisms are being reexamined under the lens of innovation and client-centered approaches. The advent of Early Dispute Resolution (EDR) into legal practice is at the forefront of this transformation, heralding a new era where client self-determination, empathy, and accessibility define the resolution of family disputes. This exploration delves into the nuanced interplay between EDR and technological advancements, examining their impact on the dynamics of family law proceedings, the experiences of litigants, and the broader implications for practitioners and the legal system. By critically analyzing the challenges and opportunities these innovations present, this article aims to provide a comprehensive understanding of their potential to foster a more just and effective resolution process while also highlighting the ethical considerations and practical adaptations required of family law practitioners in this changing landscape. This article critically examines the transformative role of EDR in modern family law practice, arguing that the adoption of EDR methodologies—notably mediation, collaborative law, and cooperative practice—represents a pivotal shift toward more empathetic, efficient, and client-centered legal processes. By exploring the unique benefits and inherent challenges of EDR, alongside practical insights for practitioners, the article seeks to underscore the importance of integrating these approaches to better meet the complex needs of families in dispute. In Part I, this article examines the traditional litigation framework that family law cases have followed for decades. Part II explores the drawbacks of the traditional litigation model and the need for a more client-centered approach. Part III introduces EDR as a viable alternative to traditional litigation, highlighting

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its benefits and various methodologies. Part IV delves into ethical considerations surrounding EDR implementation, emphasizing the importance of informed consent and appropriateness screening. Finally, Part V concludes by addressing the transformative potential of EDR in reshaping the landscape of family law practice and offers guidance for practitioners seeking to integrate EDR into their work.

I. The Traditional Litigation Framework in Family Law

Litigation is a crucial mechanism for addressing highly personal and complex issues affecting families. Through the legal process, individuals can navigate the difficult terrain of marital dissolution, custody disputes, and the division of assets with the guidance of impartial judiciary figures. This framework not only facilitates the resolution of deeply personal conflicts but also ensures that all parties' rights and interests, especially children's, are protected and prioritized.¹ By providing a structured avenue for dispute resolution, family law litigation encourages parties to engage in meaningful negotiations, often leading to settlements that reflect the best interests of the family unit, without necessitating a full trial.² Furthermore, it upholds the principle of legal accountability, deterring individuals from actions that could harm family relationships or financial stability. Through its contribution to the evolution of family law doctrine, litigation in this field offers redress for immediate familial disputes and shapes broader societal norms and expectations regarding family responsibilities and rights, reinforcing the social fabric.³

¹ Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9(1) U.C. DAVIS J. JUV. L. & POL'Y 57 (2005).

² Karine Poitras, Rachel Birnbaum, Michael Saini, Nicholas Bala, & Francine Cyr, *Family Dispute Resolution: Characteristics of Cases Resolved by Trial*, 123 CHILDREN & YOUTH SERV. REV. 105832 (Apr. 2021), <https://doi.org/10.1016/j.childyouth.2020.105832>.

³ Daniel Martin Katz, Corinna Coupette, Janis Beckedorf, & Dirk Hartung, *Complex Societies and the Growth of the Law*, 10 SCI. REP. 18737 (Oct. 30, 2020), <https://www.nature.com/articles/s41598-020-73623-x>.

A. Challenges and Drawbacks of Litigation

Litigation in the context of family and divorce law is not without its drawbacks, however, in the ways it impacts participants, families, children, society, and even the practitioners themselves. The adversarial nature of litigation can exacerbate existing tensions between parties, leading to increased emotional distress and animosity.⁴ This is particularly detrimental in cases involving children, who may be caught in the crossfire of parental conflict, potentially leading to long-term psychological impacts and strained parent-child relationships.⁵

Moreover, the litigation process can be time-consuming and financially draining for the parties involved, consuming resources that could otherwise be used for the family's benefit or individual healing. The protracted nature of legal battles may delay the emotional closure and healing process for individuals, prolonging the period of uncertainty and instability, especially for children who require stable environments to thrive.⁶

For society, the adversarial approach to resolving family disputes may reinforce a culture of litigation over mediation and cooperation, undermining community ties and social cohesion.⁷ It may also significantly burden the legal system, diverting resources from other areas of public interest.

Practitioners in the field of family and divorce law are not immune to the challenges posed by litigation. The emotionally charged nature of family law cases can lead to burnout and ethical dilemmas,⁸ as attorneys navigate the delicate balance between

⁴ Honjian Cao, Mark A. Fine, & Nan Zhou, *The Divorce Process and Child Adaptation Trajectory Typology (DPCATT) Model: The Shaping Role of Predivorce and Postdivorce Interparental Conflict*, 25(3) CLIN. CHILD & FAM. PSYCHOL. REV. 500 (2022), <https://doi.org/10.1007/s10567-022-00379-3>.

⁵ Karey L. O'Hara, C. Aubrey Rhodes, Sharlene A. Wolchik, Irwin N. Sandler, & Jenn Yun-Tein, *Longitudinal Effects of Postdivorce Interparental Conflict on Children's Mental Health Problems Through Fear of Abandonment: Does Parenting Quality Play a Buffering Role?*, 92(4) CHILD DEV. 1217 (Jan. 2021), <https://doi.org/10.1111/cdev.13539>.

⁶ *Id.* at 1477.

⁷ Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9(4) BEHAV. SCI. & L. 387 (Fall 1991), <https://doi.org/10.1002/BSL.2370090404>.

⁸ Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 984-85 (2007).

advocating for their client's interests and mitigating the adversarial impact on the family unit. The high stakes and emotional intensity of these cases can also contribute to stress and professional dissatisfaction, impacting the well-being of legal professionals.⁹

So, while litigation in family and divorce law provides a necessary mechanism for dispute resolution, its negative aspects underscore the importance of seeking alternative dispute resolution methods, when possible, to mitigate the emotional, financial, and societal costs associated with legal battles over family matters.

B. *The Discovery Process in Family Law Litigation*

As an example of the challenges inherent in the litigation approach for both litigants and attorneys, consider the process of navigating the complexities of the discovery process in family law. This phase, aimed at uncovering relevant facts and financial details, can inadvertently fuel the fire of conflict and animosity between parties. The necessity to be thorough and diligent, as dictated by ethical standards, often results in a meticulous and extensive exploration of personal and financial lives. This exhaustive scrutiny can not only increase the adversarial tension but also significantly escalate the costs associated with litigation.¹⁰

Anecdotally, as time progresses and situations evolve, previously gathered information may become outdated, necessitating further discovery to ensure decisions are made on the most current basis. This cyclical nature of discovery can prolong the litigation process, leading to fatigue and frustration among the parties involved. The requirement for court intervention to resolve disputes over the scope of discovery or to compel the production of documents adds another layer of complexity and delay, further straining the emotional and financial resources of the litigants.

Moreover, the outcomes of the discovery process may present a disproportionate cost-benefit analysis. Significant expenses and emotional tolls may yield information with limited impact on the

⁹ Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10(1) J. ADDICTION MED. 46 (Jan./Feb. 2016), <https://doi.org/10.1097/ADM.0000000000000182>.

¹⁰ David S. Dolowitz & Jamila Abou-Bakr, *Attorney-Client Relations in Divorce Cases: The Intersection of Ethics and Malpractice in Family Law*, 31 J. AM. ACAD. MATRIM. LAW. 345, 365-366 (2019).

final settlement or resolution, questioning the efficiency and efficacy of the process. This realization can lead to dissatisfaction with the legal system and a sense of injustice or imbalance, as parties grapple with the fallout of an exhaustive and invasive process that may not significantly alter the course of their case's outcome.¹¹

The impact of these challenges is not confined to the litigants alone. Family law attorneys navigating these treacherous waters face the daunting task of balancing the ethical obligation to zealously represent their clients with the practical need to manage costs and emotional strain.¹² This balancing act can strain the attorney-client relationship, as clients may struggle to understand the necessity of certain actions or become frustrated with the pace and cost of the process. In fact, a recent survey in the United Kingdom noted that the most common client complaints in law firms were related to delays, failure to advise, and excessive costs.¹³ Although based in the UK, this study echoes anecdotal evidence and experiential conclusions observed in the United States, underscoring a universal challenge within the legal profession. The implications of these findings suggest a pressing need for legal practitioners to adopt more alternative dispute resolution (ADR) strategies, with a particular emphasis on Early Dispute Resolution (EDR). EDR represents a proactive approach, seeking to address and resolve disputes at the earliest stage possible, thereby significantly reducing the financial and emotional toll on the parties involved.

While the discovery process serves an essential function in ensuring informed decision-making, its adversarial nature and potential to escalate conflict within family law litigation underscore the need to explore alternative pathways to resolution. Recognizing the drawbacks of traditional litigation models, including increased costs, emotional distress, and dissatisfaction with the legal system, many legal professionals and scholars have advocated for the broader adoption of more collaborative and cost-effective dispute resolution methods. These alternative approaches may offer a more constructive and humane means of resolving family law

¹¹ Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery*, 33 FAM. L.Q. 361, 374 (1999).

¹² MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

¹³ Alvin Chen, *Addressing Client Dissatisfaction – A Primer for Law Practices*, SINGAPORE L. GAZETTE, Mar. 2021, <https://lawgazette.com.sg/practice/compass/addressing-client-dissatisfaction-a-primer-for-law-practices/>.

disputes, benefiting litigants, their families, and the legal system with Early Dispute Resolution at the forefront.

II. Early Dispute Resolution (EDR) as an Alternative

Early Dispute Resolution (EDR) presents a viable alternative to the challenges posed by the traditional litigation process in family law. This approach encompasses a range of methodologies designed to facilitate the resolution of disputes at an early stage, thereby minimizing the emotional and financial toll on the parties involved. By emphasizing communication, negotiation, and cooperation from the outset, EDR aims to resolve conflicts before they escalate into protracted legal battles. The essence of this approach lies in its focus on early intervention, which can prevent disputes from developing into full-blown litigation. This approach conserves resources and spares clients from the adversarial and often public nature of court proceedings. By identifying potential issues early and employing strategies such as negotiation, mediation, or cooperation, EDR facilitates a more amicable and collaborative environment for dispute resolution.¹⁴ This, in turn, can lead to more satisfactory outcomes for all parties, often preserving relationships in a way that traditional litigation cannot.

The growing acceptance and trend toward adopting EDR methodologies in legal disputes is exemplified by the recent unanimous approval and adoption by the American Bar Association House of Delegates of Resolution 500, urging the increased use of Early Dispute Resolution. Resolution 500 reads:

RESOLVED, that the American Bar Association urges lawyers and all interested parties to increase the informed and voluntary use of Early Dispute Resolution: party-directed, non-adjudicative approaches to resolve disputes in a time-efficient and cost-effective manner, including, but not limited to, direct negotiation, mediation, and ombuds.¹⁵

¹⁴ John Lande, *Dispute Prevention and Early Dispute Resolution Framework*, INDISPUTABLY (Apr. 9, 2020), <http://indisputably.org/2020/04/dispute-prevention-and-early-dispute-resolution-framework/>.

¹⁵ Am. Bar Ass'n, Section of Dispute Resolution, Report to the House of Delegates, Feb. 2024, <https://www.americanbar.org/content/dam/aba/administrative/news/2024/mym-hod-resolutions/500.pdf>.

The field of EDR encompasses a variety of early dispute resolution movements in the courts and private dispute resolution ranging from relatively informal to quite structured and refined as identified by Professor John Lande.¹⁶ The early dispute resolution (EDR) processes identified by Lande include Lawyering with Planned Early Negotiation, Pre-Suit Mediation, Cooperative Practice, Planned Early Two-Stage Mediation, Planned Early Multi-Stage Mediation, Collaborative Practice, Guided Choice, Planned Early Dispute Resolution Systems, and Early Dispute Resolution Institute Process. This article focuses on Cooperative Practice, Collaborative Practice, and Planned Early Multi-Stage Mediation, since all are effective early dispute resolution processes that offer a range of structured to flexible negotiation and mediation options and each allows a robust role for the family law advocate to ensure clients are adequately represented in reaching agreement.

The following is a descriptive chart of these EDR modalities with simplified statements of the pros and cons of each approach for both the parties and attorneys included.

EDR Process	Pros for Clients	Cons for Clients	Pros for Attorneys	Cons for Attorneys
Cooperative Practice	More structure than informal negotiation. Flexibility without disqualification agreement. Encourages collaboration and preservation of relationships.	Might not be as effective in highly contentious disputes. Less formal than collaborative practice.	Encourages creative problem-solving. Can build a cooperative network of professionals.	Potentially less control over the process. Requires buy-in and commitment from both sides. Discovery may not be exhaustive

¹⁶ John Lande, *Survey of Early Dispute Resolution Movements and Possible Next Steps* (Apr. 22, 2021), University of Missouri School of Law Legal Studies Research Paper No. 2021-06, <https://ssrn.com/abstract=3832282>.

EDR Process	Pros for Clients	Cons for Clients	Pros for Attorneys	Cons for Attorneys
Planned Early Multi-Stage Mediation	Comprehensive approach for complex disputes. Scheduling promotes preparedness and thoroughness. Facilitates detailed exploration of issues.	Time-consuming and potentially more expensive. Can be emotionally draining over multiple sessions.	Enables deep engagement with the case. Facilitates thorough exploration of legal and emotional issues.	Significant time investment. Requires skill in managing prolonged mediation processes.
Collaborative Practice	Specifically designed for family law disputes. Encourages amicable resolutions and preserves relationships. Binding agreement motivates genuine negotiation.	If negotiations fail, must hire new attorneys for litigation, increasing costs. Not suitable for all types of disputes.	Specialized practice area that can enhance reputation. Promotes long-term client satisfaction.	Cannot represent client in court if collaborative process fails. Requires specific training and commitment to collaborative principles.

Incorporating these EDR modalities into family law disputes offers several compelling advantages. First and foremost, it significantly reduces the need for extensive discovery by encouraging transparency and voluntary exchange of information between parties.¹⁷ This not only curtails the time and expense associated with litigation but also lowers the emotional intensity often exacerbated by the invasive nature of traditional discovery processes. By fostering a spirit of collaboration, EDR helps maintain a focus on the mutual interests of the parties, particularly when children are involved, thus promoting outcomes that are in the best interest of the family unit as a whole.

Moreover, EDR mechanisms, such as mediation and collaborative law, provide a more personalized and flexible approach to dispute resolution. Parties are empowered to craft their agreements,

¹⁷ Grossman, *supra* note 11, at 365.

taking into account their unique circumstances and priorities, which can lead to more satisfactory and enduring solutions. This level of autonomy and control is often lacking in the conventional litigation model, where outcomes are determined by the court and may not align with the specific needs or desires of the family.

For family law practitioners, EDR represents an opportunity to fulfill their ethical obligations to their clients in a manner that is both effective and compassionate. By advocating for EDR approaches, attorneys can guide their clients through a process that is more constructive and less adversarial, thereby preserving relationships and promoting healing. This shift also aligns with a growing professional recognition of the importance of holistic legal practices that address the emotional, psychological, and financial well-being of clients.

The integration of EDR into family law has the potential to transform litigants' experiences and alleviate the burden on the legal system. It has long been recognized that by resolving disputes early and efficiently, EDR can reduce the backlog of cases and free up judicial resources for matters that require formal adjudication.¹⁸ This contributes to a more efficient and effective justice system that better serves society's needs.

III. Cooperative Practice: A Formalized Approach to Early Negotiated Settlement Process

In the realm of family law, Cooperative Practice stands out as a particularly relevant and effective Early Dispute Resolution (EDR) method, which may sound familiar to many practitioners. Cooperative Practice is based upon an agreement to negotiate and communicate cooperatively but does not require a disqualification from litigation as necessitated in collaborative law. The familiarity with this approach for family law attorneys is underpinned by the statistical reality that many family law cases conclude with some form of agreement rather than proceeding to trial. The high settlement rate in family law cases, reportedly only three percent to five percent of cases go to trial¹⁹, underscores the premise that

¹⁸ Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 9 (1990), <https://ir.lawnet.fordham.edu/flr/vol59/iss1/1>.

¹⁹ Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 323 (2004), <https://digitalcommons.pepperdine.edu/drlj/vol4/iss3/2>.

most family law cases are resolved through negotiated settlement. Where common practice and cooperative practice may diverge for some professionals, however, is the timing of that settlement and the more formalized process. For most practitioners and their clients, a negotiated settlement is the product of a long time frame that often includes a thorough, even exhaustive, discovery process and then a protracted negotiation process that may be complicated or impacted by the adversarial nature of the discovery as discussed above. So, while the clients certainly benefit from concluding their matter with an agreement, rather than entering into the even more costly and difficult trial process, they do not receive many, if any, of the benefits of an early resolution. Indeed, in the classic case of the “settlement on the courthouse steps,” parties are often in a very similar emotional and financial state to where they would be if they tried the case but with a last-minute agreement rather than an adjudicated judgment.

In contrast, cooperative practice as an EDR modality, is designed to promote early and productive negotiation intended to benefit both parties.

Cooperative practice generally involves an explicit process agreement at the outset, based on principles of: (1) acting civilly, (2) responding promptly to reasonable requests for information, (3) disclosing all relevant financial information, (4) obtaining joint expert opinions before obtaining individual expert opinions, (5) obtaining expert input before requesting a custody study or appointment of a guardian ad litem, and (5) good-faith negotiation sessions, including four-way sessions where appropriate, to reach fair compromises based on valid information.²⁰

According to the cooperative practitioners interviewed by John Lande,²¹ the mindset in cooperative cases differs markedly from litigation-oriented cases because, from the outset, there is an agreement to negotiate, not litigate, and because clients are more involved in the process. There is less coercive motion practice and more cooperative interplay to reach interim agreements, quantify the estate and issues, and negotiate final terms, and it all flows from an initial written agreement to engage in the cooperative model.

This high rate of settlement underscores the natural alignment between the cooperative practice’s ethos and the practical outcomes observed in family law disputes. Cooperative practice,

²⁰ John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*. 2008 J. DISP. RESOL. 203.

²¹ *Id.*

by design, facilitates a more structured approach to negotiation than informal talks, yet it remains less rigid than other forms of dispute resolution, such as Collaborative Law. It emphasizes the importance of open communication, mutual respect, and a willingness to work together towards a shared resolution, without the necessity of a disqualification agreement that mandates the withdrawal of attorneys if the process transitions to litigation. This method strikes a delicate balance, offering a pathway that encourages parties to actively engage in crafting their agreements, while fostering an environment where the preservation of relationships, especially when children are involved, is deemed as important as the legal outcomes. The widespread prevalence of agreements in family law matters attests to the efficacy of cooperative practices and their resonance with the objectives and needs of those navigating these often complex personal and legal challenges.

IV. The Widespread Acceptance of Collaborative Law into Family Law Practice

Another important evolution in the alternative dispute resolution (ADR) landscape and EDR, particularly relevant to family law, is the collaborative law model. This model has garnered significant attention and endorsement, most notably through the recent approval of the Uniform Collaborative Law Act (UCLA)²² by the American Bar Association (ABA). This recognition marks a critical milestone in formalizing the collaborative process, highlighting its efficacy and the legal profession's commitment to fostering non-adversarial dispute resolutions. As with the EDR Resolution 500 discussed above, the UCLA Resolution 703 was unanimously approved by the ABA Board of Governors as follows:

RESOLVED, that the American Bar Association approves the Uniform Collaborative Law Rules and Uniform Collaborative Law Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate Rules or an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.²³

²² UNIF. COLLABORATIVE LAW RULES (UNIF. LAW COMM'N 2010), <https://www.uniformlaws.org/viewdocument/final-act-101210?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf>.

²³ American Bar Ass'n, Resolution 500 (adopted by the House of Delegates, 2024 Midyear Meeting, Louisville, Ky., Feb. 5, 2024), <https://www.americanbar.org/content/dam/aba/administrative/news/2024/mym-hod-resolutions/500.pdf>.

In commenting on the ABA's support for the UCLA,²⁴ Professor David Hoffman notes that collaborative law is distinguished by its unique approach to resolving family disputes. Central to this model are the principles of voluntary participation and transparency among all parties. Unlike traditional litigation, which often escalates conflict and complicates the discovery process, collaborative law encourages open communication and a problem-solving mindset. This model operates on the premise that parties, with the support of their attorneys and other professionals, can achieve mutually beneficial outcomes without resorting to court intervention.

A key feature of the collaborative law model is its limited scope engagement, which serves as a safeguard for the discovery issue commonly encountered in family law matters. By agreeing to share information freely and work constructively towards a settlement, parties minimize the need for a protracted and often contentious discovery process. This approach not only saves time and resources but also mitigates the emotional toll on all involved.

Moreover, the collaborative process includes a provision which provides that, should the process fail to result in a settlement and litigation is pursued, the originally retained attorneys must withdraw from the case.²⁵ This requirement underscores the committed and non-adversarial stance of collaborative law, encouraging both parties and their legal representatives to invest fully in the process.

The requirement for lawyers to withdraw if a dispute cannot be resolved outside of court has sparked debate. Critics argue this pressure to settle may compromise client interests due to the lawyer's need to avoid withdrawal. Additionally, concerns arise over the potential for one lawyer to effectively force another's withdrawal from a case. Leading family law attorney, Forrest S. Mosten, however, defends the use of the "disqualification" clause, arguing that it aligns with lawyers' traditional duties to their clients. He clarifies this position by analyzing how this approach fits within the ethical framework of legal practice, addressing both the pressure to settle and the issue of forced withdrawal.

²⁴ David A. Hoffman, *The Time Has Come for the Uniform Collaborative Law Act*, MASS. LAW. WKLY., Mar. 2, 2024, <https://masslawyersweekly.com/2024/03/02/the-time-has-come-for-the-uniform-collaborative-law-act/>.

²⁵ UNIF. COLLABORATIVE LAW Act § 9 (2010).

If you serve as a lawyer for a client who decides to use collaborative divorce, your client is entitled to the same professional obligations of competence and loyalty to which you would [be] obligated in any other lawyer arrangement. In concrete terms, this means that you have a duty to pursue the client's objectives, protect your client from financial harm and legal exposure, inform your client of legal rights, produce competent work, keep all attorney-client communications confidential, avoid conflicts of interest, and ensure that your fees are fair and that clients understand them. Although your approach may differ from the traditional model, you are still a lawyer.²⁶

As noted, representing a client in a collaborative divorce does not absolve a lawyer from any professional obligations, including competence, loyalty, protection from financial harm and legal exposure, informing about legal rights, confidentiality, avoiding conflicts of interest, and fairness in fees.²⁷ This ethical framework remains steadfast, irrespective of the chosen dispute resolution model, reinforcing the role of the lawyer as an advocate and advisor, even within the collaborative law paradigm.

It is important for family law attorneys to be aware that despite practitioners' initial hesitation, clients have increasingly embraced collaborative divorce, and those who choose this approach are overwhelmingly satisfied with their choice. In research by the International Academy of Collaborative Professionals (IACP) on about 1,000 collaborative divorce cases, only nine percent of clients with successful outcomes were dissatisfied, and a mere eight percent would not recommend the process to others.²⁸ This high level of client satisfaction is just one of the reasons that since its inception in 1990, Collaborative Divorce Practice has become widespread and increasingly well-known and requested by the divorcing public. In fact, in the United States, twenty-three states have adopted the UCLA, and there are currently four additional states with pending legislation for approval.²⁹ In addition, the practice of collaborative law has grown rapidly, and the American

²⁶ FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: EFFECTIVELY HELPING DIVORCING FAMILIES WITHOUT GOING TO COURT* 45, 46 (2009).

²⁷ William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 363-67 (2004).

²⁸ Linda Wray, *IACP Research Regarding Collaborative Practice (Basic Findings)*, 12(1) *COLLABORATIVE REV.* 6 (2012).

²⁹ Collaborative Law Act, *LEGISLATIVE BILL TRACKING*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf#LegBillTrackingAnchor> (last visited Apr. 22, 2024).

Bar Association Sections of Family Law and Section of Dispute Resolution, the International Academy of Matrimonial Lawyers (IAML), and the American Academy of Matrimonial Lawyers (AAML) all have collaborative committees.

Incorporating collaborative law into family law practice offers a robust mechanism for addressing the inherent challenges of litigation, especially the often long and tortuous process of discovery. By advocating for and engaging in collaborative practices, family law practitioners can provide their clients with a more humane, efficient, and effective path to resolving disputes. This shift towards collaborative law not only reflects an evolution in dispute resolution strategies but also aligns with the broader legal community's recognition of the need for more client-centered and therapeutic legal processes.

A. *Planned Early Multi-Stage Mediation: The Neutral Factor*

The final EDR modality to focus on is Planned Early Multi-Stage Mediation. While many family law practitioners may be familiar with a mediation format comprised of half-day or full-day, marathon sessions, often late in the litigation process as a last chance to settle the outstanding issues before a looming trial date, the process of planned early multi-stage mediation is quite different. Planned Early Multi-Stage Mediation (PEMSM) is a structured approach to dispute resolution that involves engaging in mediation at predetermined stages throughout the lifecycle of a conflict or legal case.³⁰ Unlike traditional mediation, which typically occurs as a one-time effort to settle a dispute, PEMSM strategically schedules multiple mediation sessions at critical points during a dispute. This approach allows for the early identification and resolution of issues, potentially avoiding the escalation of conflicts and the need for litigation, or at least reducing the scope of litigation.

Here is a more specific breakdown of its key characteristics:

1. *Early Engagement:*

PEMSM emphasizes starting the mediation process early in the dispute cycle. This early intervention aims to address and resolve conflicts before they become deeply entrenched, reducing the time and resources required for resolution.

³⁰ John Lande, *The Evolution to Planned Early Multi-Stage Mediation*, KLUWER MEDIATION BLOG (Aug. 28, 2020), <https://bit.ly/3EqMRrk>.

2. *Multi-Stage Process:*

It recognizes that complex disputes may not be resolved in a single mediation session. Instead, it plans for multiple sessions that correspond with the evolving nature of the dispute and the needs of the parties involved. Each session aims to resolve aspects of the dispute or to build agreements that serve as stepping stones toward a final resolution.

3. *Flexibility and Adaptability:*

The process is designed to be flexible, allowing adjustments based on the dispute's dynamics and the parties' evolving positions. This adaptability is crucial for addressing underlying issues that may not be apparent at the outset.

4. *Collaboration and Participation:*

PEMSM encourages active participation from all parties and promotes a collaborative approach to problem-solving. This collaboration can lead to more sustainable and mutually beneficial outcomes.

5. *Facilitated by Neutral Mediators:*

The process is facilitated by neutral mediators who guide the parties through each stage, helping them to communicate effectively, understand each other's perspectives, and work towards a resolution.

PEMSM can be particularly effective in complex disputes where issues may unfold over time or where ongoing relationships between parties need to be preserved such as with divorces among co-parents. In this way, PEMS is extremely well-suited to the restructuring of the family that takes place in divorce and family matters. This approach aligns with the principles of Early Dispute Resolution (EDR) by prioritizing early intervention, efficiency, and the preservation of relationships. Agreeing to mediate from the outset, or in the early stages of the litigation, allows all involved to curate a process that meets the needs of the parties while fostering a cooperative and transparent approach to disclosure and negotiation with the support of a neutral facilitator and before the rigors of the litigation process have an opportunity to accelerate and

amplify the discord, pushing agreement and accord further and further away.

Incorporating Planned Early Multi-Stage Mediation (PEMSM) into family law practices offers a transformative approach, circumventing the adversarial nature of traditional litigation. This method's emphasis on early engagement and iterative problem-solving through neutral mediation fosters a more amicable, transparent, and cooperative process. By addressing issues progressively, PEMSM not only facilitates a more harmonious resolution but also significantly mitigates the emotional and financial strain typically associated with divorce proceedings. Its adaptability and focus on preserving relationships make it an ideal choice for family law matters, offering a path toward constructive and equitable outcomes while maintaining the dignity and respect of all parties involved.

B. The Ethical Gateway: Screening for Appropriateness and Informed Consent

A key factor with all methods of EDR is that cooperative practice, collaborative practice, and PEMSM are opt-in processes. In other words, both clients and attorneys must agree to participate in accordance with the practice agreement for the process. Unlike litigation, which operates under the specter of court intervention and coercive motion practice to compel participation, EDR requires full agreement on participation, and that fact alone sets a transformative tone for the evolution of the process. It is, in many cases, the first agreement of the parties and one that generally will lead to many more agreements.

When considering the ethical obligations of an attorney to a client it must be highlighted that attorneys are required to inform clients about all available process options for divorce, including litigation, mediation, collaborative law, and other alternative dispute resolution (ADR) methods.³¹ This duty is part of the broader ethical requirement for lawyers to provide competent representation, which involves advising clients on the legal, financial, and emotional implications of each option. By ensuring clients are fully informed of their choices, attorneys empower them to make decisions that best align with their interests, goals, and circumstances. This is a critical obligation and a hallmark of ethical practice for attorneys.

³¹ MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

In addition to ensuring that clients can make informed consent, attorneys also must screen for appropriateness of participation in EDR modalities. John Lande and Forrest S. Mosten extensively analyzed this screening process and thoroughly explored the responsibilities of collaborative lawyers to ensure the collaborative law process is suitable for their clients' specific circumstances.³² They highlighted the necessity for lawyers to engage in a detailed screening process to determine whether the collaborative process is an appropriate method for resolving a client's dispute and to secure informed consent from the client for engaging in collaborative divorce or any alternative dispute resolution process.

The ethical obligations surrounding EDR, as discussed by Lande and Mosten, highlight the importance of attorneys ensuring clients are well-informed about all divorce process options, including screening for the appropriateness of participation in all EDR modalities. This not only involves a commitment to competent representation but also emphasizes the need for obtaining informed consent. Strict adherence to these ethical obligations when it comes to EDR is the antidote to attorney concerns regarding the adoption of EDR into practice. When clients are properly informed and prepared to make agreements regarding their participation in EDR modalities, including the benefits and limitations of each, attorneys are operating within their ethical obligations which extend far beyond just "zealous advocacy." The key is that properly informed clients are entitled to choose their path, and their self-determination is integral to the EDR modalities and, ultimately, their satisfaction with their process.

In navigating the ethical considerations inherent in EDR methodologies, attorneys must first commit to a thorough appropriateness screening process. This involves evaluating the suitability of EDR for the client's specific circumstances, considering factors such as the complexity of the case, the parties' willingness to cooperate, and the potential for achieving a fair and equitable outcome through alternative resolution methods.³³ To conduct

³² John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347 (2010).

³³ See, e.g., John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004).

these screenings effectively, practitioners should develop a standardized checklist that covers both legal and emotional considerations, ensuring a comprehensive assessment of each case's suitability for EDR.

Moreover, securing informed consent goes beyond merely informing clients about the available options. It requires attorneys to provide a detailed explanation of the potential benefits and limitations of each EDR method, tailored to the client's unique situation. This includes discussing the likely outcomes, the process involved, and any possible risks or downsides. Attorneys should also address any client questions or concerns in a clear, understandable manner, ensuring that the decision to proceed with a particular EDR method is made with full awareness and understanding.

To facilitate this process, practitioners might consider utilizing informed consent forms that outline the key aspects of the chosen EDR method, accompanied by a detailed verbal discussion to walk clients through the information provided. These discussions should be documented in the client's file, along with a signed acknowledgment of understanding and consent.

Attorneys should also be prepared to revisit the issue of consent and appropriateness at various stages throughout the EDR process. As the case evolves, new information may emerge that affects the suitability of the chosen method or the client's willingness to continue. Regular check-ins with the client to reassess consent and appropriateness ensure that the EDR process remains aligned with the client's best interests and goals.

Incorporating these practices into the EDR process not only fulfills the attorney's ethical obligations but also strengthens the attorney-client relationship, building trust and confidence. By prioritizing transparency, informed decision-making, and client welfare, attorneys can navigate the ethical landscape of EDR with integrity and professionalism.

V. Client Satisfaction with EDR: The Cure for the Recovering Litigator

As a former family law attorney who practiced as a traditional litigator for the first two decades of my career, I know firsthand the difficulty that the adversarial approach to divorce wreaks not only on the clients but on the practitioner, too. As discussed earlier,

practitioners often struggle with the harsh demands of the stringent litigation process as well as rampant client dissatisfaction with the process and outcome, but many practitioners are unaware of the alternatives or are concerned about the application of those alternatives through the strict ethical lens of the profession.

As my career path has evolved, first to mediator and then to mediation and collaborative law trainer, I have often interacted with colleagues who are at the end of their rope with the rigors and adversarial nature of a litigation practice and who are in search of a better way to support their clients through the divorce process. Invariably, as they learn more about EDR modalities and begin to work with clients in a more cooperative and respectful process, they report increased career satisfaction and a client base with better results and more positive feedback.

These anecdotal conclusions align with the growing recognition within the legal community of the value of EDR as a means to facilitate more amicable, collaborative, and sustainable outcomes for all parties involved. The public has embraced both mediation and collaborative divorce, and cooperative practice is a growing alternative reflecting the desire for mediation and other EDR methods to become integral to family law; attorneys are discovering the profound impact these approaches can have on both their practice and their clients' lives. This evolution marks a significant departure from the contention and stress of conventional litigation, moving towards a more holistic and client-focused approach. The shift is not merely a change in method but a redefinition of the attorney's role—from a combatant in a legal battle to a facilitator of resolution and healing.

This transition reflects a deeper understanding within the legal community that the adversarial process, while necessary in certain cases, is not always the best path for families in transition. The embrace of EDR signifies a commitment to preserving dignity, relationships, and the well-being of all involved, especially children who are often the unseen victims of contentious divorces.

The positive feedback from clients who have experienced EDR firsthand reinforces the value of these methods. They report not just satisfaction with the outcomes, but also with the process itself—a process that respects their voice, minimizes conflict, and focuses on the future rather than dwelling on past grievances. This client feedback is the best testament to the efficacy of EDR,

serving as a powerful motivator for lawyers to pursue training and certification in these approaches.

The evidence of client satisfaction with EDR processes is not just anecdotal. As discussed above, the IACP survey found overwhelmingly that clients were satisfied with the process and very few would not recommend it to others.³⁴ There is additional widespread research and scholarly writing on the topic of the positive client response to these modalities. John Lande reviewed seven separate empirical studies on collaborative law in an effort to consolidate the conclusions and found that the vast majority of collaborative clients reported being satisfied with the outcome of their case.³⁵ Robert E. Emery, David Sbarra, and Tara Grover concurred, concluding that “[m]ediation generally results in higher satisfaction levels compared to adversarial court proceedings for both adults and children.”³⁶

The shift toward EDR in family law is a reflection of a broader societal movement toward empathy, understanding, and resolution. As more practitioners adopt these methods, the legal profession as a whole stands to transform the experience of divorce from one of adversity to one of mutual respect and cooperation. For attorneys considering a transition to EDR, the journey promises not just a more satisfying career path but also the opportunity to make a real difference in the lives of those they serve. By championing EDR, lawyers become not just advocates for their clients’ legal rights, but also guardians of their clients’ well-being and their families’ futures.

It is appropriate to conclude with some final thoughts from colleagues Forrest Mosten and Lara Traum who had the following words of wisdom for family law attorneys: “Attorneys, members of the judiciary, and legislators alike are now exploring a deeper mindset shift as mediation takes hold around the country. Attorneys trained solely in zealous advocacy can now expand beyond their warrior identities that they have maintained and embrace their peacemaking roles through training and balanced practice.”³⁷

³⁴ Wray, *supra* note 28, at 6.

³⁵ John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257 (2011).

³⁶ Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation: Research and Reflections*, 11(1) PSYCHOL., PUB. POL’Y, & L. 22 (2005).

³⁷ Forrest S. Mosten & Lara Traum, *Mediation as the Default Approach for Family Dispute Resolution*, 46 FAM. ADVOC. 9 (Fall 2023).

Employing alternative dispute resolution (ADR) modalities in family law matters empowers attorneys to facilitate peaceful resolutions and support clients in achieving a less adversarial and more constructive familial restructuring. In many instances, it is advantageous to prioritize amicable solutions over contentious litigation.

Conclusion: The Future of Family Law Practice

The landscape of family law is experiencing a profound transformation, characterized by the growing integration of Early Dispute Resolution (EDR) practices. This shift is reflective of a broader understanding of the unique challenges and emotional complexities present in family law disputes, emphasizing the need for more compassionate, efficient, and effective solutions. For legal practitioners within this domain, this evolution not only presents new opportunities but also sets forth new standards for the practice of family law.

The embrace of EDR in family law underscores the necessity for attorneys to continually educate themselves, not only about the legalities of these methods but also about the emotional and psychological dynamics at play in family disputes. This comprehensive understanding is crucial as the practice of family law becomes more intertwined with holistic and client-centered approaches.

The shift towards EDR in family law compels practitioners to balance zealous advocacy with the pursuit of solutions that genuinely serve the best interests of the family unit. As the demand for legal services that are both effective and empathetic grows, lawyers must adapt to these changing expectations, providing solutions that are considerate of the long-term impacts on the family.

In conclusion, the future of family law practice demands that lawyers evolve beyond their traditional roles, embodying the qualities of resolution facilitators and agents of change. The widespread adoption of EDR practices offers a promising avenue for this evolution, requiring legal professionals to innovate, adapt, and remain steadfast in their commitment to the well-being of families and the broader community. In doing so, they navigate the complex terrain of family disputes with expertise, empathy, and a forward-looking vision.

In light of the compelling advantages EDR offers, both practitioners and clients stand at the threshold of a new era in family law—an era that promises not only more amicable resolutions but also processes that reflect the complex, nuanced nature of family relationships. As we navigate this transformative landscape, the imperative for legal practitioners to adapt and embrace EDR methodologies becomes increasingly clear. To this end, the following steps and considerations are offered as a guide for integrating EDR into family law practice:

Education and Training: Commit to ongoing education about alternative dispute resolution (ADR) methods.

Case Evaluation: Develop a protocol for assessing the suitability of ADR for each new client or case.

Collaborative Culture: Foster a practice culture that values and promotes collaboration, empathy, and open communication.

Interdisciplinary Collaboration: Build relationships with professionals from other disciplines involved in the ADR process.

Client Education and Empowerment: Ensure that clients are fully informed about their options for dispute resolution from the outset.

Advocacy for ADR: Become an advocate for ADR within the legal community.

By taking these steps, family law practitioners can play a pivotal role in reshaping the landscape of dispute resolution. Integrating EDR into one's practice is not merely a professional adjustment—it's a commitment to fostering resolutions that honor the dignity, well-being, and long-term interests of families in transition. Let us embrace this opportunity to redefine resolution in family law, making a lasting, positive impact on the lives of those we serve.