**Making Justice Work**

**Enabling Access to Justice Project -**

**International literature review of Alternative Dispute Resolution**

**November 2014**

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FOREWORD

Civil problems and disputes can have adverse consequences for people, affecting their confidence, well-being, financial situation and health. We include in our definition all civil matters which raise a legal issue or which, if not resolved earlier, could ultimately result in legal proceedings. For example, issues with welfare benefits, debt, housing, employment, family disputes and consumer rights. Problems and disputes can escalate from simple, minor issues into major, complex challenges. The early resolution or avoidance of these problems can improve people’s lives

This report is a review of the literature on Alternative Dispute Resolution (ADR) in five jurisdictions besides Scotland. It looks, in particular, at how each has formally institutionalised ADR into family law and to what extent ADR has been effective. For the purposes of Making Justice Work Project 3, ADR is defined as a method of resolving a dispute including the use of mediation, conciliation, adjudication, ombudsmen or arbitration. The aim of Project 3.4 of the Enabling Access to Justice Project is to identify the role ADR can play in advancing the wider interests of the justice system and system users alongside other forms of dispute resolution. The focus throughout has been on whether ADR is an appropriate and proportionate means of resolving different types of disputes in different areas of law.

This literature review of ADR in five jurisdictions focuses on how each has formally institutionalised ADR, particularly mediation, into family law and the extent to which this has been effective. The review was commissioned following early findings from the Project 3.4 ADR Overview study which identified family mediation as one of the prominent ADR initiatives funded by Scottish Government. Improving and sustaining the wellbeing of children in Scotland is a core policy priority of Scottish Government. Family disputes and separation have considerable potential to undermine the wellbeing of the children involved in such disputes. Ensuring that the processes used to deal with those disputes do not in themselves undermine children’s wellbeing is therefore also of considerable importance. The cross-jurisdictional paper was commissioned to start a reappraisal of how family justice could achieve this aim by investigating what other jurisdictions had tried and to identify what, if anything, Scotland could learn from this. The paper looks at five jurisdictions (England and Wales, Canada, the United States, Australia, and New Zealand), all of which have given greater priority than Scotland to mediation within their family justice system and gives us some context for our own work on family justice.

The next stage of the Enabling Access to Justice Project will take the form of a family law workstream (Project 3.5) which will build on the work carried out under Project 3.4 (ADR). This will focus on the key question for publicly funded family justice which is whether it helps or hinders the achievement of outcomes for children that the Scottish Government is seeking through the Early Years Framework, GIRFEC and the Children and Young People (Scotland) Bill.

Jan Marshall, Deputy Director, Civil Law and Legal System Division, Scottish Government

Lindsay Montgomery, Chief Executive, Scottish Legal Aid Board

Executive summary

1. Alternative Dispute Resolution (ADR) is any means of resolving a dispute outside formal litigation. This report is a review of the literature on ADR in five jurisdictions besides Scotland. It looks, in particular, at how each has formally institutionalised ADR into family law and to what extent ADR has been effective.[[1]](#footnote-1)
2. The most common forms of ADR are evaluated: mediation, arbitration, collaborative law, and early neutral evaluation.[[2]](#footnote-2) Effectiveness is measured by traditional indicators: settlement rates, party satisfaction, cost savings, and time to disposition. The five jurisdictions are: England and Wales, Canada, the United States, Australia, and New Zealand.
3. There are certain problems common to most if not all empirical studies of ADR that should be kept in mind when considering the findings of this paper. Studies of ADR are very often based on limited data (because ADR conferences are nearly always held in private); are sometimes conceptually muddled (they do not always compare like with like); often use self-selecting samples (as opposed to randomised samples);[[3]](#footnote-3) and typically compare ADR with litigation (a premise that is flawed because in reality only a small fraction of all civil cases filed proceed to trial).[[4]](#footnote-4) Because there is no true baseline to measure from and no way to submit the same dispute to two ‘treatments’, one controlled and the other not, most cases are not directly comparable, which means it is difficult to assess real differences in effectiveness.[[5]](#footnote-5) Even so, the best available studies were selected for this review.
4. The first part of this report looks at how ADR has been formally institutionalised by statute, rule and other means, in the five chosen jurisdictions. The second part assesses the effect of ADR on court caseloads and the phenomenon of the ‘vanishing trial’. The third, fourth, fifth and sixth parts review the empirical research on the four main forms of ADR, evaluating their effectiveness.
5. The main findings of the report are as follows:
6. ADR (usually mediation) is mandatory for some types of civil cases in Australia, England and Wales, and many parts of the US and Canada, but is voluntary in most of Europe. Some programs make mediation compulsory for a defined class (e.g., Ontario); some give discretion over referrals to a judge (Florida); some make mediation a condition of legal aid (England); some use sanctions for unreasonable non-compliance (England); others make mediation mandatory if one party elects to mediate (British Columbia). Australia has invested heavily in Family Relationship Centres, which are intended to replace court as the point of entry into the family justice system. In New Zealand, mediation conferences are commonly chaired by judges.
7. ADR has grown at the same time that the rate of civil trials has decreased, but no study has been able to decisively credit the former with the latter.
8. Mediation is the most common form of ADR and the best researched. The majority of studies reviewed here compared mediation favourably with trial. Settlement rates varied, but generally were above 40 per cent and in some studies reached 80 per cent. Satisfaction was generally very high, the chief exception being those cases that involved violence. Mediated cases generally cost less (but only if mediation was successful) and took significantly fewer days.
9. Empirical studies of arbitration, the second most common form of ADR, are as a rule limited to employment disputes in the US. These studies produced mixed findings. Compared with litigation, arbitration generally led to higher win rates for employees and resolved in significantly shorter time (as much as half the time). Two studies found median monetary awards were lower after arbitration; one study found awards were higher.
10. Early neutral evaluation (ENE), an amalgam of mediation and non-binding arbitration, has not been subject to rigorous empirical testing, but a few published studies reported positive results. ENE sample groups took fewer days to complete than comparator groups, and reported high levels of satisfaction. Settlements rates were inconsistent, but settlement is not the primary purpose of ENE.
11. The defining principal of collaborative law is the ‘disqualification agreement’, in which lawyers must agree to withdraw if their clients fail to settle and instead proceed to court. A few published studies of collaborative law suggested that clients typically came from a wealthy demographic and that collaborative settlements were cheaper and speedier. The settlement rate was very high (over 80 per cent in all studies) and satisfaction levels were high.

Institutionalising ADR

1. This part of the report considers the trend towards institutionalising ADR in each of the five chosen jurisdictions, using specific examples. ‘Institutionalising’ here refers to the means by which each country has progressed beyond the pioneering stage of developing ADR programs, to the stage of formally incorporating ADR into the civil justice system—by statute, by rule, or by other means, such as the implementation of minimum professional standards. The literature covered here typically refers to mediation but does not necessarily exclude other forms of ADR. Before reviewing each jurisdiction, one of the most controversial issues of the institutionalisation of ADR is discussed, namely: to what extent should parties be compelled by the court to resort to alternatives to trial.

Voluntary vs. mandatory

1. In Australia and many parts of the US and Canada, mediation is compulsory for separating couples who have disputes over the custody of children. But in most European countries, mediation is voluntary.[[6]](#footnote-6) (Recommendation R (98) 1 of the Council of Europe says that ‘mediation should not, in principle, be compulsory’.)[[7]](#footnote-7) McAdoo *et al*. argue that voluntary mediation programs are rarely well used, whereas mandatory mediation programs attract much higher rates of use.[[8]](#footnote-8) They add that, according to research, mandatory referral does not appear to adversely affect litigants perceptions of procedural justice or settlement rates. Bullock and Gallagher report that voluntary mediation programs tend not to be cost-effective because they generate only small caseloads.[[9]](#footnote-9) Genn, however, argues that cases are more likely to settle at mediation if the parties enter the process voluntarily rather than under duress.[[10]](#footnote-10)
2. There are shades between ‘voluntary’ and ‘mandatory’. ADR may be made mandatory by a statutory or court rule for all cases in a defined class; made mandatory by an order issued at the court’s discretion in cases thought likely to benefit; made mandatory by one party electing for ADR; or made a condition of procuring legal aid. ADR may also be voluntary but encouraged by a court backed up with sanctions for unreasonable refusal; or entirely voluntary, with the role of the court reduced to the provision of information and facilities. Quek positions the degree to which different jurisdictions make mediation compulsory along a scale from one to five; one being the most liberal regime, five being strictest.[[11]](#footnote-11)

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| **Scale and description** | **Example** |
| 1. Categorical or discretionary referral with no sanctions[[12]](#footnote-12). | In England, an automatic referral to mediation pilot scheme at the Central London County Court was attempted in 2004–2005. Although cases were automatically referred to mediation, disputing parties had the option to object. In the event, 81 per cent of those referred did object and the scheme was abandoned. |
| 1. Requirement to attend mediation orientation session or case conference | In Virginia, US, parties are required to attend mediation orientation sessions before deciding whether or not to attempt mediation. |
| 1. Soft sanctions | English courts actively encourage ADR, and take into account a party’s conduct—including any unreasonable refusal of ADR or uncooperativeness during the ADR process—when determining the proper order of costs. Parties seeking legal aid must first attend a meeting to determine whether mediation is appropriate. |
| 1. Opt-out scheme | The mandatory mediation program in Ontario, Canada, refers all civil cases, except family cases, to mediation unless the court exempts a party by order. |
| 1. No exemptions | Courts in some Australian states, such as South Australia, Victoria and New South Wales, are empowered by legislation to refer parties to mediation with or without their consent. |

Canada

1. The nature of Canada’s constitution means that dispute resolution initiatives are organised by province. Although some statutes, such as the Divorce Act 1985*,* are enacted by the federal government and apply nationwide, the Supreme Court (also known as the Superior Court or Court of Queen’s Bench) of each province has jurisdiction over most disputes, including divorce.[[13]](#footnote-13) Five provinces have introduced laws with respect to mediation, each of them different.
2. In 1999, Ontario introduced mandatory mediation (‘Rule 24.1’ of the Civil Procedure Rules) for civil, non-family actions, with a provision for the parties to opt-out of filing a motion. Parties in all cases had to undergo mediation within 90 days of filing the first defence. Parties in standard cases could get an extension of 60 days, but all other extensions had to be obtained through formal court orders. After a two-year independent evaluation—which found that although lawyers and litigants initially disliked being compelled to mediate, they soon began to accept its results—mandatory mediation became a permanent fixture of Ontario’s civil justice system, in 2001.[[14]](#footnote-14) The program currently operates in Toronto, Ottawa and Windsor.
3. Since 1999, Family Mediation and Information Services have been set up across Ontario in 17 sites of the Family Court branch of the Superior Court of Justice. In 2011, the service was expanded across the province. Onsite court mediation services are available for parties on a given days court list to deal with a narrow range of issues, and are free of charge. For parties with more complex issues or who require more than one session, off-site mediation services are available for a fee linked to income and number of dependants. Off-site services are available to all clients regardless of whether they filed a court application.[[15]](#footnote-15)
4. Under British Columbia’s Family Law Act 2013, one party in a family law proceeding at the Supreme Court in may compel the other party to enter mediation under ‘Notice to Mediate’ regulations. The notice can be used at any time between 90 days after filing and 90 days before the date of trial.
5. A number of professional organisations in Canada have drafted minimum standards for ADR practitioners.[[16]](#footnote-16) In 1995, Family Mediation Canada published both Practice Standards, Training and Certification of Competent Family Mediators, and Standards for FMC Endorsement of Family Mediation Training Programs. The ADR Institute of Canada Inc., which formed in 2000, developed its National Mediation and Arbitration Rules, and Code of Conduct for Mediators and Arbitrators.The nature of Canada’s constitution means that dispute resolution initiatives are organised by province. Although some statutes, such as the Divorce Act 1985, are enacted by the federal government and apply nationwide, the Supreme Court (also known as the Superior Court or Court of Queen’s Bench) of each province has jurisdiction over most disputes, including divorce. Five provinces have introduced laws with respect to mediation, each of them different.

England and Wales

1. Mediation did not become established in England and Wales until prompted by Lord Woolf’s 1996 ‘Access to Justice’ report. Although he stopped short of making mediation compulsory,[[17]](#footnote-17) Woolf recommended that litigation be commenced only as a last resort and that mediation be used before the issue of court proceedings in order to attempt early settlement.[[18]](#footnote-18)
2. The Family Law Act 1996 decreed that a person could not be granted legal aid for representation for proceedings relating to family matters unless they had attended a meeting with a mediator or their case had been assessed by a mediator who deemed it unsuitable for mediation.[[19]](#footnote-19)
3. Woolf’s report was followed by the introduction, in 1999, of the Civil Procedure Rules, which placed a duty on the courts to encourage the use of ADR, with cost sanctions for litigants who failed to comply. The court could take into account the party’s conduct (including unreasonable refusal of ADR or uncooperativeness during the ADR process) in determining the proper costs order. Several English cases have since seen cost sanctions imposed because a party unreasonably refused to consent to participate in mediation.[[20]](#footnote-20)
4. In 2011, a fundamental review of family justice in England and Wales reaffirmed that mediation was the preferred approach for dealing with disputes following relationship breakdown, and that judges should retain the power to order parties to attend a mediation information session, and make cost orders where one party behaved unreasonably.[[21]](#footnote-21) The Government’s response, the Children and Families Bill,was read in the House of Commons in February, 2013. It would require parents in dispute to consider mediation as a means to settlement by making attendance at a mediation information and assessment meeting a statutory prerequisite to starting court proceedings.
5. In 1999, the Lord Chancellor’s department’s discussion paper on ADR suggested criteria for approving ADR schemes, including training, quality control (monitoring the performance of neutrals), transparency (including complaints) and access. The paper supported self-regulation and noted that codes of practice had been developed by several ADR associations.[[22]](#footnote-22) For instance, the Family Mediation Council’s (the members of which are the national family mediation organisations in England and Wales) published a Code of Practice for Family Mediators, in 2010.

The United States

1. In 1990, Congress passed the Civil Justice Reform Act, which encouraged federal district courts to develop programs using ADR. The Alternative Dispute Resolution Act of 1998 required each of the 94 districts in the US to ‘authorise’ the use of ADR in civil actions. Each district was empowered to design its own ADR program, but was required to adopt procedures for making neutral facilitators available to all parties.[[23]](#footnote-23) In 2001, the Uniform Mediation Act was enacted, defining the limits of mediation confidentiality in legal proceedings and protecting communications made during the mediation process. By 2011, more than one-third of all federal trial courts had authorised multiple forms of ADR, and all federal courts had authorised some form of ADR. The program of each jurisdiction evolved in a slightly different way. Some states created state offices to administer court-annexed ADR; others developed state-wide programs without a central administrative authority; others left it to local jurisdictions to decide whether to participate in such programs.[[24]](#footnote-24)
2. The first US state to make mediation compulsory for separating couples with custody disputes was California, in 1981. By 2001, mediation had been mandated in 13 states and many others had statutes giving judges discretionary power to order mediation. In these mandatory programs, parents had to attend at least one mediation session, which was provided free of charge. Subsequent legislation provided for some opt-outs, separate sessions and special assessments for cases where domestic violence was alleged.[[25]](#footnote-25)
3. Florida has the most extensive court mediation and ADR system in the US. In 1987, trial judges were given the authority to refer any civil cases to mediation or arbitration ‘if the judge determined the action to be of such a nature that mediation could be of benefit to the litigants or the court’. By 2003, Florida had 11 citizen dispute settlement centres, 41 country mediation programs covering all circuits in the state, 23 family mediation programs, 11 circuit civil programs, 22 dependency mediation programs, an appellate mediation program, and several court-connected arbitration programs.[[26]](#footnote-26) It has been estimated that more than 100,000 cases in Florida are diverted from court process to mediation each year. Under the Florida Rules of Civil Procedure, the first mediation session must take place within 60 days of the court referral, but parties are able to request that mediation be dispensed with by filing a motion within 15 days of referral. The number of applications for exclusion from mandatory mediation has been relatively low. Florida has been successful, Quek argues, because its programs ensure that the parties are given flexibility and autonomy over many aspects of the mediation process, and clarity over the requirements for opting out and for fulfilment of the obligation to mediate.[[27]](#footnote-27)
4. In Ohio, local courts have authority to write local rules to manage their courts according their own discretion. In order to encourage judges to provide dispute resolution services and recommend these services to litigants, the Supreme Court of Ohio, which created a Dispute Resolution Section in 1992, adopted a two-pronged approach. First, it sought to educate local judges and lawyers on the benefits of mediation. Under the lawyer’s creed, lawyers in Ohio have a duty to inform clients about alternative methods to resolve disputes, so the Supreme Court provided training events to help them meet their obligation. Second, it offered resources to the courts, such as technical assistance with program development, budgets, processes, forms and marketing tools. The statewide initiative has been successful at establishing ADR: around two hundred local courts have mediation rules in place. Each local court may decide how it provides mediation services. A large proportion of (but not all) civil (including family) and small claims cases are automatically-referred by local courts before filing. A case is more likely to be automatically-referred when children involved. Cases filed in municipal court that meet pre-determined criteria may be referred to mediation at any point before final judgment. When a post-filed case is referred by the court, either party may opt out of mediation by filing a motion. Conversely, if a case is not referred by the court, either party may request mediation by filing a motion. Cases with a history of domestic abuse are referred by the court to mediation, but only if there are procedures in place to ensure the safety of everyone involved.  [[28]](#footnote-28)
5. The first set of model standards of conduct for mediators in the US was prepared, in 1995, and revised ten years later, by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution. At the state level, Florida again led the way in creating formal mediator standards. In 1989, the state legislature extended absolute judicial immunity to court-appointed mediators. In 1992, the Supreme Court endorsed the Rules for Certified and Court-Appointed Mediators, which consisted of three parts. The first part comprised the qualifications for certification, the second the standards of conduct for mediators, and the third the rules of discipline. Florida was also the first state to adopt a procedure to enforce such standards, including a mediator qualifications board and a complaints committee. Thus, the Florida model both strikes down private civil remedies against mediators and places into effect a structured system of professional regulation.[[29]](#footnote-29)

Australia

1. The Family Law Reform Act 1995, which became law in Australia in 1996, encouraged parents to use mediation as a first resort for resolving post-separation disputes over the care of children. A decade later, in July 2006, the law was changed, transforming this encouragement into a pre-litigation requirement. Parents in conflict over arrangements for their children are now required to make a ‘genuine effort’ to resolve their dispute through a ‘family dispute resolution’ (FDR) process, and produce a certificate to this effect, before the matter may be listed for trial. Accredited FDR practitioners are authorised to issue certificates indicating whether FDR is appropriate in a given case, or whether a genuine effort has been made to resolve the matter. Exemptions can be approved where there is a history or risk of family violence or child abuse or the matter is urgent.[[30]](#footnote-30)
2. The 2006 amendments to family law also provided for the creation nationwide of 65 non-governmental Family Relationship Centres (FRCs), which, as the point of entry to the family justice system, are intended to divert families away from the courts by providing inexpensive FDR services. FRCs initially excluded lawyers, but that policy has been partially reversed: lawyers were reengaged so that family members would not be disadvantaged by lack of legal knowledge. The first three hours of mediation at FRCs are free, after which a sliding scale of fees applies according to the income of the clients. Exemption from fees for mediation exists at FRCs in a number of situations; for example, when the client is a holder of a health care or pensioner concession card or when the client is experiencing financial hardship. By 2010, $400m had been spent on these reforms to community mediation services over the first four years, of which $200m was spent on FRCs and $4m on legal assistance services to partner the FRCs.[[31]](#footnote-31)
3. In 2008, the National Mediator Accreditation System (NMAS) was instituted. The NMAS is an industry-based scheme that relies on voluntary compliance by mediator organisations. These professional bodies agree to accredit mediators in accordance with the requisite standards, which articulate minimum training and competencies. An independent industry body known as the Mediator Standards Board is responsible for developing and maintaining the NMAS.[[32]](#footnote-32)In 1990, Congress

New Zealand

1. New Zealand’s Family Court was established in 1980. Under the Family Proceedings Act 1980, either party in a family dispute could—usually after first attempting counselling—ask for the matter to be referred to a mediation conference presided over by a family judge. In 2003, the Law Commission recommended that judges be replaced by qualified mediators.[[33]](#footnote-33) After a successful Government-backed non-judge-led mediation pilot, the Family Court Matters Act was passed, allowing privately-trained, accredited mediators to undertake mediation in family courts. However, judges continued to chair mediation conferences, which could be convened when a parenting, separation or maintenance order was filed or when the Family Court decided that a child needed care or protection.[[34]](#footnote-34) Mediation conferences in family disputes are not mandatory.[[35]](#footnote-35) Either a judge or a party may ask the registrar to convene a mediation conference. Mediations are usually scheduled if settlement is likely. Conferences usually take place take on court premises, but not in a courtroom. A judge at a mediation conference can make orders only by consent: if no agreement is reached the matter proceeds to a defended hearing before a different judge.The Family Law Reform Act 1995, which became law in Australia in 1996, encouraged

ADR and court caseloads

1. It is generally acknowledged that the use of ADR has grown markedly in the last thirty years in jurisdictions such as the US, England and Wales, Canada, Australia and New Zealand. Over the same period, the rate of civil trials has fallen. Galanter observes a ‘vanishing trial’ phenomenon: the percentage of civil disputes in the US terminated by either a bench or a jury trial fell from 11.5 per cent in 1962 to 1.8 per cent in 2002.[[36]](#footnote-36)
2. Is the growth of ADR responsible for the ‘vanishing trial’? Although some desultorystatistics on the effect of ADR on court caseloads may be extracted from a handful of studies, the research in question tends to be small in scale and lacks the proper (i.e., randomised) research design that would definitively answer the question of causation.[[37]](#footnote-37) Moreover, the data required to make general claims about correlation are largely unavailable.[[38]](#footnote-38) Part of the problem is that, in many cases, ADR is pursued without filing a case in court, but there is no telling how many because data held by private ADR firms are closely guarded. Still, a study by the RAND Institute of Civil Justice on civil ‘money disputes’ (excluding family cases) in Los Angeles estimated that, in 1993, the entire ‘private’ caseload (23,672 cases)—which between 1988 and 1993 was growing at 15 per cent a year—was only about one-twentieth of the caseload of the public courts.[[39]](#footnote-39)
3. The most visible ADR occurs after a case is filed in court. A study of a multi-option ADR program in the Northern District of California estimated that 15 per cent of the total civil caseload was referred to ADR.[[40]](#footnote-40) A broader and more recent study calculated that, in 49 US districts in the twelve-month period ending 30 June, 2011, 28,267 civil cases were referred to ADR (of which 63 per cent went to mediation, ten per cent to arbitration, and five per cent to early neutral evaluation). ADR referrals again represented 15 per cent of all filed cases.[[41]](#footnote-41) But because courts are not required to record the total number of cases disposed of by ADR, we can neither calculate a settlement rate nor compute the impact of ADR on court caseloads.[[42]](#footnote-42)
4. A study of the impact of the introduction, in 1999, of the Civil Procedure Rules in England and Wales (see above) did inspect settlement rates. Two years after the rules were introduced, the number of commercial disputes referred to mediation increased by 141 per cent. Correspondingly, the proportion in ‘fast track’ cases of settlements or withdrawals before the hearing day rose from 50 per cent to 70 per cent, while the proportion heard fell from 33 per cent to 23 per cent.[[43]](#footnote-43) But direct causation cannot be inferred from these findings (which were not tested by statistical correlations) because the Civil Procedure Rules do not relate exclusively to ADR.
5. An evaluation by the Australian Institute of Family Studies found total court filings in children’s matters had declined since Australia’s family law reforms in 2006. The number of applications for final orders involving children decreased from 18,752 in 2005/06 to 14,549 in 2008/09. Again, the researchers did not statistically test the relationship.

Mediation

1. The most common form of ADR is mediation. So great in many courts is the emphasis on mediation that some authors use the terms ADR and mediation interchangeably.[[44]](#footnote-44) Mediation can be used in disputes relating to family, contract or consumer law, among others. It is a process in which a third party works to bring disputing parties to voluntary settlement. Some mediators meet with both parties together; other mediators meet with each separately, acting as a go-between.
2. Family mediation research is considerably farther developed than research on other forms of ADR.[[45]](#footnote-45) A number of studies comparing mediation with adversarial processes have found that mediation results in faster settlement, lower costs, greater levels of satisfaction, improved compliance with a settlement, and other benefits in some contexts.[[46]](#footnote-46) However, some writers argue that the benefits of mediation are over-stated and have not been subject to rigorous empirical scrutiny. Others argue that the effectiveness of mediation rests on the nature of the program and the predispositions of participants.[[47]](#footnote-47)

Settlement rates

1. Kelly reviewed nine different family studies. She concluded that ‘using a variety of methodologies, measures, and samples, these reports suggest strong support for the use of mediation in family disputes for custody and access, child protection and comprehensive divorce cases’. Settlement rates ranged between 50 and 90 per cent, and client satisfaction was high in all studies.[[48]](#footnote-48)
2. The Californian Centre for Families, Children and the Courts initiated, in 1991, a series of studies of mandatory mediation in child custody cases. (Because mediation was mandatory, there was no litigation comparison group.) In a snapshot study of 1,388 cases in 1991, 55 per cent of families reached agreement. One quarter of those who did not settle were scheduled for further mediation.[[49]](#footnote-49)
3. An evaluation of the mandatory mediation program in Ontario found that full settlement rates for mandatory mediation in Ottawa and Windsor increased from approximately 41 per cent in 2007/08 to 46 per cent in 2011/12. Full and partial settlement rates for mandatory mediation matters have consistently been at 45 per cent or higher since tracking began in 2003.[[50]](#footnote-50) In 2012/13, the overall mediation settlement rate for family service users (combined full and partial agreements) for onsite and offsite mediation was 78 per cent.[[51]](#footnote-51)
4. Inspired by Ontario’s program, an automatic referral to mediation pilot was established in the Central London County Court in 2004–2005. Although there was automatic referral of cases for mediation, the parties were given almost unrestricted ability to object to participating. Research by Genn et al. found that the settlement rate of mediated cases fell from 69 per cent among cases referred in May 2004, to 38 per cent for cases referred in March 2005.[[52]](#footnote-52) The results were almost the exact opposite of those of Ontario. The Canadians experienced only a handful of cases in which the parties opted out of the mandatory mediation scheme, but 81 per cent of those referred to mediation (the majority being personal injury cases) in the London pilot objected to the referral.[[53]](#footnote-53) A decision that the pilot had been largely unsuccessful was in effect taken after the experience of the first six months, but the scheme was allowed to run for a full year before being abandoned.[[54]](#footnote-54)
5. Research was carried out on the Tenth Judicial District in Colorado, where family disputes were systematically referred to mediation by the court in the early stages of dissolution. Waivers to exempt parents could be obtained for domestic violence or where participation would be a hardship. Parents reached full agreement in 39 per cent of a sample of 92 cases, and agreement on some issues in 55 per cent.[[55]](#footnote-55)
6. An evaluation of family law reform by the Australian Institute of Family Studies found that 57 per cent of separating couples reported that they reached full or partial agreement about their child after visiting either FRCs or FDR services during 2008 or 2009. [[56]](#footnote-56)
7. In a study of a family court in Virginia, US, Emery et al. selected a sample using ‘random assignment’: parents who had applied for a contested custody hearing were asked whether they would like to participate in a mediation program or a study of the court. This sampling technique, the authors claim, was crucial to attributing cause to different outcomes. Even so, their sample was small (35 mediated families and 36 litigating families).[[57]](#footnote-57) 80 per cent of the mediation group settled and 11 per cent ended up before a judge. By contrast, 72 per cent of the adversary group proceeded to court.
8. In New Zealand, a family mediation pilot was run at the North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006. In Christchurch mediation was referred by default, but the three other courts identified appropriate cases before referring them. 540 cases were offered family mediation during the pilot, of which 380 were subsequently referred to a mediator. Of the cases that entered pre-mediation, 284 proceeded to mediation, and of these, 257 were completed by the end of June 2006. Of the completed mediations, agreement was reached on all matters in 59 per cent of mediations, and on some matters in another 27 per cent.[[58]](#footnote-58)
9. Genn argues that analyses of the outcome of mediation in court-based schemes show that the readiness of parties to mediate is an important factor in settlement.[[59]](#footnote-59) However, Wissler points to two studies examining the impact of mode of referral that found no differences in the rate or size of settlement between cases that entered voluntarily and cases ordered to mediation.[[60]](#footnote-60)

Satisfaction

1. Emery *et al*. found that parents in a family court in Virginia, on average, preferred mediation to litigation. Parents were more satisfied with mediation when interviewed both six weeks after resolution and 12 years after. The authors found that, consistently, the outlying and unhappy group in their studies was fathers who continued with adversary settlement. Mothers almost always won full legal and physical custody in the adversary settlement group, but mediation gave fathers a greater voice and joint legal custody more often. In the adversary group, mothers’ and fathers’ scores were negatively correlated: the more mothers felt they won, the less fathers felt they won. In the mediation group, mothers’ and fathers’ scores were positively correlated: the more mothers felt they won, the more fathers felt they won, too.[[61]](#footnote-61)
2. In 2010, Shaw conducted a meta-analysis of five divorce mediation studies in an attempt to statistically summarise the difference between mediation and litigation. [[62]](#footnote-62) She found that, on average across all studies, the grand effect size (the difference between mediation and litigation) was 0.36—a small but moderate effect. In other words, her findings indicated that mediation outperformed litigation across many measures, including satisfaction with outcome, satisfaction with process, and overall satisfaction.[[63]](#footnote-63) Shaw concedes that several sub-variables revealed small to moderately *negative* effect sizes, which may be considered costs of mediation. Under the ‘outcome satisfaction’ variable, one study found that litigation participants were more likely than mediation participants to report that they ‘won what they wanted’. Another study reported that mediation parties were more likely to feel pressured to go along with something they did not want than were litigation parties. Still another study revealed that women who mediated received a smaller percentage of the family’s income in the divorce agreement.[[64]](#footnote-64)
3. Feminist scholars and advocates for victims of domestic violence have long argued that mediation is inherently unfair and may be dangerous for such victims.[[65]](#footnote-65) They argue that such cases ought to be adjudicated. Yet, Hunter adds, evidence from several studies shows that cases involving allegations of domestic violence are routinely sent to mediation rather than diverted to litigation. Other studies of mediation show that the issue of violence is often marginalised in the mediation process.[[66]](#footnote-66) Australian researchers found that respondents in a study of family mediation were less satisfied with many aspects of mediation if their case involved violence. During mediation, victims of violence felt intimidated, manipulated or pressured into an agreement, and were more likely to receive less than a forty per cent share of basic assets.[[67]](#footnote-67)
4. Bevan and Davis conducted a study of all cases handled by 15 family mediation services in the UK over an 18 month period. They conducted telephone interviews with 1055 individuals using mediation and lawyers, and in 646 cases also interviewed the person’s solicitor. They also conducted second interviews with 477 individuals and 310 solicitors. In all cases, one or both parties was publicly funded. They found that 82 per cent thought the mediator had been impartial; 70 per cent found mediation very/fairly helpful; 71 per cent said that they would recommend it to others in a similar situation; 59 per cent expected to be able to negotiate further changes between themselves. The researchers concluded that mediation had distinctive and positive features and ought to be supported as a separate system running in parallel to the court system.[[68]](#footnote-68)
5. An Australian Institute of Family Studies review of Australia’s 2006 family law reforms discovered high levels of satisfaction among FDR service clients, many of whom experienced high levels of conflict and had complex support needs. Still, some parents reported being pressured to reach an agreement, and the data showed that satisfaction was strongly linked to how well family dispute resolution practitioners manage questions of family dysfunction.[[69]](#footnote-69)
6. The majority of over 6,700 mothers and fathers in snapshot studies of mandatory mediation in California in 1991 and 1993 reported substantial satisfaction on sixteen aspects of the mediation process and its outcomes.[[70]](#footnote-70)
7. Client satisfaction surveys for 2012/13 indicated that 91 per cent of clients were satisfied with Family Mediation Services in Ontario.[[71]](#footnote-71)
8. In 2007, after a mediation pilot, Government researchers in New Zealand received completed survey forms from 109 parties which they supplemented with 32 interviews. 80 per cent of people said that they were well informed about the mediation beforehand; 75 per cent said that they were able to say what they wanted to during mediation, and 78 per cent said that their children’s views were quite well or very well presented.[[72]](#footnote-72)

Cost

1. In 2007, a National Audit Office (NAO) review of mediation in England and Wales estimated that the average cost of legal aid in mediated cases (£752) was less than half that for cases where mediation was not used (£1,682). The latter figure represented an additional annual cost to the taxpayer of £74m.[[73]](#footnote-73)
2. In an analysis of large-scale data from court-based mediation schemes, Genn found that mediators, parties and their lawyers believed successful mediation could save money, but it was difficult to estimate how much, because, although the baseline was always trial, the majority of cases would not proceed to trial and would not therefore incur the costs of trial. She adds that unsuccessful mediation may increase the costs for parties by an estimated £1,500–£2,000.[[74]](#footnote-74)
3. A 2004 report published by the Judicial Council of California on mandated early mediation pilot programs, as well as voluntary programs, in four superior courts. Nearly 8,000 cases were mediated in the programs during the pilot period. The data showed significant reductions in litigant costs and attorney time resulting from the pilot programs: attorney estimates indicate that during 2000 and 2001, the programs may have saved in excess of $49m in litigant costs and more than a quarter of a million attorney hours.[[75]](#footnote-75)

Time

1. Research on mediation in the Tenth Judicial District in Colorado found that the mediation group in the study had significantly fewer days (mean = 334 days) between filing and final orders than the comparison group (mean = 395).[[76]](#footnote-76)
2. The NAO’s study found mediated cases were quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases.[[77]](#footnote-77)
3. In an analysis of large-scale data from court-based mediation schemes, Genn found no evidence to suggest any difference in case lengths between mediated and non-mediated cases.[[78]](#footnote-78)
4. In a study of a family court in Virginia, US, Emery *et al*. found that parents settle their disputes in half the time when assigned to mediation compared with adversary settlement.[[79]](#footnote-79)
5. In a New Zealand Government pilot project, mediation led by specialist mediators typically took three to four hours. Further data indicated that 89 per cent of the mediations were completed in one session and only ten per cent were adjourned for review at a future date. Survey respondents said the process was faster than judge-led mediation because the participants did not have to wait for a judge to become available.[[80]](#footnote-80)

Arbitration

1. Arbitration, perhaps the oldest form of dispute resolution, is used mostly for commercial, employment and construction disputes, but can be used in family cases.[[81]](#footnote-81) Arbitration functions like a privatised court system: an expert presides and at the end of a closed hearing makes a ‘judgment’, by which before the sitting both parties agree to abide.
2. Outside the US, empirical studies of arbitration are few, mostly owing to the lack of publicly available data.[[82]](#footnote-82) Those empirical studies that have been published rely on files from individual arbitration service provider organisations such as the American Arbitration Association (AAA).[[83]](#footnote-83) Research on consumer arbitration is scarce;[[84]](#footnote-84) research on family arbitration is non-existent. The following is, therefore, a review of research on employment arbitration in the US.

Win rate[[85]](#footnote-85)

1. Eisenberg and Hill used a database of AAA employment dispute awards to compare court-tried employment cases and arbitrated employment claims. The data consisted of 297 awards from 1999 to 2000. They compared adjudicated and arbitrated outcomes, with cases divided into civil rights claims and the other non-civil rights claims and subdivided into higher pay and lower pay employee disputes. In non-civil rights disputes, higher pay employees prevailed in 50 of 77 cases (65 per cent); lower pay employees prevailed in 38 of 96 cases (40 per cent). These rates were statistically significantly different (p = .001). The authors found no evidence of a significant difference (p = .252) between higher pay arbitration outcomes and litigated outcomes.[[86]](#footnote-86) The employee success rate in state-court litigation, 57 per cent (82 of 145 cases), was similar to the 65 per cent success rate in higher pay employee arbitrations. More importantly, the employee success rate in arbitration was in fact *higher* than the employee trial win rate. Eisenberg and Hill found little evidence that arbitrated outcomes materially differ from trial outcomes for higher paid employees.[[87]](#footnote-87)
2. Using data from reports filed by the AAA pursuant to California Code requirements, Colvin analysed 1,213 arbitration cases decided by an award after a hearing, from 2003 to 2007. He found that the employee win rate among the cases was 21.4 per cent, which was lower than both employee win rates reported in previous employment arbitration studies and win rates for litigants in court.[[88]](#footnote-88) However, he admits that the characteristics of cases in arbitration may differ systematically from those in litigation.
3. In 2003, Delikat and Kleiner compared outcome and timing factors in 125 employment discrimination cases filed in the Southern District of New York with those in 186 arbitrations involving employment disputes in the securities industry. They found a 46 per cent employee win rate, which compared favourably to employee win rates (33–36 per cent) found in federal court employment discrimination trials.[[89]](#footnote-89)
4. Bingham’s study examined a 270-case sample of commercial and employment arbitration awards decided between 1993 and 1994. She found that employers won statistically significantly (p < .001) more often when they were ‘repeat players’. Moreover, even when they won, employees recovered less of their claims when arbitrating against repeat player employers. When they won against repeat player employers, employees recovered only 11 per cent of their claims. When they won in cases involving one-shot employers, they recovered 48 per cent of their claims.[[90]](#footnote-90)
5. Howard reported that, in 1992–1994, plaintiffs won 68 per cent of cases in AAA arbitrations and 48 per cent of securities industry arbitration cases, but only 28 per cent of cases adjudicated in court.[[91]](#footnote-91)
6. A study by the AAA indicated that employees won 73 per cent of AAA employment arbitrations in 1992, and won significantly more cases in arbitration than litigation from 1993 to 1995. However, the AAA reported that in the 310 consumer arbitrations it administered from January to August 2007, consumers prevailed in 48 per cent of the cases they filed as claimants, while businesses prevailed in 74 per cent of the cases they filed.[[92]](#footnote-92)
7. In 2000, the National Arbitration Forum (NAF) reported that individual plaintiffs won 71 per cent of the claims brought against corporate entities before the NAF. In contrast, between 1987 and 1994, individuals won less than 55 per cent of claims brought in federal court under original diversity jurisdiction, and only about 30 per cent of claims brought under removal jurisdiction.[[93]](#footnote-93)
8. In his study of 272 civil rights cases and 117 non-civil rights cases in California courts from 1998 and 1999, Oppenheimer found employee win rates of 50 per cent for the former and 59 per cent for the latter.[[94]](#footnote-94)

Time

1. Eisenberg and Hill found that out of 172 non-civil rights cases resulting in an award, the mean time to issuance of an award was 270 days. In the 42 civil rights cases that went to an award, the average time to disposition was 276 days. They compared these data with reported federal court data from 1999–2000 and state court data from 1996. This showed that the average time to trial of 170 non-civil rights cases in state was 723 days. For the 163 civil rights cases in state court, the average disposition time was 709 days, and for the 1,430 civil rights cases in federal court, it was 818 days. Eisenberg and Hill conclude that, by any measure, arbitration resolved more quickly than litigation. Mean and median times in arbitration ranged from about seven to thirteen months. Mean and median litigation times, in both federal and state courts, all exceeded twenty months.[[95]](#footnote-95)
2. Colvin reports that cases typically took around two to two and a half years to reach trial in federal and state courts. The mean time to disposition for an employment arbitration case that resulted in an award was 361.5 days. In other words, the time taken to obtain a resolution after a hearing was about half as long in arbitration as in litigation. [[96]](#footnote-96)
3. Delikat and Kleiner’s study found that arbitrated disputes were resolved in eight and a half fewer months than in litigated disputes were.[[97]](#footnote-97)

Award

1. Eisenberg and Hill found that, in both civil and non-civil cases, median awards exceeded $65,000. They found no statistically significant differences between arbitration and litigation in employee win rates or in median or mean award levels for higher paid employees.[[98]](#footnote-98)
2. Colvin found in cases won by employees, the median award amount was $36,500 and the mean was $109,858, both of which were substantially lower than award amounts reported in employment litigation.[[99]](#footnote-99)
3. Delikat and Kleiner found that the median monetary award was nearly $4,500 higher in arbitration than in court.[[100]](#footnote-100)

Early neutral evaluation

1. Early neutral evaluation (ENE), which is like a mixture of mediation and nonbinding arbitration, is a nonbinding form of ADR in which a neutral third party (usually a lawyer with expertise in the substantive legal area of a suit) offers disputing parties a confidential opinion on the strengths and weaknesses of each side’s argument, the likely outcome of the case, and the likely awards.[[101]](#footnote-101) ENE is promoted as a cost-effective substitute for formal discovery and pretrial motions. Although settlement is not the primary goal of ENE, the process can lead to settlement.
2. ENE was first used in an experimental federal court-organised program by the Northern District of California, in 1983.[[102]](#footnote-102) It has since been adopted in a number of states for a variety of civil disputes, including contract, product liability, employment, personal injury cases, and also for settling financial issues in divorce cases. In some programs, such as the program in the Southern District of California, parties in all eligible civil cases must go through ENE, meeting with a magistrate judge to discuss the case and the court’s ADR options, but no state currently mandates court-annexed ENE for divorce cases. Unlike mediation, ENE has been only sparsely empirically assessed for its value in reducing case processing time or satisfying users. Only one of the studies below relates to divorce cases.[[103]](#footnote-103)

Empirical studies

1. In a congress-authorised report, known as the RAND studies, Kakalik *et al*. evaluated two ENE programs over a four year period, from 1991 to 1995. The first was in the Southern District of California. In 1995, the authors surveyed lawyers and litigants who had participated in ENE, and compared the findings with a comparison group surveyed in 1991. They found that median time to termination was 316 days for the ENE sample group compared with 388 days for the comparison group. (Although this finding was close to being statistically significant, Kakalik *et al*. note that other policy changes during the period may account for the difference). 84 per cent of lawyers in the ENE sample were satisfied with the management of the program (compared with 71 per cent in 1991, a statistically significant difference) and 73 per cent of ENE litigants were satisfied (compared with 66 per cent in 1991). The settlement rate was 36 per cent.[[104]](#footnote-104)
2. The second study was of the Eastern District of New York (which included 227 cases from 1992 to 1995). Kakalik *et al*. found that the comparison group took 614 days to complete, but the ENE group to 561 days. The finding was not statistically significant, but the authors note that their sample included both early and later neutral evaluations in the sample, which may have made the cases take longer. They found little difference in cost or satisfaction levels. The median dollar outcome for cases in the NE sample was $6,000 higher than it was in the comparison group. The settlement rate was 66 per cent.[[105]](#footnote-105)
3. A four-year qualitative study conducted in the Northern District of California between 1988 and 1992 evaluated the district’s mandatory ENE program for civil (but not family) cases. Two thirds of those who participated were satisfied with the program and believed it was worth the resources. Lawyers found ENE led to settlements that saved their clients an average of ten times the cost of an ENE session.[[106]](#footnote-106)
4. In 2002, Hennepin County Family Court Services, in conjunction with the Minnesota Fourth Judicial District Family Court, introduced ENE for child custody and parenting time cases. The fees for the program were based on income or, for those parties who were represented, on the hourly rate of the attorney. Research on the first two years of the program found ENE was successful in promoting settlements. The study included all 349 ENE cases completed in the program’s first two years. Of these, 51 per cent reached full settlement, and another 12 per cent reached partial settlement. More recent estimates suggested a 65 to 70 per cent success rate.[[107]](#footnote-107) The court did not collect evaluation data on client satisfaction or on how the ENE process affected the court system.[[108]](#footnote-108)

Collaborative law

1. Collaborative law, which was first introduced, in Minneapolis, US, in 1990, is a form of ADR used mostly in divorce cases.[[109]](#footnote-109) In this method the two parties and each of their lawyers meet together in a four-way conference, seeking to negotiate a fair settlement.[[110]](#footnote-110) The defining principal of collaborative practice is the ‘disqualification agreement’: from the outset both lawyers must agree to withdraw if their clients fail to settle and instead proceed to court. This rule is designed to give lawyers the freedom to concentrate on the interests of their clients and on settlement rather than on preparing for trial. In theory, then, collaborative law offers the best of both the legal route and ADR: strong advocacy *and* collaborative negotiation controlled by the divorcing parties.
2. Collaborative law is now regularly practiced across the US, Canada, Australia and Europe (including England). Eight American states—Alabama, Hawaii, Nevada, Ohio, Texas, Washington, D.C., Washington state and Utah—have, since 2009, enacted into law the Uniform Collaborative Law Rules and Act, which is also pending enactment in a number of other states. The Act provides an ‘ethical infrastructure’ for collaborative practice, including basic definitions, minimum requirements for the participation agreement, disqualification provisions, and confidentiality and evidentiary privileges.[[111]](#footnote-111)
3. Supporters claim that, compared with traditional litigation, collaborative law encourages more open communication, more creative solutions, less competition, less polarisation in the stances of both parties, stronger post-divorce relationships, and kinder effects on children. Collaborative law is also contrasted favourably with mediation, which, some argue, may disadvantage women because they are usually in a weaker economic position than their spouse. Tesler argues, mediation is appropriate only for a very limited group of ‘high-functioning, low conflict’ parties, whereas collaborative law is appropriate for nearly all divorcing couples excluding those who are so low-functioning they require adjudication.[[112]](#footnote-112)
4. But commentators discourage collaborative law divorces for couples with a history of domestic violence or other abuse. Critics also worry about the compatibility of collaborative law with the lawyer’s duty of loyalty to and zealous representation of his or her client. Others argue that an unintended consequence of the disqualification agreement is that it may incur more cost to the parties if they fail to settle—because they are forced to hire new counsel in order to proceed to court— than it would have had they skipped collaborative negotiations altogether.[[113]](#footnote-113)
5. Empirical research on the effects of collaborative law on post-divorce families is scarce and imperfect.[[114]](#footnote-114) Most studies rely on small, non-random samples for their data, and readers should be cautious about how far these findings may be generalised. Below are the summarised findings of several studies, categorised according to what each found about who uses collaborative law, how much it costs, how long it takes to settle, how often parties settle successfully successful, and how satisfied parties are with the process.

Client demographics

1. In 2003, Schwab surveyed collaborative lawyers and their most recent clients, from eight well-established local practice groups, in seven states in the US. He received at least partial responses from 71 lawyers and 25 clients. He found that collaborative clients were in general white, middle-aged, well-educated and affluent. The average age was 49 years-old, and ranged from 34 to 69 years-old. 84 per cent had completed a four-year college degree and 32 per cent held either a masters’ degree or a doctorate. 84 per cent reported an annual pre-divorce combined household income greater than $100,000; 40 per cent of clients surveyed reported household incomes greater than $200,000. All clients were white.[[115]](#footnote-115)
2. The International Academy of Collaborative Professionals (IACP), an international community of legal, mental health and financial professionals promoting collaborative practice, conducted a survey of it members, from October, 2006, to July, 2010. 933 cases (almost 90 per cent of which came from the US) were included in the survey. The IACP found that 56 per cent had marital estates worth between $500,000 and $2m. Only five per cent of all cases featured estates valued at less than $50,000. 78 per cent of clients held a four-year college degree and 30 per cent held a postgraduate degree.[[116]](#footnote-116)
3. In a 2008 study of family lawyers in England and Wales, Sefton found that 81 per cent of clients were aged 35–54 years-old and 11 per cent were 55–64 years-old. 32 per cent had a first degree or equivalent and an additional 42 per cent had higher degrees. 27 per cent of parties in recently opened or completed cases had family assets worth £250,000–£500,000, 26 per cent had assets worth £500,000–£1m, and 29 per cent had assets worth over £1m.[[117]](#footnote-117)
4. Still, because in the US there is limited access to legal counsel for the poor, the relative wealth of collaborative divorce clients, Tesler argues, is no different to the relative wealth of divorce clients in general. She notes that in recent years there has been increased interest in devising programs to provide access for lower income families to collaborative divorce services.[[118]](#footnote-118) Wray argues that the wealthy demographic of clients does not mean collaborative practice is used only in high-value financial divorce cases. IACP data shows that children were involved in 84 per cent of all cases, and children subject to the legal process were involved in 62 per cent of all cases. One or more mental health professionals were used in 44 per cent of reported cases (while 48 per cent used a financial professional). Wray adds that mental health professionals are used to assist the parties with developing parenting plans and learning communication skills needed to share parenting responsibilities.[[119]](#footnote-119)

Cost

1. After an analysis of 199 divorce cases, the Boston Law Collaborative, a law firm specialising in collaborative law, reported that a litigated divorce cost $77,746, but a collaborative divorce cost $19,723. (A mediated divorce had a median cost of $6,600.)[[120]](#footnote-120)
2. Schwab’s study found that the average cost of a collaborative divorce was $8,777.[[121]](#footnote-121)
3. Wiedmer quotes estimates of typical collaborative settlement as costing between five and thirty per cent of the cost of traditional litigation.[[122]](#footnote-122)
4. ICAP Survey results showed that the average total cost for all core collaborative professionals of a collaborative case was $24,185.[[123]](#footnote-123)

Time

1. Schwab’s study suggested that the collaborative process took on average 6.3 months to reach settlement. Schwab also cited Tesler’s manual for collaborative lawyers. Tesler estimated that collaborative cases involving no complex issues with ‘high-functioning’ clients can be handled in ten to fifteen hours. Where the issues become more complex and the clients are ‘adequately functioning’, Tesler estimates attorney time ranges between fourteen to twenty five hours, while the most complex cases involving the most ‘dysfunctional’ clients involve a minimum of twenty five hours, but probably significantly more time.[[124]](#footnote-124)
2. The IACP reported that 14 per cent of all cases took less than three months, 44 per cent took less than six months, and 79 per cent took less than a year.[[125]](#footnote-125)
3. Most of the lawyers in Sefton’s study reported that collaborative practice was speedier than other forms of dispute resolution. For their most recently completed cases, 67 per cent of lawyers said collaborative practice was shorter than litigation, and 42 per cent said it was shorter than mediation. The estimated time savings of collaborative practice was up to three months in 55 per cent of cases, three to six months in 34 per cent of cases, and six to twelve months in 11 per cent of cases.[[126]](#footnote-126)

Settlement rates

1. Of the 748 cases in his sample, Schwab reported that 654 were settled, making an overall settlement rate of 87 per cent.[[127]](#footnote-127)
2. The IACP surveyed found that, of 933 collaborative cases, 86 per cent settled and 11 per cent terminated without settlement (the other two per cent were reconciled).[[128]](#footnote-128)
3. In his study of England and Wales, Sefton reported an overall settlement rate of 83 per cent for settlement of all issues. Of lawyers reporting their latest completed case, 92 per cent reported full agreement and four per cent reported partial agreement.[[129]](#footnote-129)
4. Daicoff notes that a recent survey found only ten per cent of collaborative cases terminated prior to complete settlement.[[130]](#footnote-130)

Satisfaction

1. Schwab asked clients in his study to rate their level of satisfaction with the outcome of their divorce on a scale of one (least satisfied) to five (most). Overall, satisfaction was high, averaging 4.35.[[131]](#footnote-131)
2. An IACP survey of 98 clients found that 75 per cent were satisfied with the collaborative process, 75 per cent would definitely or probably refer another person to collaborative practice, and 81 per cent considered their lawyer’s fees to be reasonable.[[132]](#footnote-132)

1. The focus of the literature review is ADR and family law, with some exceptions. For instance, arbitration, for want of studies on the family variety, is evaluated for its effectiveness in employment disputes. The reader will be alerted where data does not relate to family cases. [↑](#footnote-ref-1)
2. ADR also includes negotiation and conciliation. Negotiation is almost always attempted first to resolve a dispute. It allows the parties themselves to control the process and the solution. Conciliation is a process by which a conciliator, who is generally more interventionist than a mediator, attempts to induce parties to resolve a dispute by improving communications and providing technical assistance. [↑](#footnote-ref-2)
3. Ingleby, R., ‘Court sponsored mediation: The case against mandatory participation,’ *The Modern Law Review*, 1993, vol. 56 (3), pp441–451. [↑](#footnote-ref-3)
4. Maclean, M., Hunter, R., Wasoff, F., Ferguson, L., Bastard, B., and Ryrstedt, E., ‘Family justice in hard times: Can we learn from other jurisdictions?’ *Journal of Social Welfare & Family Law*, 2011, vol. 33 (4), p336. See also: Hunter, R., ‘Adversarial mythologies: Policy assumptions and research evidence in family law,’ *Journal of Law & Society*, vol. 30 (1), 2003, p158. Hunter adds that lawyers are not so adversarial as ADR advocates suggest. She refers to research showing that having legal representation does not inevitably result in court proceedings, that filing court proceedings does not inevitably result in protracted litigation and a judicial decision, and that a judicial decision is not always a bad thing. [↑](#footnote-ref-4)
5. Menkel-Meadow, C., ‘Empirical studies of ADR: The baseline problem of what ADR is and what it is compared to,’ Georgetown Public Law Research Paper no. 1485563, 2009, p2ff. [↑](#footnote-ref-5)
6. In March 2010, in an attempt to reduce the country’s backlog of some five million court cases, the Italian Minister of Justice issued a legislative decree requiring parties in most civil cases to first attempt resolution through mediation. The new rules were not popular with the legal community, and in 2011 a national strike led by the Italian bar association led to the closure of the courts for two days. [↑](#footnote-ref-6)
7. NAO, *Legal aid and mediation for people involved in family breakdown*, Report by the Comptroller and Auditor General, HC 256 session 2006/07, London: The Stationary Office, March, 2007, p10. [↑](#footnote-ref-7)
8. McAdoo, B., Welsh, N.A., Wissler, R.L., ‘Institutionalisation: What do empirical studies tell us about court mediation,’ *Dispute Resolution Magazine*, 2003, vol. 9, p8. [↑](#footnote-ref-8)
9. Bullock, S.G., and Gallagher, L.R., ‘Surveying the state of the mediative art: A guide to institutionalizing mediation in Louisiana,’ *Louisiana Law Review*, 1997, vol. 57, pp946–947. [↑](#footnote-ref-9)
10. Genn., H., Fenn, P., Mason, M., Lane, A., Bechai, N., Gray, L., and Vencappa, D., *Twisting arms: court referred and court linked mediation under judicial pressure,* Ministry of Justice Research Series, 1/07, May, 2007, p172ff. [↑](#footnote-ref-10)
11. Quek, D., ‘Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program,’ *Cardozo Journal of Conflict Resolution*, 2010, vol. 11, pp488–490. [↑](#footnote-ref-11)
12. *Categorical* referral applies when statutes provide that certain classes of disputes must undergo ADR; *discretionary* referral refers to judges who are given authority to refer to ADR any case they deem appropriate. [↑](#footnote-ref-12)
13. Zutter, D.L., ‘Incorporating ADR in Canadian civil litigation,’ *Bond Law Review*, 2001, vol. 13 (2), pp1–18. [↑](#footnote-ref-13)
14. Hann, R.G., and Baar, C., *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive summary and recommendations*, Ontario Ministry of the Attorney General, March, 2001. [↑](#footnote-ref-14)
15. Ministry of the Attorney General of Ontario, personal communication, 1 August, 2013. [↑](#footnote-ref-15)
16. NADRAC, *A framework for ADR standards: Report to the Commonwealth Attorney-General*, Canberra, 2001, pp45–46. [↑](#footnote-ref-16)
17. In 2011, the Ministry of Justice (MoJ) proposed to introduce automatic referral to mediation in small claims cases worth less than £5,000 (Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system,* A consultation on reforming civil justice in England and Wales: The Government response, London, Cm 8274, February, 2012). [↑](#footnote-ref-17)
18. Genn, H., ‘Civil mediation: a measured approach?’ *Journal of Social Welfare & Family Law*, 2010, vol. 32 (2), p197. [↑](#footnote-ref-18)
19. Chan, Y.-C., Chun, R.P.K., Lam, G.L.T., and Lam, S.K.S., ‘The development of family mediation services in Hong Kong: Review of an evaluation study,’ *Journal of Social Welfare & Family Law*, vol. 29 (1), 2007, pp3–16. [↑](#footnote-ref-19)
20. Quek, D., *op. cit*., p503. [↑](#footnote-ref-20)
21. Ministry of Justice, *Family justice review: Final report*, London, 2011, p23. [↑](#footnote-ref-21)
22. NADRAC, *op. cit.*, pp45–46. [↑](#footnote-ref-22)
23. Stipanowich, T.J., ‘ADR and the “vanishing trial”: The growth and impact of “Alternative Dispute Resolution”,’ *Journal of Empirical Legal Studies*, 2004, vol. 1 (3), p849. [↑](#footnote-ref-23)
24. Bullock, S.G., and Gallagher, L.R., *op. cit.,* p924. [↑](#footnote-ref-24)
25. NAO, *op. cit*., p24ff. [↑](#footnote-ref-25)
26. Stipanowich, T.J., *loc. cit*. [↑](#footnote-ref-26)
27. Quek, D., *op. cit*., pp504–507. [↑](#footnote-ref-27)
28. Hagerott, J.C., Manager, Dispute Resolution Section, Supreme Court of Ohio, personal communication, 13, 18 and 20 September, 2013. [↑](#footnote-ref-28)
29. Bullock, S.G., and Gallagher, L.R., *op. cit.*, p933, p936 and p946. [↑](#footnote-ref-29)
30. Rhoades, H., ‘Mandatory mediation of family disputes: Reflections from Australia,’ *Journal of Social Welfare & Family Law*, vol. 32 (2), 2010, p183. [↑](#footnote-ref-30)
31. Maclean *et al*., *op. cit.*, p320. [↑](#footnote-ref-31)
32. Sourdin, T., *Australian National Mediator Accreditation System: Report on project*, 2008. [↑](#footnote-ref-32)
33. Law Commission, *Dispute resolution in the Family Court*, report 82, Wellington, 2003, p76. [↑](#footnote-ref-33)
34. Dadelszen, von, P., ‘Alternative Dispute Resolution in the Family Court: Implementation, issues and a general overview,’ AMINZ, 2009. [↑](#footnote-ref-34)
35. Family Court of New Zealand, personal communication, 12 September, 2013. [↑](#footnote-ref-35)
36. Galanter, M., ‘The vanishing trial: An examination of trials and related matters in federal and state courts,’ *Journal of Empirical Legal Studies*,2004, vol. 1 (3), p514ff. In her technical study of court data, Hadfield attributes the decrease in incidences of trial not to increased settlements as a result of ADR, but to higher rates of non-trial adjudication. Hadfield argues that the data used by Galanter and others are based on a misleading dichotomy between settlement and trial. In reality, cases may be finally disposed in a number of ways: e.g., they may be abandoned by the plaintiff; they may end in a default judgment; they may be dismissed for failure to state a claim or on a motion for summary judgment. But ADR studies tend to count abandonment or a default judgment as ‘settlement’, and any adjudication as ‘trial’. In her study, Hadfield corrects the disposition codes found in court data and finds that, contrary to the presumption that the vanishing trial is evidence of the increasing role of private dispute resolution, the settlement rate may actually have been the same or lower in 2000 than it was in 1970, while the non-trial adjudication rate may have been much higher (Hadfield, G.K., ‘Where have all the trials gone? Settlements, non-trial adjudications and statistical artefacts in the changing disposition of federal civil cases,’ *Journal of Empirical Legal Studies,* 2004, vol. 1, pp705–734). [↑](#footnote-ref-36)
37. Stienstra, D., Federal Justice Centre, personal communication, 9 September, 2013. [↑](#footnote-ref-37)
38. As Stipanowich notes: ‘Ideally, the data would have included a longitudinal comparison of those kinds of cases that make up the relatively tiny percentage of court filings that result in trial, and tally the number of similar cases that were probably diverted from litigation by pre-dispute contractual agreements or post-dispute arrangements’ (Stipanowich, T.J., *op. cit*., p871). [↑](#footnote-ref-38)
39. Stipanowich, T.J., *op. cit*., p869. [↑](#footnote-ref-39)
40. Stienstra, D., Johnson, M., and Lombard, P., *A study of the five demonstration programs established under the Civil Justice Reform Act of 1990: Report to the Judicial Conference Committee on Court Administration and Case Management*, Federal Judicial Centre, 1997, p186. [↑](#footnote-ref-40)
41. Stienstra, D., *ADR in the Federal District Courts: An initial report*, Federal Judicial Centre, 2011, pp15–16. [↑](#footnote-ref-41)
42. Stienstra, D., *loc. cit.*. [↑](#footnote-ref-42)
43. The Lord Chancellor’s Department, *Emerging findings: An early evaluation of the Civil Justice Reforms*, 2001, para 4.12 and 4.3. [↑](#footnote-ref-43)
44. e.g., Quek, D., *op. cit*., p480. [↑](#footnote-ref-44)
45. Kelly, J.B., ‘Family mediation research: Is there empirical support for the field?’ *Conflict Resolution Quarterly*, vol. 22 (1–2), p29. [↑](#footnote-ref-45)
46. Salem, P., ‘The emergence of triage in family court services: The beginning of the end for mandatory mediation?’ *Family Court Review*, vol. 47 (3), 2009, pp373–374. [↑](#footnote-ref-46)
47. Stipanowich, T.J., *op. cit*., p911. [↑](#footnote-ref-47)
48. Kelly, J.B., *op. cit*., p29. [↑](#footnote-ref-48)
49. Kelly, J.B., *op. cit*., p4ff. [↑](#footnote-ref-49)
50. Hann, R.G., and Baar, C., *op. cit*.. [↑](#footnote-ref-50)
51. Ministry of the Attorney General of Ontario, personal communication, 1 August, 2013. [↑](#footnote-ref-51)
52. Genn., H., *et. al*, *op. cit*., p.ii. [↑](#footnote-ref-52)
53. Unfortunately, the launch of the scheme coincided with a judgment by the Court of Appeal in *Halsey v Milton Keynes General NHS Trust*, which ruled that the court had no power to compel parties to enter a mediation process, and that to do so might be an infringement of the right to a fair trial under Article Six of the Human Rights Act 1998. [↑](#footnote-ref-53)
54. Genn, H., *op. cit*., p199. [↑](#footnote-ref-54)
55. Kelly, J.B., *op. cit*., p9ff. [↑](#footnote-ref-55)
56. Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., *Evaluation of the 2006 family law reforms*, Australian Institute of Family Studies, 2009. [↑](#footnote-ref-56)
57. Emery, R.E., Sbarra, D., and Grover, T., ‘Divorce mediation: Research and reflections,’ *Family Court Review*, vol. 43 (1), pp22–37. [↑](#footnote-ref-57)
58. Barwick, H., and Gray, A., *Family mediation: Evaluation of the pilot*, Ministry of Justice, 2007, pp11–18. [↑](#footnote-ref-58)
59. Genn., H., *et al*., *op. cit*., p172ff. [↑](#footnote-ref-59)
60. Wissler, R.L., ‘The effectiveness of court-connected dispute resolution in civil cases,’ *Conflict Resolution Quarterly*, 2004, vol. 22 (1–2), p60. [↑](#footnote-ref-60)
61. Emery, R.E., *et al*., *op. cit*., p30. [↑](#footnote-ref-61)
62. Meta-analysis is a technique used to survey research literature. The ‘effect size’ (*d*) expresses the magnitude of difference between the treated group and the control group, and is stated in standard deviation units. Effect size allows computation of summary statistics such as the grand effect size, which indicates the overall effectiveness of an intervention across studies. A *d* value of 0.2 is considered a small effect; 0.5 a moderate effect; 0.8 a large effect (Shaw, L.A., ‘Divorce mediation outcome research: A meta-analysis,’ *Conflict Resolution Quarterly*, vol. 27 (4), 2010, pp447–467). [↑](#footnote-ref-62)
63. Shaw, L.A., *op. cit*., p460; p465. [↑](#footnote-ref-63)
64. Shaw, L.A., *op. cit*., p465. [↑](#footnote-ref-64)
65. Salem, P., *op. cit*., p372. [↑](#footnote-ref-65)
66. Greatbatch, D., and Dingwall, R., ‘The marginalisation of domestic violence in divorce mediation,’ *International Journal of Law, Policy & the Family*, 1999, vol. 13, pp174–190. [↑](#footnote-ref-66)
67. Hunter, R., *op. cit*., p158. [↑](#footnote-ref-67)
68. Bevan, G., and Davis, G., *Monitoring publicly funded family mediation: report to the legal services commission*, 2000, Legal Services Commission. [↑](#footnote-ref-68)
69. Kaspiew, R., *et al*., *op. cit*., p93; p110. [↑](#footnote-ref-69)
70. Kelly, J.B., *op. cit*., p4ff. [↑](#footnote-ref-70)
71. Ministry of the Attorney General of Ontario, personal communication, 1 August, 2013. [↑](#footnote-ref-71)
72. Barwick, H., and Gray, A., *loc. cit.* [↑](#footnote-ref-72)
73. NAO, *op. cit.*, p5. [↑](#footnote-ref-73)
74. Genn, H., *op. cit.*, p200. [↑](#footnote-ref-74)
75. Stipanowich, T.J., *op. cit*., p862ff. [↑](#footnote-ref-75)
76. Kelly, J.B., *op. cit*., p9ff. [↑](#footnote-ref-76)
77. NAO, *op. cit.*, p5. [↑](#footnote-ref-77)
78. Genn, H., *op. cit.*, p200. [↑](#footnote-ref-78)
79. Emery, R.E., *et al*., *op. cit*., p30. [↑](#footnote-ref-79)
80. Barwick, H., and Gray, A., *loc. cit.* [↑](#footnote-ref-80)
81. Family law arbitration was introduced in England and Wales in February, 2012. This scheme, which is run by the Institute of Family Law Arbitrators, enables couples to resolve out of court family disputes relating to finance or property (but not contact with or custody of children), by appointing an experienced family lawyer specially trained to arbitrate. [↑](#footnote-ref-81)
82. In 1992, arbitration accounted for only 1.7 per cent of contract dispositions and 3.5 per cent of tort dispositions in the state courts in the 75 largest counties in the US (Galanter, M., *op. cit*., p514ff). [↑](#footnote-ref-82)
83. Colvin, A.J.S., ‘An empirical study of employment arbitration: Case outcomes and processes,’ *Journal of Empirical Legal Studies*, 2011, vol. 8 (1), p2. [↑](#footnote-ref-83)
84. The compulsory assignment, inserted into consumer and employment contracts, to pre-dispute arbitration in the event of a contractual dispute is one of the most hotly debated policy issues in the US, and has prompted a number of empirical studies on the effects of and differences between voluntary and compulsory assignment to arbitration. Still, in many other countries, including all states in the European Union, pre-dispute contractually-ordered arbitration is prohibited in consumer and employment settings (Menkel-Meadow, C., *op. cit.*, p9). Reviewing 226 lending-related, consumer-initiated cases filed with the NAF over a four-year period, Ernst & Young found that, when cases went to arbitration, consumers prevailed 55 per cent of the time. When settlements and claimant-initiated dismissals were included, nearly 80 per cent of consumers obtained favourable results in arbitration. They concluded that their findings ‘do not support the allegations that consumers are disadvantaged by mandatory arbitration clauses’ (Ernst & Young, *Outcomes of consumer arbitration: An empirical study of consumer lending cases*, 2004). [↑](#footnote-ref-84)
85. Arbitration studies generally look at ‘win’ (as opposed to settlement) rates, for consumers or employees, defining ‘win’ in various ways. Colvin (2011), for example, uses a broad definition: an employee win is any case in which some award of damages, however small, is made in favour of the employee. [↑](#footnote-ref-85)
86. The litigation data did not allow a similar comparison of litigation and arbitration results for lower paid employees because this demographic group was underrepresented in court. [↑](#footnote-ref-86)
87. Eisenberg, T., and Hill, E., ‘Employment arbitration and litigation: An empirical comparison,’ Public law and legal theory research paper series, 2003, no. 65, New York University School of Law, p13. [↑](#footnote-ref-87)
88. Colvin, A.J.S., *op. cit*., pp5–6. [↑](#footnote-ref-88)
89. Delikat, M., and Kleiner, M.M., ‘An empirical study of dispute resolution mechanisms: Where do plaintiffs better vindicate their rights?” *Dispute Resolution Journal*, 2003, vol. 58 (4), p56. [↑](#footnote-ref-89)
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92. Schmitz, A.J., ‘Legislating in the light: Considering empirical data in crafting arbitration reforms,’ *Harvard Negotiation Law Journal*, 2010, vol. 15, p139. [↑](#footnote-ref-92)
93. Mogilnicki, E.J., and Jensen, K.D., ‘Arbitration and unconscionability,’ *Georgia State University Law Review*, 2003, vol. 19, p764. [↑](#footnote-ref-93)
94. Oppenheimer, D.B., ‘Verdicts matter: An empirical study of California employment discrimination and wrongful discharge jury verdicts reveals low success rates for women and minorities,’ *University of California Davis Law Review*, vol. 37, p535ff. [↑](#footnote-ref-94)
95. Eisenberg, T., and Hill, E., *op. cit*., p20. [↑](#footnote-ref-95)
96. Colvin, A.J.S., *op. cit*., pp5–6. [↑](#footnote-ref-96)
97. Delikat, M., and Kleiner, M.M., *op. cit.*, p56. [↑](#footnote-ref-97)
98. Eisenberg, T., and Hill, E., *op. cit*., p5. [↑](#footnote-ref-98)
99. Colvin, A.J.S., *op. cit*., pp5–6. [↑](#footnote-ref-99)
100. Delikat, M., and Kleiner, M.M., *op. cit.*, p56. [↑](#footnote-ref-100)
101. Santeramo, J.L., ‘Early neutral evaluation in divorce cases,’ *Family Court Review*, vol. 42 (2), p325. [↑](#footnote-ref-101)
102. Pearson, Y., ‘Early neutral evaluations: Applications to custody and parenting time cases program development and implementation in Hennepin County, Minnesota,’ *Family Court Review*, 2006, vol. 44 (4), p673. [↑](#footnote-ref-102)
103. Menkel-Meadow, C., *op. cit.*, p32. [↑](#footnote-ref-103)
104. Kakalik, J.S., Dunworth, T., Hill, L.A., McCaffrey, D.F., Oshiro, M., Pace, N.M., and Vaiana, M.E., *An evaluation of mediation and early neutral evaluation under the Civil Justice Reform Act*, 1996, The Institute for Civil Justice, RAND, p195ff. [↑](#footnote-ref-104)
105. Kakalik, J.S., *et al*., *op. cit.*, p195ff. [↑](#footnote-ref-105)
106. Folberg, H.J., and Rosenberg, J.D., ‘Alternative Dispute Resolution: An empirical analysis,’ *Stanford Law Review*, 1994, vol. 46, p1489. [↑](#footnote-ref-106)
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116. Wray, L.K., ‘IACP research regarding collaborative practice (basic findings),’ *The Collaborative Review: The Journal of the International Academy of Collaborative Professionals,* 2012, vol. 12 (1), pp6–8. [↑](#footnote-ref-116)
117. Cited in Lande, J., ‘An empirical analysis of collaborative practice,’ *Family Court Review*, vol. 49 (2), p5. Sefton sent a survey to 999 family lawyers in the group Resolution. 300 responded. [↑](#footnote-ref-117)
118. Tesler, P., personal communication, 16 August, 2013. Tesler refers to three such programs. One model, used in the New Orleans area prior to Hurricane Katrina, uses grants from community foundations to fund training of collaborative professionals that are combined with the expectation of *pro bono* representation and the use of small groups for collaborative financial and parenting education. A second model uses funds from the family court system to create collaborative centres, such as the one established, in 2006, in New York, where means-tested clients can receive representation from lawyers who receive free training through the program. Lastly, in a program being implemented in Northern California, the collaborative practice group and the local family law court work together to refer suitable low income couples who are attempting to manage their divorce on a self-represented basis, for screening into an accelerated collaborative program in which they receive professional services for free from a collaborative team in a single four-hour session. [↑](#footnote-ref-118)
119. Wray, L.K., chair of the IACP Research Committee, personal communication, 22 August, 2013. [↑](#footnote-ref-119)
120. Foran, P., *op. cit*., p793. [↑](#footnote-ref-120)
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