

THE INTERDISCIPLINARY SETTLEMENT CONFERENCE: A GRASSROOTS ALTERNATIVE FOR RESOLVING HIGH-CONFLICT PARENTING DISPUTES IN LEAN TIMES

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This article describes a court-connected alternative dispute resolution program, the Interdisciplinary Settlement Conference. The key feature of this program is the participation of two volunteer panelists, one a family law attorney and the other a mental health professional experienced in parenting disputes, who assist the judicial officer in working with the parties and their attorneys (if any) to reach a resolution of their parenting dispute. Significantly, in addition to addressing the parties' legal issues, the panelists also address the parties' psychological and emotional issues relevant to the dispute on an as-needed basis. Findings from six years of experience with the program are discussed, including evidence of high satisfaction with the program, a high rate of settlement, a decrease in relitigation, and a concomitant savings of scarce judicial resources.

Keywords: *Alternative Dispute Resolution (ADR); Court-Connected ADR; Family Courts; Family Law; Interdisciplinary Dispute Resolution; and Settlement Conferences.*

I. INTRODUCTION

As has frequently been discussed in these pages, our legal system currently finds itself in the midst of a paradigm shift regarding the adjudication of child custody/parenting disputes.¹ At the heart of this fundamental rethinking of basic assumptions is the recognition of the limitations of the traditional adversary system to address the needs of separating families and the emergence of innovative dispute resolution programs.² In keeping with this trend, a committee of stakeholders in Marin County, California, met in June 2007 and implemented the Interdisciplinary Settlement Conference (ISC) program, a judicial proceeding in which a volunteer mental health professional (MHP) and a volunteer family law attorney work together with a judicial officer to help separating and separated parents to resolve their parenting dispute.

What distinguishes the ISC from other interdisciplinary approaches to the resolution of such disputes is the way in which it attempts to harmonize the complementary skill sets of judges, attorneys, and MHPs. Unlike most interdisciplinary, court-connected alternative dispute resolution (ADR) modalities, in which the MHP and/or lawyer are typically ancillary to and often disconnected from the judicial process,³ in the ISC the judge, MHP, and lawyer function as an integrated team. Moreover, in the ISC the MHP-panelist is encouraged to use the full range of his/her clinical skills as needed to help the parties recognize and work constructively with the psychological and emotional dynamics that underlie the putative dispute that is the subject of the formal motion before the court. By inclusively addressing the parties' legal and psychological issues, the ISC team more often than not is able to defuse the parties' hostility and help them to shift their focus from blaming each other to attending to the needs of their children in a more objective, open, and dispassionate way. The program has been very successful in terms of overall settlement rates, party satisfaction with the process, reduction in interparty acrimony, deeper buy-in to agreements that are reached, lowered relitigation rates, and conservation of scarce judicial resources.⁴

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II. BACKGROUND

Most American jurisdictions face the twin trends of increasing numbers of self-represented litigants as well as reductions in judicial resources and decreasing affordability of private resources to assist families going through divorce.⁵ This challenge is exacerbated by dockets disproportionately clogged by the “frequent fliers” who come to court regularly to litigate custody, both pre- and post-decree. Given these burgeoning problems, and the manifest benefits of alternatives to traditional litigation for handling family disputes,⁶ the lead author in the spring of 2007 approached the supervising judge of the Marin County Superior Court’s family law department, Hon. Verna A. Adams, and suggested that at custody settlement conferences the presiding judicial officer be assisted by two volunteer settlement specialists, one of whom would be a MHP with experience in family, especially parenting matters, the other an experienced family law attorney. Judge Adams greeted the suggestion with enthusiasm and in June 2007 appointed the court’s Family Interdisciplinary Committee (FIC), consisting of key stakeholders among local lawyers, mediators, and MHPs, all with extensive experience in the area of child custody disputes, to flesh out the idea and implement a suitable program.⁷ Given budgetary realities, the committee decided to create a pilot program that was based entirely on the pro bono contributions of its panelists. Lacking the wherewithal to engage in serious evidence-based research (such as randomized controlled trials) prior to the creation and implementation of the program, a broad-contours approach was used with the intention to fine-tune as we went along, and reassess after one year. The results after the one-year pilot stage were so overwhelmingly positive that the court decided to implement the program on a permanent basis. This included further invitations to qualified MHPs and attorneys, new local rules and forms, and additions to the court’s web site. The FIC continued to meet monthly, and the FIC along with the judicial officers and the ISC panelists meet annually, to discuss and make improvements to the program, which is now a regular feature of custody/parenting litigation in Marin County.

III. ASSUMPTIONS AND GOALS

In creating the ISC program we proceeded from three core assumptions and related goals⁸:

Assumption # 1: *Adversarial litigation is ill suited for resolving most parenting disputes.*⁹ This is a point about which there is little disagreement today.¹⁰ One aspect of the adversary system’s inadequacies stood out for us, however: the tendency of the legal system to end the litigation but not resolve the underlying problem—which can then fester and grow until its next eruption and the next visit to court. Our goal was to create an approach that would understand the parties’ custody dispute as a complex dynamic of human relationships¹¹ and attempt to resolve the conflict “holistically in an effort to resolve the entire conflict and not simply its particular instantiation . . . at a given point in time.”¹²

Assumption # 2: *An effective alternative to adversarial litigation in family law must meaningfully address the parties’ psychological and emotional issues that are typically entangled with their legal positions.* We believed that the effective alternative we were seeking needed to include in the dispute resolution process the parties’ subjective experience of the dispute as well as the objective legal context in which such experience is played out.¹³ Our goal, therefore, was to create a program that views divorce not primarily as a legal event, but rather as an ongoing social and emotional process of restructuring the family that has significant financial, legal, and psychological aspects.¹⁴ When characterized in this way, parenting disputes call for “interventions that are collaborative, holistic, and interdisciplinary, because these are the types of interventions most likely to address the families’ underlying dysfunction and emotional needs.”¹⁵

Assumption # 3: *An interdisciplinary approach to resolving parenting disputes, and corresponding change in mindset, is the best means to address holistically the legal, psychological, and emotional facets of such disputes.* We assumed that an interdisciplinary team consisting of a lawyer and a MHP

could best assist the parties and the court to understand and address the underlying family dynamics that are the cause of the legal dispute that is formally before the court, as well as ensure that decisions are informed by current psychological research in addition to principles of law.¹⁶

IV. MECHANICS OF THE ISC PROGRAM

A. SELECTING AND CALENDARING APPROPRIATE CASES FOR AN ISC

ISCs are voluntary and are usually scheduled upon request of the parties or suggestion of the trial judge.¹⁷ In selecting cases for the ISC program Marin's family law judges attempt to strike a couple of balances: between cases where conflict is intractable versus cases where conflict is unworkable, and between cases where expert assistance is essential and cases where it is not. Our rule of thumb is that ISCs are reserved for the more challenging cases pre- and postdecree—cases that are high conflict¹⁸ and/or involve multiple visits to court, cases involving very young children, parents with mental health or substance abuse issues, children with special needs, relocation cases, and so forth—so as not to overtax the pro bono proclivities of the panelists. Although no formal screening protocol has been adopted, the judges generally decline to conduct ISCs in cases in which there has been proven domestic violence involving coercive control (i.e., battering or intimate terrorism), child abuse, severe pathology, or ongoing significant substance abuse.¹⁹ If the case seems relatively straightforward or involves a low-conflict family that is simply heading for trial, the judges will set a judge-only settlement conference.²⁰ The judges generally set ISCs thirty days or so before a trial or hearing. ISCs are typically calendared for half days (afternoons), but particularly complex cases are occasionally set for a full day. Once a case is set for an ISC, the court's ADR coordinator, Norma Johnson, contacts panelists on a rotating basis to solicit availability and screen for conflicts. Once panelists have agreed to serve on a particular case, she sends out information packets (usually consisting of settlement conference statements, Family Court Services reports, and custody evaluations, if any, but can include other documentary information from the file at the judge's discretion) about a week prior to the date of the ISC.²¹

B. QUALIFICATIONS AND TRAINING OF PANELISTS

In order to ensure selection of competent panelists, while at the same time maintaining an open-door policy to interested professionals, the FIC established minimum recommended qualifications of both attorney- and MHP-panelists. These qualifications are listed on the court's Web site. By way of overview, MHPs are encouraged to have significant experience working with high-conflict divorce cases, including evaluating pathology; working with party dynamics; identifying party and children's needs; detecting indicators of child abuse/neglect, domestic violence, and substance abuse; crafting parenting plans; and familiarity with research on divorce and children.²² Attorney-panelists are encouraged to have significant experience in litigation and/or settlement of high-conflict parenting cases through mediation or the Collaborative process, as well as familiarity with age-appropriate parenting plans, the impact of entrenched parental conflict on child adjustment, and the effect of stepparents and blended families on parenting relationships. Our experience has confirmed that specialized training is appropriate to understand and master the unique, hybrid aspects of the ISC panelist role that are different from the usual responsibilities of lawyer and MHP²³ and to address the need to work seamlessly with a professional from another field.²⁴

C. COMPENSATION

ISC panelists all serve pro bono and are prohibited from further remunerated work with the parties. Panelists are free to participate in as many or as few ISCs per year as they like.

D. LIMITATIONS ON LIABILITY

The issue has arisen, thankfully only theoretically, about possible exposure to liability resulting from participation as an ISC panelist, particularly for the MHPs. In the heated atmosphere of custody litigation, disgruntled litigants sometimes seek to blame others for judicial decisions with which they disagree, sometimes going so far as to file a complaint with the state licensing authority or to bring a civil lawsuit.²⁵ Judge Adams responded to this concern in the ISC context by appointing all ISC panelists as the court's own experts under California Evidence Code Section 730, thus granting them quasi-judicial immunity.²⁶ Although not a guarantee that a complaint will not be brought, appointment as a judicial expert²⁷ and the acquisition of quasi-judicial immunity provides a fair measure of comfort regarding potential liability.²⁸

E. CONFIDENTIALITY

ISCs, like all judicial settlement conferences in California, are by statute nonconfidential.²⁹ Confidentiality is also affected by MHP-panelists being mandatory reporters, a fact to which participants are alerted at the outset of the ISC. Nevertheless, we have not detected noticeable deleterious effects on ISCs due to the lack of explicit confidentiality protection.³⁰

F. PRE-ISC MEETING OF JUDGE AND PANELISTS

Immediately before an ISC begins there is a brief meeting of the judicial officer and the panelists in the judge's chambers.³¹ These meetings are essential to forge a common approach. The judge, who has had experience with the parties (and their counsel, if any), will elicit the views, concerns, and suggestions of the panelists, and together with the panelists will iron out the team members' different takes on how to proceed and create a loose structure for the process.

G. WHERE TO MEET

ISCs are typically conducted in the judge's jury room, which has the advantage of being less formal and perhaps less intimidating than the courtroom.³² In cases with safety concerns the ISC will convene in the courtroom, where the bailiff's presence can add a sense of safety and containment.

H. WORKING THE ISC

There are no firm rules as to how the judge and the two panelists conduct the ISC. The structure is flexible and will vary depending on the configuration of the team, the judge's style, the team members' idiosyncrasies and philosophies, and their perceptions of the needs of the parties and the demands of the case. Typically, the judge commences the ISC by making an introductory statement that serves as a brief orientation: introducing the panelists, describing how the process works and what the purpose of the ISC is, discussing confidentiality, explaining the roles of the panelists and judge, and allowing the participants to ask any questions they might have.³³ As discussed more fully below, the judge and the panelists will then proceed using tools similar to those employed by interdisciplinary mediation teams who use a facilitative style. The ISC team will work the case as the circumstances require, including facilitating dialogue between the parties, inquiring into the parties' positions and interests, challenging assumptions, inviting brainstorming, providing information, and evaluating possible solutions.

I. ROLE OF THE JUDICIAL OFFICER

While there appears to be consensus among family law judges and professionals regarding the importance of encouraging settlement in child custody cases,³⁴ there remain significant differences of opinion about the role of the judge, including whether the judge assigned to a case (in Marin the assigned judge tries the case) should conduct settlement conferences involving that case.³⁵ There are significant concerns, for example, that a judge conducting a settlement conference will be exposed to inadmissible evidence that may be improperly relied on at a subsequent hearing, that parties may be less likely to speak frankly if they know that the judge will be the decision maker if the case fails to settle, that parties might be encouraged to posture, or that parties might feel undue pressure to settle.³⁶ The usual solution to these concerns is to have a second judge, who has not been involved in the case, conduct the settlement conference. The relative merits of the same-judge and different-judge approaches have been vigorously debated in the literature,³⁷ but not in the context of family court or parenting disputes.³⁸

We have come to the conclusion that in the unique context of family law, particularly in parenting disputes, the advantages of the “same-judge” approach outweigh its disadvantages. We have found that, for the most part, parties usually want to settle and have a strong desire to tell their story unfiltered by lawyers or rules of evidence to the judge who knows them, knows their case, and/or may have interviewed their children.³⁹ By the time a case gets to an ISC it typically has a lot of history and there is often a reluctance on the part of the litigants to effectively start over with a new judge. Accordingly, while mindful of the possible disadvantages,⁴⁰ our default position is that the judge assigned to the case will preside at the ISC, although parties have the option of requesting a different judge.⁴¹

While each ISC unfolds organically based on the needs of each case and the style of the particular judge and panelists, one distinctive characteristic affecting the judge’s role in all cases is the fact that the ISC is a facilitative rather than an evaluative process.⁴² At no time does the judge offer an opinion as to the strengths or weaknesses of a party’s case or as to likely outcomes at trial,⁴³ although s/he might offer an opinion as to the reasonableness or practicality of a given proposal.⁴⁴ Accordingly, the ISC judge’s first task is to create an atmosphere that maximizes the odds of the parties successfully negotiating a settlement.⁴⁵ This is accomplished in a variety of ways, including use of an informal and caring tone, asking open-ended questions, reflective and empathic listening, demonstrating concern for the parties and their children, and otherwise acting in a way that results in the parties feeling that they have had their say and been heard. By empathizing and connecting with the parties from the outset, and not rushing to solution, the hostility and anxiety that are so common in these cases tend to dissipate. This often creates a “clearing in the woods” in which the parties can more dispassionately address solutions that would be in the best interests of their children.⁴⁶

After the initial phase in which the goal is to connect emotionally with the parties, the judicial officer will frequently take a backseat and let the panelists take the lead in exploring the nature of the problem. This allows the judge to relax more than would be the case at a judge-only settlement conference and often permits him/her to observe the parties and the issues from a totally different perspective. As Marin’s Judge Beverly Wood explains,

My role during this part is to *learn* from listening to the mental health expert. I am learning more about the case and conflict because the conversation is happening in a different way than our previous discussions. During this phase I am also learning a lot about child development, parenting issues, mental health issues.⁴⁷

That the judge can sometimes allow the panelists to take the lead does not, however, render the judicial role superfluous. The ISC is a judicial settlement conference, not a co-mediation, and as such the judge at all times actively utilizes the skills and authority of his/her position.⁴⁸ At some point after the parties’ positions have been fleshed out the ISC typically arrives at a fork in the road: if the parties are willing and able to begin negotiating a settlement of their dispute, that is the direction the

conference will take. If, however, the tension, hostility, or reactivity of the parties is such that this is not feasible, then the judge and panelists will typically attempt to help the parties to explore the contribution of these qualities to their impasse. This requires the ISC judge to make use of skills and knowledge beyond that needed in typical civil cases (or even typical settlement conferences in family law), including the capacity to work with high-conflict couples and individuals and some familiarity with psychopathology, substance abuse, domestic violence, family dynamics, and child development.⁴⁹ It also requires the judge to set a tone and normalize an approach that permits the exploration of emotions and psychological dynamics.⁵⁰ The following excerpt from an article on judicial mediation sums up well this aspect of the judge's role in the ISC:

[B]ecause [judicial] mediation is a conversation designed to explore the relationships behind a conflict, the [judge] can more freely allow expressions of emotion to color the proceedings, since emotion can be a window onto the real conflict behind the dispute. Letting parties express emotional reactions to the conflict or the proceedings rather than simply present thought-out legal positions can allow the [judge] to see where the truly intractable problems lie and can provide insight into why the parties have taken the positions they have. . . . Understanding the dynamics of the situation—the parties' relationships, their cultural standpoints, and the emotions behind the problem—can suggest what is behind the impasse and can help break up a logjam in negotiations.⁵¹

If the parties' telling their stories and feelings heard does not create the clearing in which meaningful negotiations can take place, uncovering the operative dynamics often does.⁵² Assuming such a clearing can be created, the judge and panelists will then attempt to help the parties to reach an agreement, including exploration of underlying interests, generation and evaluation of different options, and fleshing out final details, as discussed above. In that process the judge has the responsibility of ensuring that any agreement reached by the parties reflects an outcome that is in the best interests of the children involved.⁵³ The judge also bears ultimate responsibility for keeping the process on track, balancing the needs of the parties (and sometimes their lawyers) to be heard with the need to complete the ISC in a single afternoon. Assuming the case does settle, the judge needs to make sure the agreement is properly placed on the record, that all outstanding issues have been addressed, and that future dates are set where necessary.⁵⁴

J. ROLE OF THE ATTORNEY PANELIST

The attorney-panelist's role in the ISC can be broken down into two primary functions. First and foremost, the attorney-panelist needs to provide the "voice of reality," helping the parties to distinguish and accept which options are realistic and possible and which are not, often thereby reducing the distance between the parties.⁵⁵ This can include explaining relevant legal principles, statutes, and case law, as well as mentioning practical procedural points, such as the possibility of a review hearing after a fixed amount of time. S/he can speak about the protections the law can offer, which can be extremely comforting or reassuring to some parties. Occasionally the lawyer-panelist will opine as to the legal soundness of a party's position or proposal (something the judge is far less likely to do). Hearing someone with credibility explain what is likely to fly in court and what isn't based on their own experience as a litigator can have a powerful effect. This provides an opportunity for parties to hear perspectives different from that of their own attorney or, in the case of pro pers, to hear about the law for the first time.⁵⁶

Second, the attorney-panelist keeps the process focused on the goal of reaching agreement. S/he is the problem solver in the room,⁵⁶ focusing more on content than on process. S/he makes sure all necessary topics are addressed and ensures that focus is placed on the details, including the specifics of what will shortly become a court order. At the same time the attorney-panelist has to make room for the judge and MHP to work initially with the parties on an emotional level (and ideally to join them in that effort) and resist the temptation of moving too quickly to solutions.

K. ROLE OF THE MHP PANELIST

As one of our judges put it, MHPs don't suffer from the "public relations deficit" that lawyers do, and this, combined with the MHP's expertise in the area of custody/parenting, tends to result in the MHP commanding a great deal of respect, credibility, and influence in the room from the very outset. Unquestionably the MHP's presence and participation dramatically change the dynamics of the entire process, both substantively and procedurally. Procedurally, the MHP-panelist's presence tends to neutralize adversarial combativeness and encourage an openness to emotional and psychological issues that might otherwise be absent. Substantively, consideration of psychological and emotional issues tends to cut through impasse and can lead to solutions and terms that might not otherwise be included.

One of the primary functions of the MHP-panelist is to provide emotional support to the parties. This includes, but is not limited to, helping the judge ensure that the parties feel compassionately and supportively heard.⁵⁸ By his/her empathic presence and attunement, by recognizing and reflecting back what is important to each parent, and by assiduously avoiding collusion in a party's story of blame, the MHP-panelist provides comfort, support, safety, and hope throughout the ISC.⁵⁹ Such support then gives the parties permission to talk more openly with one another on a human level and a greater capacity to negotiate and compromise. Another of the MHP's tasks is to model and invite empathic communication, which helps shift the parties' and their lawyers' assumptive model from battling to mutual problem solving. This is generally accomplished by a combination of tools familiar to most mediators and couples counselors, such as reframing, normalizing, clearing up false attributions of motive, and getting the parties to shift from trying to convince the panelists that their version of the facts is what really happened to a recognition that the parties can simultaneously hold differing versions of reality.⁶⁰ This often results in a sense of *traction*—a sense that everyone is talking honestly about what really matters, rather than a sense of circling or stuttering that can result when honest discussion is occluded by legal maneuverings, positional bargaining, and *ad hominem* attacks.

One of the most important components of the MHP's role is that of providing relevant psychological information to the parties, the lawyers, and the judicial officer.⁶¹ This includes research-based information on such things as the effects of divorce and conflict on children and parents; overnight visitation with young children, and other attachment-related issues; effects of relocation on children of different ages; social and emotional needs of children at different stages of development; developmentally appropriate parenting plan options given the children's ages; and proper consideration of the effects of psychopathology, special needs, substance abuse, domestic violence, and similar issues.⁶² This aspect of the MHP's participation helps enormously to effect a shift on the part of the litigants from an emphasis on being right or winning to obtaining a better understanding of the children's needs, finding the most appropriate options to meet them, and seeing the children's needs as separate from their own.⁶³ Sometimes the parties are so entrenched in their dispute—usually meaning they are unable to place their children's emotional needs above their own personal feelings about their former spouse—that it may be necessary to attempt to work with the couple's dynamics⁶⁴ in order to loosen or shift things sufficiently that worthwhile negotiations can at least begin.⁶⁵ Working effectively with the psychological dynamics of high-conflict couples requires extensive experience working with vulnerable, volatile, narcissistic, and often unstable individuals in the context of high-intensity custody battles.⁶⁶ It also requires an understanding of the unresolved inner conflicts, defensive tactics, and coping strategies of people going through divorce and the ways in which such intrapsychic issues play out interpersonally in custody disputes.⁶⁷ Whatever the parties' underlying motivations and issues may be, when the parties are at an impasse MHP-panelists need to be able to make quick assessments of the dynamics and capacities of the parties and determine the right blend of interpretation, confrontation, and support that will help the parties to make appropriate shifts in their positions and behavior.⁶⁸

L. CONCLUDING THE ISC

When the formal terms of an agreement have been reached, the parties, attorneys, panelists, and judicial officer return to the courtroom, where the parties are voir dired by the judicial officer and the

agreement placed on the record. The judges always ensure that a formal order is prepared by one of the attorneys if both parties have attorneys or by the judge if one or both parties are self-represented. Given the parties' ongoing relationship with one another, the written record of the parties' agreement must be as unambiguous as possible so as to minimize the odds of future conflict.⁶⁹ On occasion a review hearing is set to ensure compliance and/or progress, in which the panelists generally agree to participate. Finally, the parties are given a questionnaire⁷⁰ (whether the matter settles or not) in order to gather feedback for further fine-tuning of the program.

M. AFTER THE ISC

To maximize effectiveness, any court-connected ADR program must have a mechanism for self-monitoring and self-improvement. The ISC program does this in two ways. First, as mentioned above, the FIC, the judges, and panelists meet regularly to refine the program. Second, procedures have been implemented for tracking the results of the ISCs, including statistical analysis of the case files and responses to the questionnaire referred to above. This information is then used to refine the overall efficacy of the program and ensure that the program is meeting the needs of the parties and accomplishing the goals of the program.

V. OUTCOMES, LIMITATIONS, AND FURTHER RESEARCH

A. OUTCOMES

By quantitative and qualitative measures the Marin ISC program has been a huge success. Through the end of 2014, seventy-four percent of the ISCs resulted in a settlement on the date of the ISC. Twelve cases that did not settle on the date of the ISC itself settled shortly thereafter, raising the settlement percentage to seventy-eight percent. The statistics for settlements on the date of the ISC break down as follows:

- 2008 conducted 18, of which 14 settled (78%)
- 2009 conducted 15, of which 11 settled (73%)
- 2010 conducted 26, of which 21 settled (81%)
- 2011 conducted 50, of which 30 settled (60%)
- 2012 conducted 50, of which 36 settled (72%)
- 2013 conducted 31, of which 24 settled (77%)

Significantly, of the 148 cases that settled on or shortly after the ISC, only twenty-six had subsequent child custody disputes that were brought to court (eighteen percent). This means that eighty-two percent of the cases that settled at or shortly after the ISC stayed settled at least one year from the date of the ISC, reflecting a significant reduction in relitigation by these parties.⁷¹ Moreover, of the twenty-six cases that had subsequent actions, half of the cases settled after another motion was filed, either via another settlement conference, or on their own. Among the settled cases, a number of review hearings were cancelled due to party satisfaction with the original agreement reached at the ISC. Of the cases that did not settle, most were cases in which a parent or parents relocated or cases in which there were significant substance abuse issues. Since the inception of the program a total of twenty-nine cases went to trial (i.e., three to four per judicial officer per year), representing a significant reduction in the number of custody trials per year. Given the fact that these cases are the truly high-conflict cases, including the frequent fliers (a significant number of cases were six to nine years old, and two were eleven years old), these statistics are impressive.⁷² More importantly, we believe they represent significant increases in litigant satisfaction with the process and its outcome, more durable agreements, and significant savings in court days and other scarce judicial resources.⁷³ Anecdotal evidence corroborates the conclusion that this program has been successful and further expands the definition of success. For example, a number of attorney panelists we interviewed regarding the

program shared their belief that the settlements reached in the ISCs tend to be better, more comprehensive, based on more solid information, and more durable than results reached through other means, including judgments entered after a hearing and settlements reached through informal negotiations by the attorneys. Lawyers representing parties in ISCs report being highly pleased with the ISCs and now routinely request them.

Judicial officers involved in the program have been unwavering in their enthusiasm about it. According to one judge, “one reason why these things are successful is precisely because finally, at last, someone is talking to these people. There are just not enough judicial personnel to do more than plug the holes.” The judicial officers in the program have all noted the decrease in repeat filing of custody motions and the “better decisions made by parents for themselves and their children.” There is considerable evidence of party satisfaction in the form of comments of appreciation and recognition made by the parties to the panelists and judge during and immediately after the ISCs, as well as in the parties’ questionnaire responses.⁷⁴

B. LIMITATIONS AND FURTHER RESEARCH

It is important to note that in starting and running Marin County’s ISC program we have not had rigorous evidence or studies available to us to guide or evaluate the effectiveness of this program. All we have is our own statistical and anecdotal evidence. We have other limitations that affect the generalizability of our findings: a small number of cases, a plethora of qualified professionals willing to serve pro bono, and a relatively homogeneous population (mostly White middle class and Latino), including mostly shared cultural assumptions. We have to admit that we do not really know how transferable or replicable our results might be in other jurisdictions with other populations. We have not collected information about gender, gender identity, ethnicity, race, age, family contexts, financial resources, sexual orientation, and developmental or life stage about the parties who have come through the program. Nor do we have knowledge about the applicability of our program across other cultures⁷⁵ or information about the availability of potential panelists in other jurisdictions.⁷⁶ Notwithstanding this dearth of evidence and social science research, we believe that ISC programs are viable in other jurisdictions, given the very local nature of the planning committees who will implement them. And it is clear that more comprehensive data gathering by various ISC programs would greatly assist a broader evaluation of such programs as a whole.

VI. CONCLUSION

The ISC is an inexpensive and effective way to help courts settle cases and achieve better outcomes for families and children involved in contentious family restructuring than are available through traditional court-based alternatives. The program provides access to experienced attorneys and MHPs that lower-income families might not otherwise be able to afford. Importantly, cases settled at an ISC tend to stay settled (meaning a significant reduction in return trips to court and, inferentially, a reduction in intrafamily conflict). While such advantages and results may be achieved by other court-related ADR processes, what distinguishes the ISC is that they are obtained by means of the joint, coequal participation of judges, family lawyers, and MHPs, which allows the court to address the complex needs of families at a level and to a degree that courts are generally not equipped to handle alone. While the family court process is not and cannot be a substitute for true therapeutic interventions for families in need, our experience thus far suggests that jointly attending to the psychological as well as the legal needs of separating families is both appropriate and effective in helping courts discharge their responsibility to protect and assist families and children going through the painful process of separation and divorce.

NOTES

1. See, e.g., Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009); Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009). Although we prefer the term “parenting” over “custody,” given the frequency with which the latter term is still used we use the two interchangeably herein.

2. See, e.g., Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323 (2001); Michael E. Lamb & Joan B. Kelly, *Improving the Quality of Parent-Child Contact in Separating Families with Infants and Young Children: Empirical Research Foundations*, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 187, 193 (Robert M. Galatzer-Levy et al. eds., 2d. ed. 2009); Jennifer E. McIntosh et al., *Evidence of a Different Nature: The Child Responsive and Less Adversarial Initiatives of the Family Court of Australia*, 46 FAM. CT. REV. 125, 126 (2008).

3. There are a few family court-related ADR programs in which a team of neutrals works with the parties to attempt to reach a settlement. These tend to be characterized by a heavy evaluative component and the absence of judicial participation. For example, in Minnesota’s Social Early Neutral Evaluation program, a male–female team of two lawyers or one lawyer and one MHP evaluates the strengths and weaknesses of the parties’ cases and works with the parties to reach agreement on custody/parenting-related issues. See <http://www.mncourts.gov/Help-Topics/ENE-ECM.aspx> (last visited 9/18/2015). In Winnipeg’s Comprehensive Co-Mediation Project, the parties meet with the co-mediation team for up to six joint mediation sessions. See <http://www.justice.gc.ca/eng/fl-df/fjs-sjf/view-affic.asp?uid=124> (last visited 12/31/2013). There are a number of nonsettlement conference, family court-related ADR programs in which MHPs work directly with the parties. However, these programs typically require that the parties meet with the MHP outside the courthouse (i.e., in a nonjudicial proceeding), and the MHP has little, if any, interaction with a judicial officer. For example, in the Tarrant County, Texas, Superior Court Access Facilitation Program, an access facilitator meets with the parents and tries to facilitate a parenting plan at the inception of a custody case. AFCC COURT SERVICES TASK FORCE EXEMPLARY PRACTICES SUB-COMMITTEE, EXEMPLARY FAMILY COURT PROGRAMS AND PRACTICES: PROFILES OF INNOVATIVE AND ACCOUNTABLE COURT-CONNECTED PROGRAMS 51–52 (2005) (describing this program). Oregon’s Collaborative Evaluation/Mediation Model consists of a combination of a streamlined custody evaluation followed by a mediation that attempts to implement the evaluator’s recommendations. *Id.* at 57–58. In Connecticut’s Conflict Resolution Conference Program, the parents meet with a MHP out of court for several sessions in an attempt to reach an agreement. Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 753 (2007). In New Mexico’s FAIR program, doctoral-level psychology students at the University of New Mexico help separated and divorced parents learn healthier coparenting skills. Melissa Gerstle et al., *The Family Assessment and Intervention Resources (F.A.I.R.) Program: A Collaborative, Court-Based Intervention for High Conflict Parents*, in INNOVATIONS IN COURT SERVICES 61 (Cori K. Erickson ed., 2010). In New Jersey’s Custody Neutral Assessment program, MHPs meet with high-conflict parties, discuss contested issues, and make clinical recommendations to the court on how to resolve disputed issues. See <http://www.judiciary.state.nj.us/burlington/resource.htm> (last visited 9/18/2015).

4. See Salem, *supra* note 1, at 373–74 (discussing the importance of mediation being a forum in which the parties can obtain “greater levels of party satisfaction (even when an agreement is not reached) and, importantly, improved post-separation family relationships”); *Id.* at 375 (“[h]aving fully participated in the process, the parents will experience a greater sense of ownership and satisfaction with the outcomes. Because the agreements they make will reflect the parents’ actual needs and interests, they will, therefore, be more enduring”); KENNETH CLOKE, THE CROSSROADS OF CONFLICT 70–86, 311–315 (2006) (describing varying levels of conflict resolution, and emphasizing that by talking about what is truly at stake, moving beyond the surface manifestations of the conflict (e.g., contempt and hostility), and getting to deeper levels of truth and vulnerability, the parties are likely to get to deeper levels of resolution than merely disposing of the immediate case).

5. See generally Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 50 FAM. CT. REV. 377, 379 (2012).

6. See generally Salem, *supra* note 1, at 371–72; Singer, *supra* note 1, at 363–64.

7. For a cogent discussion of the importance to a new ADR program of buy-in from relevant stakeholders, see Boyarin, *supra* note 5, at 390–91; see also Joanne Goss, *Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton*, 42 FAM. CT. REV. 511, 512–13 (2004) (discussing questions to be asked by and of relevant stakeholders when starting a court-connected ADR program and the importance of forming a “JDR Design Committee”).

8. Our concern for obtaining clarity around the program’s goals is mirrored by Professor Boyarin’s admonition that one of the “primary barriers to the broad implementation of [court-connected ADR] programs” is “a lack of clarity in defining the goals of [the program].” Boyarin, *supra* note 5, at 394.

9. We recognized, of course, that different courts around the country and the world have adopted various innovations to improve upon the adversary model, transforming the judicial role in varying degrees from the old umpire/fault-finder model to something more akin to a conflict manager using a therapeutic or facilitative approach. See, e.g., ANDREW I. SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 2–5 (2004); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 93 (2006); Institute for the Advancement of the American Legal System (IAALS), *The Modern Family Court Judge* 1–10 (2014); Julie MacFarlane, *ADR and the Courts: Renewing our Commitment to Innovation*, 95 MARQ. L. REV. 927, 928 (2012); Salem et al., *supra* note 3, at 745–46; Andrew I. Schepard, *The Evolving Judicial Role in*

Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management, 22 U. ARK. LITTLE ROCK L. REV. 395, 396–407 (2000); Singer, *supra* note 1, at 363–64; Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 12 (2009). Few such innovations had yet been adopted in Marin County with respect to parenting disputes at the time of the introduction of the ISC program, and none contained all the elements of (1) a judicial settlement conference, (2) absence of evaluation of the parties' respective cases, (3) a team of settlement panelists working directly with the judge, and (4) one of whom is a MHP.

10. *E.g.*, Emery et al., *supra* note 2, at 324; Nancy A. Flatters, *Family/Child Judicial Dispute Resolution (JDR): An Overview of One Canadian Court's Settlement Conference Approach to the Pretrial Resolution of Family and Child Welfare/Protection Matters*, 41 FAM. CT. REV. 182, 182–83 (2003); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002); M. Jerry McHale et al., *Building a Child Protection Mediation Program in British Columbia*, 47 FAM. CT. REV. 86, 87 (2009); McIntosh et al., *supra* note 2, at 126.

11. *See* E. FROMM, *THE ART OF LOVING* 24–27 (1956); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47–75 (1991) (discussing the dominant paradigm of the lone rights-bearing individual and explaining how our legalistic oneness “regularly promotes the short-run over the long-term, sporadic crisis intervention over systemic preventive measures, and particular interests over the common good”); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 1–4 (1990); Jennifer Nedelsky, *Reconceiving Rights as Relationships*, 1 REV. CONST. STUDIES/REV. D'ETUDES CONSTITUTIONNELLES 1, 7–8 (1993) (discussing the oneness of the emphasis on individualism and the conception of rights as boundaries); Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U.L. REV. 1286, 1295–96 (1993). *But see* Donna H. Lee, *Viewing Family Court Practice Through the Prism of Purpose*, COLUM. J. L. & SOC. PROBS. 647, 648 (2007) (pointing out the existence of “a conceptual divide” in defining the family court's purpose between those who focus on revitalizing due process protections within traditional litigation and those who focus on interdisciplinary approaches as a means of improving family dynamics, and expressing skepticism as to the latter).

12. Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RES. L.J. 351, 372 (2006).

13. The importance of such an integration was recognized by Carol Gilligan, who emphasized “the paradoxical interdependence of self and relationship, which then overrides the pure logic of formal reason and replaces it with a more encompassing form of judgment, a polyphonic structure that is able to sustain the different voices of justice and care.” Carol Gilligan et al., *Moral Development Beyond Adolescence*, in *HIGHER STAGES OF HUMAN DEVELOPMENT* 208, 223–24 (Charles Alexander & Ellen Langer eds., 1990). Such integration represents “a cognitive transformation from a formal to a dialectical mode of reasoning,” and “reunite[s] intelligence and affectivity,” resulting in a more “inclusive understanding.” *Id.* at 224. *See generally* JAY FOLBERG ET AL., *DIVORCE AND FAMILY MEDIATION* 3 (2004) (“[d]ivorce entwines legal considerations with emotional dynamics; family dissolution is a matter of the heart as well as the law”); LOIS GOLD, *BETWEEN LOVE AND HATE: A GUIDE TO CIVILIZED DIVORCE* (1992).

14. *See* Boldt & Singer, *supra* note 9, at 93; Schepard, *supra* note 9, at 396, 407; Singer, *supra* note 1, at 364; *see also* Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004) (“The best interests of children in divorce . . . cases have become defined as primarily a legal problem; in reality, they are much more complex psychological, social, and legal problems that typically become intertwined into other issues such as child support. Family relationships have become ‘legalized’ in such a way that the system loses sight of the human problems in context and focuses only on addressing answers to the legal issues . . .”).

15. Singer, *supra* note 1, at 364.

16. *See* SCHEPARD, *supra* note 9, at 176 (“[i]nterdisciplinary coalitions that support the interests of children are the key to expanding and consolidating this paradigm shift”); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA. L. REV. 637, 640 (2006); Singer, *supra* note 1, at 364.

17. Typically judges will suggest an ISC at a hearing on a noticed request for order or motion, at a case progress or status conference, or at an ex parte hearing.

18. The term “high conflict families,” which appears frequently in the literature on custody disputes, has a particular set of often overlapping meanings, including families with frequent postdecree return trips to court or where domestic violence is present. In Marin's ISC program we use the term to mean any family, pre- or postdecree, with high degrees of anger, blame, and conflict between the parents resulting in difficulty or inability to reach agreements around the children. *See* JANET JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF HIGH-CONFLICT AND VIOLENT FAMILIES* 4–5 (1st ed. 1997) (explaining that high-conflict families “are identified by multiple, overlapping criteria: high rates of litigation and relitigation, high degrees of anger and distrust, incidents of verbal abuse, intermittent physical aggression, and ongoing difficulty communicating about and cooperating over the care of their children”).

19. Both research and experience confirm that high-conflict cases are very likely to involve issues like substance abuse, domestic violence, child abuse, and serious mental health issues, so screening for cases that are inappropriate for an ISC is a matter of degree. *See, e.g.*, Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 291 (2005) (“[t]he more intransigent conflict-ridden divorcing families are likely to be troubled by multiple indicators of domestic violence, child neglect, molestation and abuse, parental substance abuse, mental health problems, and child abduction”). The judges' experience and judgment are key, as they can lead to a “sixth sense” as to which cases are likely to have a good shot at settlement and which are not. Screening is thus a highly personal and subjective process, which is why no formal screening criteria have been adopted. Even the presence of past domestic violence does not automatically

disqualify parties from attending an ISC. *See* Flatters, *supra* note 10, at 188 (“it cannot be assumed that even the presence of domestic violence makes a case unsuitable for a settlement conference”).

20. Judge-only custody settlement conferences are regularly set by appointment and are just as regularly held impromptu when *ex parte* emergencies dictate or the parties wish to proceed by way of informal discussion instead of adversarial hearing. As Marin’s Judge Wood reports, “if [the parties] are here [for a hearing or an *ex parte* matter] and I have time I will invite them to just sit down and hammer things out impromptu (often with the pro pers). I would say that I do this regularly” (personal communication, Nov. 25, 2013).

21. Such materials are typically confidential and filed under seal. However, California Family Code Section 3025.5(d) permits the court to share such documents with “any other person upon order of the court for good cause.” An order finding such good cause is typically entered in each ISC case.

22. *See* Marsha K. Pruet & Janet R. Johnston, *Therapeutic Mediation with High-Conflict Parents*, in FOLBERG ET AL., *supra* note 13, at 92, 94 (“experienced and highly trained mediators . . . improve the likelihood of success in high conflict cases. . . . Mediation-type interventions with high-conflict couples require special knowledge and skills in order to have any chance of being effective. Interventions with divorcing families that are entrenched in conflict and chronic custody disputes should be grounded in a basic understanding of the psychological and systemic dynamics that generate and sustain disputes”). Most of Marin’s MHP panelists are either custody evaluators, family mediators, or collaborative divorce coaches.

23. *See* Joan B. Kelly, *Preparing for the Parenting Coordination Role: Training Needs for Mental Health and Legal Professionals*, 5 J. CHILD CUST. 140, 142 (2008). Although this article focuses on the training needs of parenting coordinators, many of the principles apply equally to ISC panelists.

24. *See generally* Firestone & Weinstein, *supra* note 14, at 211 (divorce and related matters “are complex problems [that require] collaboration and the participation of many other professionals. All professionals involved need training in mental health, law, collaborative conflict resolution strategies, the dynamics of divorce, child development, the causes and consequences of child maltreatment, and the importance of interdisciplinary teams”). An integrated team approach requires that each ISC panelist be familiar with the skills and role of the other professional and of the judicial officer, so that the team can function like practiced dance partners.

25. This phenomenon is of particular concern to the custody evaluators who make up the majority of our MHP panelists given that, among psychologists in many states, it is child custody evaluators who face the highest rate of licensure board complaints. *See, e.g.*, Karen Franklin, *California Custody Evaluators Facing Lost Immunity*, FORENSIC PSYCH. BLOG (Apr. 25, 2010), available at <http://forensicpsychologist.blogspot.com/2010/04/calif-custody-evaluators-facing-lost.html> (“[a]mong forensic psychologists [in California], child custody evaluators face the highest rate of licensure board complaints”); Mark Greer, *Ensuring That “Good-Faith” Evaluations are Safe*, 35 MONITOR ON PSYCH. 25, 25 (2004), available at <http://www.apa.org/monitor/jun04/ensuring.aspx> (nearly eighty percent of all complaints filed with the Florida Board of Psychology were related to custody evaluations); Terrence Koller, *Should There Be Immunity For Custody Evaluators?* (2005), <http://www.apadivisions.org/division-31/publications/articles/resources/immunity-custody.pdf> (summarizing custody evaluator immunity laws).

26. On its face, California Evidence Code Section 730 applies to situations “before or during . . . trial” where “expert evidence is or may be required by the court or by any party to the action.” In such situations, the court is authorized to “appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required.” It is thus not clear from the statute’s language whether it would properly apply to ISC panelists. However, whether the appointment of ISC panelists under section 730 is technically proper would appear to be irrelevant to the question of liability, due to the application of the doctrine of quasi-judicial immunity in cases involving neutral third parties who attempt to help resolve cases. *See, e.g.*, *Howard v. Drapkin*, 222 Cal. App. 3d 843, 858–59 (1990) (“[w]e agree with defendant and amicus that the justification for giving judicial and quasi-judicial immunity to judges, commissioners, referees, court-appointed persons (such as psychologists, guardians ad litem and receivers), and nonappointed persons (such as those who prepare probation reports and handle child abuse cases) applies with equal force to these neutral persons who attempt to resolve disputes”).

27. Appointment as a court expert under California Evidence Code Section 730 does not in any way change or affect the panelists’ role or responsibilities. Whether styled an expert, a settlement specialist, a settlement facilitator, a mediator, and so on, the panelists effectively function as co-participants with the judge in assisting the parties to reach a settlement. The panelists do not act in a strictly advisory role, as might be the case with a scientific expert in a patent case, but rather play a role that is a *sui generis* hybrid of advisor, mediator, and judge pro tem. They are always accountable to the judge conducting the ISC.

28. Other options have been employed in California and other jurisdictions to achieve this end, including court ordered sanctions, specific statutory immunities for evaluators, and statutory prohibitions on licensing board complaints without prior judicial authorization. *See, e.g.*, *Laborde v. Aronson*, 92 Cal. App.4th 459, 462 (2001) (court of appeal affirmed dismissal of complaint alleging tortious conduct by custody evaluator and award of sanctions of \$24,000 against plaintiff and his attorney pursuant to Cal. Code Civ. Proc. § 128.7); GA CODE § 19-9-3(a)(7) (2010) (neither a court appointed custody evaluator nor a court appointed guardian ad litem shall be subject to civil liability resulting from any act or failure to act in the performance of his or her duties unless such act or failure to act was in bad faith”); FLA. CODE § 61.122(1) (2012) (“[a] psychologist who has been appointed by the court to develop a parenting plan recommendation . . . is presumed to be acting in good faith if the psychologist’s recommendation has been reached under standards that a reasonable psychologist would use to develop a parenting plan recommendation”); W.VA. CODE § 55-7-21(a) (2011) (“[a] licensed psychologist or licensed psychiatrist who has been appointed by a court to conduct a child custody evaluation in a judicial proceeding shall be presumed to be acting in good faith if the evaluation has been conducted consistent with standards established by the American psychological association’s

guidelines for child custody evaluations in divorce proceedings”); ARIZ. REV. STAT. § 32-2081(B) (2013) (“The board shall not consider a complaint against a judicially appointed psychologist arising out of a court ordered evaluation, treatment or psychoeducation of a person to present a charge of unprofessional conduct unless the court ordering the evaluation, treatment or psychoeducation has found a substantial basis to refer the complaint for consideration by the board”). It should be noted that there are many who are dissatisfied with the immunity granted to neutrals working with the family courts in California, and efforts have been made to modify or repeal quasi-judicial immunity granted to such neutrals (*see, e.g.*, AB 2475 (Beall, 2009-2010 legislative session)).

29. *See* CAL. R. CT. 3.1380 (advisory committee comment which states that “the special confidentiality requirements for mediations established by Evidence Code sections 1115–1128 expressly do not apply to settlement conferences under this rule”); CAL. EVID. CODE § 1117(b)(2) (explicitly exempting judicial settlement conferences from the protections of the code’s mediation confidentiality provisions). A resolution was adopted by the Conference of California Bar Associations in 2011 requesting that California Evidence Code Section 1117 and California Rule of Court 3.1380 be amended to specifically include settlement conferences within the protection of the mediation confidentiality statutes. *See* <http://calconference.org/html/wp-content/Resolutions/2011/7/07-10-2011.pdf> (last visited 11/13/2013). To date, no such legislation has been adopted in California.

30. Marin’s ISC program does provide some confidentiality protection, in that the panelists are appointed as the court’s own experts pursuant to California Evidence Code Section 730 (*see* Section D *supra*), and as such cannot be subpoenaed to testify in any subsequent proceeding involving the parties or their children.

31. Concerns have been raised that a pre-ISC meeting between the judge and the panelists constitutes an improper *ex parte* communication. Such concerns are addressed in the Marin Superior Court by the fact that in each case the panelists are appointed as the court’s own experts pursuant to California Evidence Code Section 730. Although there is no clear statute, rule, or decision to this effect in California, Marin’s judges believe that a judge has to be able to consult with an expert he or she has appointed in order to ensure the smooth functioning of the judicial role. This uncertainty and approach are not uncommon in the United States. *See* Joe Cecil & Thomas Willing, *Court Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706*, in FED. JUDICIAL CTR. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 525, 549–50 (1st ed. 1993) (“[o]ur interviews revealed considerable *ex parte* communication between judges and experts as well as some confusion concerning the proper standard. More than half of the judges who responded to the question ‘Did you communicate directly with the expert outside of the presence of the parties?’ answered ‘yes.’” The authors conclude that “[w]hether this concept [ex parte communications] is applicable to court-appointed experts is unclear,” and suggest that “[a] broad prohibition of *ex parte* communications between a judge and a court appointed expert would impede necessary communication when the expert is appointed to serve as a technical advisor to the court . . .”). An argument can be made that the communications between the judge and the panelists are permitted by implication or extension of California Rule of Court 5.235 (which permits certain *ex parte* communications in child custody proceedings).

32. Former Magistrate Judge Wayne Brazil suggests that meeting in chambers, as opposed to the courtroom, “encourages a sense of intimacy and informality that may make the participants more open . . . during discussions and more flexible during negotiations.” Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. DISP. RES. 1, 31 (1987).

33. *See generally id.* at 33–34 (describing typical contents of his opening remarks at settlement conferences and stating that “[o]bviously the goal is to create as much distance as possible between the feeling at the settlement conference and the formalism, pugilism, and defensiveness normally associated with a trial”).

34. There is very little literature on judicial settlement conferences in the child custody arena *per se*. Noel Semple, *Judicial Settlement- Seeking in Parenting Disputes: Consensus and Controversy*, 29 CONFLICT. RESOL. Q. 309, 310–12 (2012). Notwithstanding the paucity of scholarly attention, it appears likely that many if not most of the family law judges in North America attempt some kind of voluntary resolution of parenting disputes, usually in pretrial or settlement conferences. *Id.* at 310 (all of the respondents in Semple’s survey of family law judges and other family law professionals in New York and Toronto reported that the family court judges in these jurisdictions actively seek to convince parents to voluntarily resolve their disputes, usually in pretrial conferences, using either evaluative techniques, facilitative techniques, or some blend of the two). *See also* Flatters, *supra* note 10, at 190, 191 n.45 (discussing studies showing that a substantial majority of lawyers believe that “judicial involvement significantly improves the prospects of settlement and that judges should involve themselves in the settlement process as part of pretrial and case management processes”).

35. *See* Semple, *supra* note 34, at 310 (concluding that, while there is consensus “regarding the importance of encouraging settlement,” this “papers over significant differences of opinion about the role of the judge”).

36. *See, e.g.*, William L. Adams, *Let’s Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 ORE. L. REV. 427, 430 (1993); Brazil, *supra* note 32, at 13–15; Semple, *supra* note 34, at 322.

37. *E.g.*, John. C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. DISP. RESOL. 569 (2006); Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335 (2006); Roselle L. Wissler, *Court- Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RESOL. 271, 284–303 (2011) (extensive discussion of lawyers’ views on the “same judge” versus “different judge” question); Roselle L. Wissler, *Judicial Settlement Conferences and Staff Mediation: Empirical Research Findings*, DISP. RESOL. MAG., Summer 2011, at 18–20 (noting that “there is a lack of empirical evidence in the civil litigation context as to whether negotiations are in fact affected when the settlement facilitator is also the ultimate decision maker”).

38. See Semple, *supra* note 34, at 322 (“[t]he relative merits of the ‘one-judge’ and ‘two-judge’ models have been debated in the literature, but without apparent reference to the specificities of family court or parenting disputes”).

39. See Wissler, *supra* note 37, at 310–311, 322. A majority of lawyers in Wissler’s study thought that judges assigned to the case had more credibility regarding settlement considerations as compared with other facilitators. She assumes this is because judges assigned to the case “presumably are more familiar with the facts and issues in the case and, thus, would be better able to evaluate the merits and value of the case.” She opines that, “[i]n some cases, the perceived benefits of the judge’s credibility regarding settlement considerations might override concerns about the possible prejudicial effect of information revealed during the settlement conference.” *Id.*

40. Marin’s judicial officers have attempted to address these potential disadvantages in a number of ways. (1) Is there a risk that some parties will feel pressure to settle due to the presence of the assigned judge? While we recognize that this risk cannot be completely eliminated, even if the judge does not overtly pressure the parties to settle, it seems minuscule in our experience. The ISC is an option parties have the right to choose—it is not a mandatory settlement conference. It is usually apparent when a party is feeling pressured to settle due to the presence of the trial judge, and in that event such feelings would then become part of the conversation. (2) Is there a risk that the assigned judge’s presence at the ISC could encourage posturing? It could and sometimes does, especially if attorneys are involved. However, most ISC participants are self-represented, and in our experience the parties are usually too busy trying to get their point across to posture. On the contrary, the presence of the assigned judge tends to raise the level of the parties’ investment and usually encourages good behavior. (3) Is there a risk that a party who has reservations about his/her ability to negotiate with the other party might be reluctant to raise such concerns in front of the trial judge or the other party? Such concerns do arise, and experienced judges usually know how to handle them when they do (e.g., breaking out into separate session), particularly if they are already familiar with the parties. (4) Is there not a risk that, if the case does not settle, the judge will have had exposure to information that might bias his/her opinion or that would not be admissible in evidence? Again, this risk cannot be completely eliminated, but it seems negligible. In terms of actual evidence, there is usually not a lot of information that the judge learns for the first time at an ISC. S/he will have seen these parties several if not many times before and will generally be quite familiar with their case. As a practical matter, because they are the triers of fact unassisted by a jury, family law judges are always tasked with the job of sorting inadmissible from admissible evidence, and that problem exists whether the information is proffered at a settlement conference or in open court and hence is not a problem specific to ISCs.

41. The assigned judge never participates in an ISC unless the parties so stipulate on the record. As a matter of course the assigned judge always admonishes the parties and counsel that s/he will be the trier of fact at a contested hearing if the case does not settle and gives the parties an opportunity to object to his/her participation at the ISC. While there may be some risk that a party might not want to risk alienating the judge by objecting to his/her participation in the ISC, in our experience the risk is de minimis, given that it is quite common for parties to ask for another judge to conduct the ISC. Significantly, the judges do not require the parties to ask the trial judge not to participate; rather, they ask the parties whether they want the trial judge to participate—a fine but important distinction. In any case, if either party or their lawyer has a concern about the ultimate trier of fact officiating at the ISC, the judicial officer will try to find another judge who is willing to step in. If another judicial officer is unavailable, the ISC will proceed with the panelists only.

42. The few articles that explicitly address the role of the judge in custody settlement conferences, written primarily by judges themselves, tend to acknowledge the facilitative–evaluative tension, even as they come down on either side of the divide. See, e.g., Goss, *supra* note 7; T. J. Gove, *Judge-Mediated Case Conferences in Family Law: Looking for the Best Attainable Outcome*, 57 ADVOC 855 (1999); Hugh F. Landerkin, *Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model*, 35 ALBERTA L. REV. 627 (1997); Abraham H. Lief, *Pretrial of Family Law in the Supreme Court of Ontario: Simplify and Expedite*, 10 LAW SOC’Y UPPER CAN. GAZ. 300 (1976); Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009); Jacqueline W. Silbermann, *Child Custody in Contested Matrimonials*, 80 N.Y.St. B.A. J. 16 (2008).

43. Family law judges who prefer an evaluative approach tend to emphasize the importance of efficiency, of objective analysis of legal issues, and of neutralizing emotions to make this possible. E.g., Flatters, *supra* note 10, at 191; Goss, *supra* note 7, at 515; Landerkin, *supra* note 42, at 662, 672. Family law judges who favor a facilitative approach tend to emphasize the importance of the parties keeping the decision-making power in their own hands, of seeking to shift the perspectives of the parties away from their grievances against each other and toward their children’s interests, of creating goodwill and healthy dialogue between the parties that will survive the litigation itself, and the technical and ethical difficulties of predicting a trial outcome at a pretrial settlement conference. E.g., Semple, *supra* note 34, at 318–21; Otis & Reiter, *supra* note 12, at 366, 369–70. The weight of scholarly opinion appears to be that cases involving ongoing relationships between the parties, particularly parenting disputes, are better suited to a facilitative approach, and that when a facilitative approach is used in such cases better results are achieved. See Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 82 (2002); Landerkin, *supra* note 42, at 663; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 511 (1985); Noel Semple, *Judicial Settlement-Seeking in Parenting Cases: A Mock Trial*, 2013 J. DISP. RESOL. 301, 328 (2013).

44. As Marin’s Judge Wood explains, “we don’t usually tell parties how we would rule, but I certainly tell them whether I think a proposal is reasonable or not, or I might discuss how I ruled on a similar matter, or remind them of certain aspects of the law that I think they are overlooking” (personal communication, Oct. 4, 2013).

45. See Brazil, *supra* note 32, at 4 (“the mind set that is appropriate for hosting a settlement conference is very different from the mind set that judges develop when presiding at trial or contested hearings. In settlement settings, the judge must be much more patient, much more open to letting the lawyers meander, both intellectually and emotionally, and much more willing to demonstrate to counsel both knowledge of the case and openness of mind”). See also Otis & Reiter, *supra* note 12, at 384 (“[a]t the opening of a judicial mediation session, the parties are firmly in an adjudicative mindset: their positions are defined adversarially, the conflict is generally conceptualized in winlose terms, and discourse focuses on respective rights and entitlements. Their narrations will at first remain strongly adversarial, centered on grievance and blame”).

46. Both research and experience confirm the importance of parties feeling heard by the judge, even if the judge does not end up making a decision for them. See, e.g., Brazil, *supra* note 32, at 4 (“[i]t is especially important to let the parties . . . talk at the outset, to let them tell their side of the story, perhaps discursively, so that they feel that they have been truly heard . . .”); IAALS, *supra* note 9, at 8 (emphasizing that importance of the parties feeling that they have had an opportunity to voice their perspective and that their perspective has been heard by the judge); Landerkin, *supra* note 42, at 655 (parties are more satisfied with even adverse judgments if they feel they’ve been heard).

47. Personal communication, Oct. 4, 2013.

48. The judge’s presence alone lends a solemnity and gravitas to the proceedings that would otherwise be absent. See Otis & Reiter, *supra* note 12, at 352, 365 (observing that judicial mediation offers a beneficial blend of “some of the legal and moral gravitas of adjudication with the flexibility and adaptability of ADR” and suggesting that “the perception of the judicial office as one of impartiality and independence . . . confers on judges a degree of moral authority. This can function to keep the process on track and to prevent abuses of the process by the parties or their representatives”). See also Semple, *supra* note 34, at 329 (explaining that one characteristic of judges “is their inherent authority. This authority is a consequence of judicial enforcement power, predictive power, and moral suasion, and it has an effect whether or not the judge seeks to use it”). In addition to the authority inherent in their role, judges typically bring many particular qualities and skills that make them effective in the ISC, including ample knowledge of the law and extensive experience in working with disputing parties and counsel. See, e.g., Otis & Reiter, *supra* note 12, at 366 (“[j]udges have an understanding of legal issues that permits them cogently to focus on the issues underlying the dispute and to bring these to the fore during discussions between the parties, even if this necessarily must stop short of expressing an opinion on the case”), 370 (“[t]he presence of a judge reminds the parties of what is at stake, ensures that the process is capably run in all instances, and allows continued vigilance of issues like the balance of bargaining power”).

49. See SCHEPARD, *supra* note 9, at 181; IAALS, *supra* note 9, at 5-6 (“an understanding of child development and family dynamics [by the judge] is critical”); see also BILL EDDY, *THE FUTURE OF FAMILY COURT: STRUCTURE, SKILLS AND LESS STRESS 77* (2012) (suggesting that a majority of high-conflict parenting disputes involve one or more family members with a mental health problem).

50. The ISC judge’s demeanor and approach would appear to be similar to that of the Family Court of Australia’s Children’s Cases Program judges, as described by McIntosh and her colleagues. See McIntosh et al., *supra* note 2, at 132 (the judges in this program have been “predominantly experienced as a respectful, child-focused and supportive person, enabling a higher level of reflection, and militating against attack-counterattack processes by the parties and their legal representatives. . . . [M]any parents . . . were . . . often reached, moved, and inspired by a judge who entered their struggle”).

51. Otis & Reiter, *supra* note 12, at 387-88.

52. In order to best facilitate these kinds of conversations, Marin’s ISC judges as a general rule encourage the parties to stay in joint session, rather than break out into separate caucuses. The question of whether it is advisable for a judge in a settlement conference to meet separately with the parties is the subject of lively debate in the scholarly literature, e.g., Harold J. Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131 (2001); Brazil, *supra* note 32; Dale A. Oesterle, *Dangers of Judge-Imposed Settlement*, 9 LITIGATION 29 (1983), although the literature on settlement conferences in parenting disputes is almost entirely silent on the question of caucusing, with the one judge who did address the issue coming out decidedly against the practice. Flatters, *supra* note 10, at 187 (“it is for the judge to create an environment where the emotional content of the dispute can be openly discussed by the parties together and not separately in a caucus”). Proponents of the practice emphasize the freedom it affords the judge to speak frankly with each side about the strengths, and especially the weaknesses, of their case, as well as the avoidance of the risk that one side will antagonize the other in the presentation of its case. E.g., Brazil, *supra* note 32, at 23-24; Oesterle, *supra*, at 57. Opponents of private caucuses emphasize the dangers inherent in ex parte communications, in which there is no opportunity to correct or respond to misstatements made by the opposing side, the danger that the judge will inadvertently miscommunicate important points as s/he shuttles from party to party, and the ethical and practical dangers inherent in judges rendering evaluative opinions in such caucuses without a full presentation of the evidence. E.g., Brazil, *supra* note 32, at 22, 24; Oesterle, *supra*, at 57. Marin’s ISC judges encourage the parties to stay in joint session for all of the reasons explicated by opponents of the private caucuses, but do not hesitate to break out into separate session where to do so would support the purpose of the ISC—for example, to shore up a party’s confidence or to more deeply address something a party feels too vulnerable to explore in front of their ex-spouse—but always with the goal of returning to the joint session and continuing the dialogue, whenever this is possible. The judges never participate in separate caucuses without (1) both parties’ agreement and (2) making sure they spend roughly the same amount of time with each side.

53. This obligation reflects a tension between the parents’ right to settle their dispute in a way that is mutually acceptable to them (but possibly contrary to the interests of the children) and the mandate imposed by law that the legally correct outcome

is that which is best for the children concerned. See Semple, *supra* note 34, at 325–26. Both Judge Wood and Judge Adams have on rare occasions terminated an ISC in which they believed the parents were losing sight of the children’s best interests.

54. See generally Brazil, *supra* note 32, at 68 (describing closing procedures for avoiding “loose ends”).

55. See Pruett & Johnston, *supra* note 22, at 108 (describing private co-mediation approach in which lawyers for the parties are encouraged to “become part of the voice of reality, helping clients understand their options and counseling them about the options that are not realistic in their circumstance”).

56. For some self-represented litigants, their conversation with the attorney-panelist (or MHP) will be their only contact with an attorney (or MHP).

57. See also Flatters, *supra* note 10, at 191 (describing the role of counsel for the parties in settlement conferences as requiring them “not to defend the client’s position but to become an integral voice in . . . an interests-based analysis in a problem-solving structure”).

58. In conventional settlement conferences lawyers and judges often shy away from rehashing the past, afraid that such venting will derail any chance of an agreement. However, if the parties are holding on to their untold version of events and any accompanying resentment, the inability to be heard may be what prevents an agreement from being reached. See GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* 208 (2008) (“the goal of speaking about the past is to gain a fuller understanding of how the parties believe they have gotten to where they are. Knowing this can open a meaningful dialogue about what is important to the parties in going forward. In fact, avoiding the past can keep people locked in their conflict, fueled by mutually reinforced negative views of each other’s past actions and motives. The idea that allowing expression of feeling is somehow to provide space for ‘venting’ suggests that emotions are a contaminant in the process, rather than a valid aspect of the parties’ experience. Emotions, authentically experienced and expressed, are often part of the inquiry and may prove key to gaining a fuller understanding”); Pruett & Johnston, *supra* note 22, at 99 (“some attention may need to be given to reworking the events, giving each parent an opportunity to discuss his or her views of critical incidents”).

59. Johnston suggests that some parties may be confused by the MHP’s support of both sides. Janet Johnston, *Clinical Work With Parents in Entrenched Custody Disputes*, in *A HANDBOOK OF DIVORCE AND CUSTODY: FORENSIC, DEVELOPMENTAL, AND CLINICAL PERSPECTIVES* 343, 348–49 (Linda Gunsberg & Paul Hymowitz eds., 2005). But see FRIEDMAN & HIMMELSTEIN, *supra* note 58, at 209 (“the mediator’s heartfelt acceptance of both views allows the parties to see their confrontation as one of differing perspectives and [they] thereby begin to escape the hold that the conflict has over them”). The latter is more descriptive of our own experience in ISCs.

60. See Pruett & Johnston, *supra* note 22, at 103 (“[t]he mediator endeavors to relate empathically to feelings expressed by both parents, is careful not to take sides, and makes it clear, repeatedly, that there are two sides to every story”).

61. ISCs in general provide a unique learning opportunity for the parties, which the panelists and the judge all contribute to. See Otis & Reiter, *supra* note 12, at 391 (noting that “[j]udicial mediation is particularly suited to developing and exploiting . . . the educative or teaching function of the process”).

62. This facet of the MHP’s work is particularly helpful to parties who have not had a custody evaluation because they cannot afford it or because an evaluation has failed to resolve the underlying dispute. The educational component is a frequent reason that courts suggest and lawyers request an ISC.

63. See Pruett & Johnston, *supra* note 22, at 95, 98. Based on the information they have gathered about the parties’ children, the MHP can comment on the developmental appropriateness of whatever options the parties are considering and can suggest other developmentally appropriate options. See, e.g., DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES: A STRATEGIC APPROACH* 218 (1998) (“[s]uggestions can be offered in a very direct form or through examples from other couples’ creative solutions to similar problems”).

64. This approach of momentarily setting aside the legal issues in order to attend to the emotional dynamics of the parties is not unfamiliar to professionals involved in custody-related mediation. See, e.g., Johnston, *supra* note 59, at 350 (“[t]he point . . . is to formulate a working hypothesis about the ‘divorce impasse,’ the intrapsychic and interactional factors in and between parents and others that maintain the family disputes”); Pruett & Johnston, *supra* note 22, at 94 (“ . . . a specific focus on . . . relational issues . . . improve[s] the likelihood of success in high-conflict cases”); Saposnek, *supra* note 63, at 170–71 (“[i]f normal but temporarily disabling feelings are causing the impasse, some brief therapeutic work within the mediation session can be of much help in facilitating the parent through some of the grief so that negotiations can effectively begin”). See generally H. IRVING & M. BENJAMIN, *FAMILY MEDIATION: CONTEMPORARY ISSUES* (1995); Lois Gold, *Lawyer and Therapist Team Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 209 (Jay Folberg & Ann Milne eds., 1988). The interventions discussed by these authors envision multiple sessions over multiple weeks. While the goals of the ISC are necessarily more modest given the small amount of time available, the approach of dissolving impasse by helping parties understand the unconscious motivations underlying their dispute has proved highly effective in the ISC context, and the theories and techniques of these more time-consuming approaches are highly relevant and useful to the MHP-panelist.

65. It would of course be foolhardy or naïve to assume that a couple’s long-standing emotional conflicts can be resolved in a settlement conference of a few hours’ duration. Even in longer dispute resolution processes such as mediation, commentators have noted the need to focus more on “conflict management” than dispute “resolution.” E.g., Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 3, 7 (Jay Folberg & Ann Milne eds., 1988); Saposnek, *supra* note 64, at 208. Nevertheless, it is our experience that some aspects of the couple’s underlying conflict can be resolved even in the single afternoon that is typically available for an ISC, at least enough to create sufficient trust and emotional and cognitive space to negotiate an agreement. See Milne & Folberg, *supra*, at 7 (who conclude

that “[f]or now, let us accept both dispute resolution and conflict management as complimentary and obtainable goals of mediation”).

66. Pruett & Johnston, *supra* note 22, at 95 (suggesting that mediators working with high-conflict parents need to have “considerable experience working with fragile, vulnerable, narcissistic, and potentially volatile people”).

67. For example, litigious couples in custody disputes commonly engage in splitting (e.g., seeing oneself as the only safe and responsible caregiver while viewing the other parent as wholly irresponsible and even dangerous) and negative merging (e.g., clinging desperately to a negative relationship with the other rather than having no relationship at all). *E.g.*, Johnston, *supra* note 59, at 344; Pruett & Johnston, *supra* note 22, at 94–95. Johnston speculates that much of the high drama and emotional intensity of many custody disputes are a way of masking and relieving the parties’ “feelings of existential emptiness, incipient depression, and fears of emotional death,” Johnston, *supra* note 59, at 359, while Saposnek suggests that many litigants “grapple with their ex-spouse to gain some sense of security, personal power, and dignity,” Saposnek, *supra* note 64, at 171. *See generally* JOHNSTON & ROSEBY, *supra* note 18.

68. Although such an approach may sound shockingly like therapy to some, our experience has shown that confronting the underlying psychological causes of impasse head on is appropriate, effective, and usually welcomed in the ISC context as a way of helping the parties get to the heart of what their dispute is really about so they can deal with it more effectively. At the same time, it should be emphasized that insight-related strategies that aim to raise the parties’ level of awareness as to their underlying psychological motivations are not effective or appropriate with all parties to custody disputes. Some individuals are too emotionally fragile or too rigidly defended to be confronted with such suggestions without feeling shamed, attacked, or exposed. In such cases it may be more appropriate to attempt to redirect rather than confront the party’s defenses, often by means of support intended to shore up the party’s confidence and sense of identity. *See, e.g.*, Pruett & Johnston, *supra* note 22, at 96 (in such cases “[t]he mediator points out the parent’s strengths and reframes conflicts as emanating from positions of strength, such as protective feelings for his or her children”). These authors go on to explain that “[p]eople who are the most frightened or psychologically vulnerable often need reassurance, rather than a confrontation that serves only to deepen their fears and maladaptive behaviors. It is part of the clinician’s art to know when direct confrontation will be effective versus counterproductive. Parents for whom the separation is a narcissistic wound of major proportion, evoking profound shame and rage, generally do not respond well to direct descriptions of their maladaptive behaviors or interpretations of the underlying causes. Reframing their negative behaviors in terms of more benign or positive intentions and supporting their developing capacity to maintain self-control reinforces their incipient ability to deescalate the conflict.” *Id.* at 99. It is thus crucial for the MHP to get a sense of the ego strength of the parties and to be “protective of the parents’ vulnerabilities,” in order to determine the best approach to use with the parties. Johnston, *supra* note 59, at 353.

69. *See* Pruett & Johnston, *supra* note 22, at 100 (suggesting, in the context of therapeutic mediation, that careful attention be paid to the wording of the agreement so as to prevent the reemergence of prior impasses: “[t]he agreement must be specific enough that the couple can have positive interactions and slowly build mutual trust. At the same time, it must satisfy both parents’ particular fears”). *See also* Otis & Reiter, *supra* note 12, at 389–90 (stressing the importance of recognizing the prospective nature of a negotiated settlement: “[b]y seeking to resolve a conflict globally, rather than just dealing with a particular instantiation of that conflict, mediation recognizes that the parties are linked to one another in a complex relationship; [judicial] mediation thus works actively to create for the parties a new *modus vivendi*”).

70. Marin’s ISC questionnaire was created by a subcommittee of the Family Interdisciplinary Committee consisting of the lead author; Joan B. Kelly, Ph.D.; and Andrew Lamden, LCSW and was adapted from Dr. Kelly’s Client Assessment of Mediation Services questionnaire, which was tested and validated by her mediation research project. *See* Joan B. Kelly & Lynn Gigy, *Client Assessment of Mediation Services (CAMS): A Scale Measuring Client Perceptions and Satisfaction*, 19 *MED. Q.* 43 (1988).

71. This would appear to be in keeping with the research-based finding that mediated cases have a lower relitigation rate than litigation control groups. *See* ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION* 178–81 (1994); Kelly, *supra* note 10, at 139. Regrettably, we do not have statistics from the period prior to the inception of the ISC program to know exactly how significant a reduction in relitigation these figures represent. However, anecdotal evidence from the judicial officers indicates that the reduction in ongoing litigation by the same parties is substantial.

72. Unfortunately, we did not start using our participant questionnaire until January 2014, too late to include data from these questionnaires in this article.

73. *See* Wissler, *supra* note 37, at 300 n.114 (2011) (“[t]here is a general consensus that settlement procedures should be assessed by the quality of the process and the settlements achieved, not only by the number of settlements produced”). Regarding the importance of considering the nature of the agreement, its durability, and relitigation rates in evaluating family court dispute resolution, *see* Liz Trinder & Joanne Kellett, *Fairness and Effectiveness in Court-Based Dispute Resolution Schemes in England*, 21 *INT’L J.L. POL’Y & FAM.* 322, 325 (2007).

74. As an example, one litigant wrote to Judge Adams after the conclusion of an ISC as follows: “Because of your ability to communicate effectively with both [mother] and I, I believe it has forever changed our outlook on the many parenting issues we have faced and will face in the future. . . . After leaving your courtroom, I actually hugged [mother] in the hallway and let her know how truly sorry I was for how our custody related issues had become so difficult. Without your presence, I know that would not have happened.”

75. *See* Connie J. A. Beck et al., *Collaboration Between Judges and Social Science Researchers in Family Law*, 47 *FAM. CT. REV.* 451, 455 (2009) (“[u]nfortunately, little research exists about how culturally, racially or ethnically diverse populations

treat their children or each other and what specific variables might be important to consider in making decisions about their families”).

76. While the pro bono aspect of Marin’s ISC program may be an obstacle to those seeking to replicate the program, the existence of numerous court-connected ADR programs in which volunteer mediators are paid for at least a portion of their time suggests that the same may be feasible with regard to ISC panelists. *See, e.g.,* N.D. CAL. ADR RULE 6.3(c) (specifying terms of compensation for volunteer mediators in court-connected ADR program).

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