

CHAPTER 34
CASE RESOLUTION OPTIONS
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The text of this Chapter is excerpted from the <i>ADR Handbook for Judges, American Bar Association Section of Dispute Resolution</i>, pages 114-132 (2004).	
34.01	<p>ADR AUTHORIZED IN MINNESOTA CHIPS CASES</p> <p>The court may authorize parties and participants in any child in need of protection or services, permanency, or termination of parental rights petition to participate in any appropriate form of alternative dispute resolution including family group decision making, parallel protection process, and mediation when such alternative dispute resolution is in the best interests of the child. The court may order that a child be included in the alternative dispute resolution process, as appropriate and in the best interests of the child. An alternative dispute resolution process, including family group decision making, parallel protection process, and mediation, may be used to resolve part or all of a matter before the court at any point in the proceedings subject to approval by the court that the resolution is in the best interests of the child. Minn. Stat. § 260C.163, subd. 12</p>
34.02	<p>REASONS TO USE ADR</p> <p>In child protection proceedings, the courts and agencies must balance the public policy concerns and federal law provisions with the needs and interests of their personnel and the families they serve. Juvenile courts and child welfare agencies often have inadequate funding and limited personnel resources, yet they must handle an overwhelming number of cases. The interdisciplinary nature of Alternative Dispute Resolution (ADR) and its emphasis on participant interaction and information sharing make ADR processes excellent resources for courts and agencies.</p>
34.03	<p>CAN BE USED AT ALL STAGES OF PROCEEDINGS</p> <p>Since the 1980s, ADR programs in dependency courts have been established in more than 30 states. In some states they have become an integral part of the dependency court process. ADR processes are used in child dependency at all stages of a case, from the initial report of abuse or neglect, the entry of a case into the court system, to the final stages where a child returns home or the case is closed through adoption or other event. ADR processes have been successful at each of these stages. ADR processes may be internal court or agency programs or programs contracted through private service providers.</p>
34.04	<p>TYPES OF ADR: MEDIATION AND FAMILY CONFERENCING</p> <p>There are two basic types of ADR used in dependency cases: mediation and family conferences. There are similarities and differences between mediation and family conference processes.</p> <ol style="list-style-type: none"> 1. Mediation in child protection cases has four basic interdependent stages: orientation, fact-finding and issue development, problem solving, and agreement/disagreement and closure. 2. Family conferences have similar stages but rely heavily on the family to come up with their own solutions. Additional differences include the people involved in the session, the types of agreements that result, the cases that are appropriate for each, and how the process is connected with the court or agency. <p>Both processes use a neutral to help parties discuss their disputes, make decisions, and resolve conflict. The neutrals are trained professionals from a variety of background. In addition to their mediation or facilitation training, they are frequently required to have specific training in child welfare issues, policy, and law.</p>
34.05	<p>ADR MODELS</p> <p>There are multiple models of mediation and family conference programs. Some ADR programs are provided as an internal court process, where staff neutrals in the court building conduct sessions. Some family conferences are conducted by social service or child welfare agencies in the community or in their office. Some mediation and family conference programs operate within the court building, but are run by an outside group, not court staff. Other</p>

	<p>programs are coordinated through law schools or community mediation centers and meet outside of the courthouse. These programs all have the potential to be successful, as long as they have a strong connection to the judges, other professionals, and the parents.</p>
34.06	<p>ADR ACHIEVES SUCCESSFUL INTERVENTIONS</p> <p>Mediation and family conferences are successful interventions in juvenile court cases because they help professionals and family members to consider the strengths and weaknesses of the particular family involved. In court, the professionals are required to focus on the inadequacies of the family and the problems that similar families face. Social workers on child dependency cases are usually put in the difficult position of working to help a family change disruptive patterns and also reporting on that family to the court. Mediations and family conferences allow the family and other participants to have a vote in whether to accept or reject an agreement. The parties are able to communicate with each other in an informal setting, something that the adversary nature of the court proceedings does not permit. ADR processes increase the role of the family in the problem-solving process and focus the participants on timely decisions that are in the best interests of the child. This helps the children, the family, and the court.</p>
34.07	<p>MEDIATION – OVERVIEW</p> <p>Child dependency mediation is a non-adversarial process where an impartial, neutral third party without authoritative decision-making power assists the parties, including parents, attorneys, agency personnel, and sometimes extended family members or foster parents to discuss their disputes and concerns, exchange information, focus on the best interests of the child, and create potential solutions for their issues. The main goal is to facilitate resolutions that serve to preserve the safety and best interests of children and the safety of all family members. There should always be a special protocol for handling domestic violence cases? Families, attorneys, and caseworkers are the key participants. Depending on the mediation model used, attorneys may be involved during the entire session, for some of it, or they may not participate at all.</p>
34.08	<p>FAMILY CONFERENCES – OVERVIEW</p> <p>Family conferences are family-focused, strengths-oriented, community-based processes where parents, extended family members, social work professionals and others come together to make decisions collectively for children or young adults. Family conferences allow parties to share in the decisions that affect them and focus on a family's strengths, not weaknesses. The conferences are labor intensive and value the ability of families to make decisions relating to their children. The decision-making process is supported by, but not dictated or directed by, the professionals. The family conference is planned by a coordinator who contacts the family, explains the process, and asks the family who should be included in the conference. The coordinator also helps the family think about possible topics and outcomes of the conference. There are different models of family conferences, but they all focus attention on the needs of the children and the family.</p>
34.09	<p>WHICH PROCESS TO USE</p> <p>When a program has both dependency mediation and family conferences available, certain cases are better off in one process over the other.</p> <ol style="list-style-type: none"> 1. Mediation. According to the criteria established in Santa Clara County, a case is more appropriate for mediation when there has been a petition filed and the case has one or more of the following factors: there is a high level of litigation, a moderate to high level of parental conflict, the parents clearly need legal advocacy and information, there are concurrent child custody disputes, or a restraining order prevents the parties from attending together? Mediation is a more formal and legalistic process. 2. Family Conferences. The criteria also provide guidance on which cases are more appropriate for family conferences and less appropriate for mediation. Appropriate cases include those where the parties want to have a family conference, where a parent has a severe mental illness or a very low intelligence that would preclude his ability to

	<p>constructively participate in mediation, when a large number of extended family members are available to participate, or when one or both parents are being criminally prosecuted for abuse or neglect. The family conference process will allow participants to have more familial support from extended family, and the parties may have representatives or non-legal advocates helping them. The earlier in a case a matter is referred, the easier it will be to establish a positive and constructive relationship between the family, agency personnel, and the court?'</p>
<p>34.10</p>	<p>SCREENING CASES FOR AN ADR PROGRAM Cases that are sent to an ADR process must be screened to determine if they are appropriate. It is important that whenever the screening is done, the screeners know the protocol and have been trained to identify the proper cases.</p> <ol style="list-style-type: none"> 1. Judges may screen cases before they are sent to ADR, or the court may decide to have the ADR program decide whether cases are appropriate. <p>34.09 Screening Cases for an ADR Program (continued)</p> <ol style="list-style-type: none"> 2. Cases also must be screened for domestic violence. ADR programs take different approaches where there has been domestic violence in a family. Domestic violence advocates have concerns that victims of domestic violence may be re-victimized through an ADR process. If one party exerts control or threatens violence, another party may make agreements in an attempt to ensure their safety. ADR advocates work to ensure that parties are able to negotiate with each other without being under undue influence. Some programs eliminate all cases with obvious domestic violence, while other programs include such cases after a case-by-case examination. 3. When programs take the time to examine the individual cases, they avoid eliminating people from the program who may benefit from it. If a case involves domestic violence, screening may identify ways to create a process that works for the parties. 4. Parties may participate in the process but not meet in the same room with another party, for example, or they may participate by phone. 5. Domestic violence may also become apparent during the mediation process, so mediators need to be continually screening to ensure that all participants feel safe in the process. An ADR program needs to work with the domestic violence advocates in the local community, or with another mediation program that has addressed these issues, to keep participants safe. 6. Cases can be screened to ensure that parties have the capacity to participate in mediation. If a court has both mediation and family conferencing programs, cases may be screened for which is the appropriate process. <p>Courts may also limit their referrals by screening through a pilot program that takes only certain types of cases or cases at a certain stage of the legal process—for example, at intake, at adjudication, or at termination of parental rights.</p>
<p>34.11</p>	<p>SELECTING NEUTRALS AND DECIDING ON ONE VERSUS TWO There are several different methods that ADR programs use when selecting facilitators or mediators for particular cases. The protocols for the program should establish who is eligible to act as a neutral. These protocols will need to refer to state requirements for facilitators and mediators.</p> <ol style="list-style-type: none"> 1. The court may hire permanent court employees, or it may establish a roster of neutrals, or it may simply specify the basic credentials neutrals must have in order to mediate cases filed in the court. 2. The court may wish to leave selection of the neutrals for the program up to a program coordinator or rely on a state ADR agency that has certified neutrals for these types of cases. 3. From the list created by one of these entities or drawn up by the court, the protocol may ask the judge or the parties to select a neutral, or there might be a rotational list that the ADR coordinator uses.

	<p>4. When a program has sufficient resources, it may be helpful to appoint co-facilitators or co-mediators. The benefits of using two neutrals in a case include:</p> <ul style="list-style-type: none"> • increased opportunity for ethnic, gender, and age balance; • increased perceptions of balance, impartiality, and fairness; • wider range of expertise available at the table; • easier to gain the trust of the parties; • easier to do more observation of the parties; • increased comfort of new neutral working with mentor; and • more opportunities for feedback, sounding boards, and planning. <p>34.10 Selecting Neutrals and Deciding on One or Two (continued)</p> <p>5. Some concerns related to using two neutrals include:</p> <ul style="list-style-type: none"> • not cost-effective; • more scheduling difficulty; • complexity of the session; • dynamics between the neutrals may confuse the parties; • need to pay close attention to how the process is shared; and • risk that neutrals will model conflict resolution, compete with each other <p>The value of using two neutrals depends on the type of dispute, the level of distrust between parties, the expense, the logistics, and the experience of the neutrals.</p>
<p>34.12</p>	<p>DECIDING HOW CASES WILL BE SCHEDULED</p> <p>Courts have several options for scheduling ADR sessions.</p> <ol style="list-style-type: none"> 1. Some courts have specified dates or days of the week when mediation sessions are held. 2. Other programs have mediators on staff that are available to mediate as soon as the case is referred. 3. In other courts, the parties may simply agree to have the mediation session on a date to be announced, leaving to the mediation program coordinator or their support staff to schedule the mediation. 4. Two other ways to standardize the scheduling of the mediation sessions are to hold them automatically three days prior to the next court date or to hold them at some point in the two weeks prior to the next court date. 5. Whenever possible, it is best to schedule the mediation before the end of the hearing. One of the most difficult elements of an ADR process is finding a time that works for all the participants. Parties may not have easy access to a phone or mailbox, and court and agency staff have busy calendars, making it difficult, after the parties have left the courthouse, to find dates when all parties are available for a session. The easier the process is for the participants, the more likely it is that they will be supporters of the process. 6. Family conferences have more parties than mediations and tend to take longer to schedule than mediations. Family conferences may be held or scheduled through the social service or child welfare agency or through the court. The same scheduling techniques as above may be used if the process is court-driven. If an agency is scheduling or conducting the session, it may be done by the caseworker or an organization hired to conduct family conferences. <p>It is important to have well-trained individuals scheduling these sessions. They will need to tell the parties about the process, explain why they should attend, and work with multiple schedules. Parties are sometimes reluctant to participate because they do not understand the process, see the value, or have the time. The person who schedules the session needs to</p>

	<p>know enough about the process to explain the benefits to the participants.</p>
<p>34.13</p>	<p>DETERMINING WHERE SESSIONS WILL BE CONDUCTED</p> <p>As with each of the matters above, the court has a number of options regarding location of the ADR sessions.</p> <ol style="list-style-type: none"> 1. Some courts set up space for the ADR program in the courthouse. Holding the sessions in the courthouse is helpful for scheduling and is appreciated by participants who are involved in other court-related activities. A courthouse location works well if the parties are to return to court after the mediation or family conference to enter their agreement. 2. Other programs prefer to hold the ADR sessions in other community settings, in part because the courthouse may be seen as an intimidating space for parents and other non-attorneys. Family conference sessions are usually held in community centers, libraries, agency offices, or homes. <p>34.12 Determining Where Sessions Will be conducted (continued)</p> <p>The court's ADR protocol should establish a preferred location in the community or close to the courthouse for convenience of the court personnel. The location will depend on the goals for the ADR program. Many family conference programs are community-based and would prefer to work in the community, but some work in courthouses alongside the mediation programs.</p>
<p>34.14</p>	<p>CONFIDENTIALITY</p> <p>Confidentiality and exceptions to confidentiality are both extremely important issues in ADR processes.</p> <ol style="list-style-type: none"> 1. When processes are confidential, parties talk openly about their concerns and questions without worrying about what will be reported or be quoted at the next court hearing. 2. State laws also have certain confidentiality and reporting standards that govern conduct in ADR sessions. Sometimes these standards are in conflict within a given state. Additionally, standards differ from state to state. 3. Many states have enacted confidentiality requirements for mediation but have allowed child dependency mediation programs to opt-out of the confidentiality requirements due to the nature of the cases and the need to protect vulnerable children. 4. Confidentiality in these cases is more complicated than in other areas of law because of the presence of mandated reporters. A mandated reporter is someone who is obligated to report any allegations of abuse or neglect of which they become aware. When a mediation or family conference session occurs in a dependency case, quite often issues will be discussed that could qualify under a mandatory reporting statute. When state statutes require that all conversations in mediation remain confidential, mandated reporters may be stuck when reporting allegations conflict with state statutes that govern confidentiality in ADR. 5. It is important that the court and interested agencies work together to address the court's confidentiality requirements. Arkansas, for example, has a very specific mediation confidentiality statute. In order to ensure that mandated reporters in child dependency cases are comfortable participating in the mediations, and to ensure that all parties are adequately protected, the state's dependency mediation program created an agreement to mediate that states, "New allegations of abuse or neglect not previously reported, may be reported". 6. Some states, as well as the Uniform Mediation Act, provide for exceptions to confidentiality in certain circumstances. Program confidentiality protocols that are established must comply with the law and any local court rules that govern the process. The Cook County Illinois Rules provide one such example. The following are typical exceptions to confidentiality in state laws, program guidelines, or a program's Agreement to Mediate: <ul style="list-style-type: none"> • allegations of abuse or neglect not previously reported; • threat of harm to someone inside or outside the room;

	<ul style="list-style-type: none"> • communications that trigger mandated reporting according to the current state law on mandatory reporting; and • any information contained in the final agreement, which will be submitted to the court. <p>The ADR processes must always protect children first. Therefore, exceptions should be written into any new court rules or ADR program protocols. When an ADR program is established in dependency matters, the program planners should investigate current state law on mandatory reporters and reporting requirements and search for state laws or court guidelines on mediation confidentiality and any exceptions.</p>
34.15	<p>ADR PROCESS – MEDIATION</p> <p>A. MODELS. The mediation processes used in dependency cases have two main models:</p> <ol style="list-style-type: none"> 1. The parties work together throughout the process, sometimes breaking for private sessions (caucuses) with the mediator, sometimes meeting together for the whole process. 2. The professionals participate in different parts of the session than the family. <p>B. SUCCESSSES IN BOTH MODELS. Both models have had success.</p> <ol style="list-style-type: none"> 1. Model 1: <ol style="list-style-type: none"> a. There is frequently an orientation where the mediator or co-mediators discuss their role, the goals of the process, the confidentiality requirements and other ground rules, and the agreement to mediate. b. All the parties make opening statements telling the others what they would like to accomplish in the mediation. c. The mediators help the parties to set an agenda or identify the issues. d. The parties have a joint discussion of the issues and may start problem solving. e. The group may break out into smaller groups, or the mediator may meet individually with one or more party. f. The parties continue their joint discussion until they reach an agreement, or they determine they are unable to reach an agreement. Parties may also come up with partial agreements. g. The final plan, if one is achieved, is submitted to the court. 2. Model 2. One of the early and very successful dependency mediation programs that uses model B is in Santa Clara County, California. The mediation process in Santa Clara typically involves the following stages: <ol style="list-style-type: none"> a. A report with information about the case, including anything related to domestic violence, is forwarded to the mediators by the court. b. A brief orientation of the parents and other interested participants to the dependency mediation process is conducted by mediation program personnel. c. A meeting with the attorneys and assigned social worker is conducted by the mediator to foster an exchange of the most current case-related information, including anything related to domestic violence, identification of issues, and problem solving. d. Program personnel also conduct sessions with all the parties and/or caucus with the family members in various combinations, for the purpose of differentially assessing the issue of domestic violence as it applies to the mediation process, for an identification and exchange of the most current case-related information, for identification of issues, and for problem solving. e. Meetings with the individual parties, the social worker, and their attorneys are

	<p>conducted.</p> <ul style="list-style-type: none"> f. A final group meeting for a last attempt at problem solving is held, to identify areas of agreement/disagreement, clarify expectations, and answer remaining questions. g. Parties and attorneys proceed to court and present the outcome of mediation to the judge. <p>C. Agreements Reported to Court. Only areas of agreement to which all parties and attorneys and the social worker agree are reported to the court. The substance of the mediation process is otherwise confidential and not subject to discovery. The court then determines the acceptability or unacceptability of any agreement presented and remains the ultimate decision-maker.</p> <p>34.14 ADR Processes – Mediation (continued)</p> <p>D. Timing of Presenting Agreements to Court. If agreements are presented to the court soon after the mediation process, there is less room for disagreement about the meaning of the agreement and when compliance should start. If the judge has questions about the provisions of the agreement, it is helpful for the parties to know this soon after they participate. Where the participants have been able to reach agreement, the court should go over the agreement, clear up any misunderstandings without breaching the confidentiality of the session, and enter an order reflecting the agreement. If the parties have been unable to reach agreement, the court goes ahead with the legal proceedings. Whether their issues are resolved or not, parties frequently benefit from the time spent in mediation. The professionals learn new information about the case and their clients. Their clients feel heard and feel like they are a part of the process.</p>
<p>34.16</p>	<p>FAMILY CONFERENCES</p> <p>A. Goal of Family Conferences. In family conferences the goal is to balance child safety with family integrity and build partnerships among family members, the court, social service agencies, service providers, and the state child protective system to develop a safety plan for children. It empowers a family and often uses untapped resources and supports. The agreements that result from family conferences may go to the court or may become part of the agency file. These agreements focus on what the family can do for the child and the parent or parents. One of the successful ADR programs in Hawaii is 'Ohana conferencing.' This program stresses the importance of family time apart from professionals. It is a community-based intervention strategy that diverts abuse and neglect cases from court and assists families involved in the court process.</p> <p>B. Options for Family Conferences. There are many different versions of family conferences used in social service agencies and courts in this country and others. The conference may be coordinated and led by court or child welfare agency personnel or an outside facilitator. A primary goal of these conferences is to help the family to create an acceptable care and protection plan for their child or children. A trained facilitator works with extended families and professionals to exchange information, to discuss the children and the issues that brought the parties together, to problem solve, and to create a plan for the future. Sometimes the facilitators are community members.</p> <p>C. Discussion Items. Items discussed at family conferences may include supervision, placement, visitation, family reunification, and other permanent plans for the child, as well as final case resolutions (including the voluntary relinquishment of parental rights). Participants usually include parent(s), other family members, extended family, children (dependent on their age maturity level, and the subject matter), law guardians or</p>

	<p>attorney ad litem, neighbors and/or friends, therapists, school counselors, service providers, kinship care providers, foster families, caseworkers, case reviewers, parents' attorneys, CASA workers, and other involved professionals. Sometimes additional support people from a church, the community or children's schools, counselors, or medical personnel may participate. If there is an attorney, it is usually the child's representative.</p> <p>D. Process. In family conferences the first session is a joint session with all the participants. At this session the focus is on the strengths of the family and the issues they are addressing. The facilitator helps the participants identify the important issues to be discussed. There may or may not be private time for the family without the facilitator and without the professionals. The family makes the determination of who should be included as family. After the family, with or without the facilitator, designs a plan for the future safety and permanence of the child, the professionals come back into the room to discuss the plan. If everyone agrees that the plan will work, it is submitted to the agency or the court. If modifications need to be made, based on policies or opinions of the professionals, the family will work on an alternative plan.</p> <p>E. Location of Conferences. Family conferences are sometimes held as part of the legal court process. More often they are a part of the child welfare or social service agency process and are held at the social service agency or a community center. A caseworker or facilitator for the family conference project often organizes them. The coordinator tries to work around the family's schedule. It is sometimes necessary to have the meeting in the evening or on weekends.</p> <p>F. Pre-session information. There are generally no formal pre-session statements submitted in the ADR processes in dependency cases. The facilitators in family conferences become familiar with the family and the issues they face as they coordinate the conference or through information gathered by the coordinator. Mediators may or may not read the case file before a mediation, depending on the program's preferred approach. Some programs may want the mediator to become familiar with the case by reading the entire file. The mediator may want to read the basic information in the referral forms and not delve into the entire file. The file will be written from the perspective of only one or two of the parties and may have information that is confidential and should not be shared with everyone. All case files convey a point of view. Programs should decide how they want the mediator to approach this information.</p> <p>G. Referral Form. In the referral form, or other documents sent to the program, the court and parties should list the issues they hope the parties will discuss and consider. The mediator should start there. These will not be the only issues discussed, but they can help to set the stage for the discussion. Other mediators will want to have a copy of the entire file and see all that the case has involved up to that point. The parties who participate in the mediation will have to sign waivers for the mediator to have this information if it contains any medical or other confidential information.</p> <p>H. Agreements, forms, and reporting. Settlement agreements are usually prepared and signed at the ADR session and should be written in the parties' words as much as possible. An agreement may resolve the dispute either partially or fully. Sometimes the parties simply agree to continue to follow previous court orders and agree on an interpretation of those orders. It is always good to have agreements in writing, to be concise, to use plain language, and to not leave room in an agreement for different interpretations. Some programs have boilerplate language in an agreement and may</p>
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	<p>have a standard form that lets the court know whether there has been no agreement or a partial or full agreement.</p> <p>I. Court Review and Approval of Agreement. There are several ways that the court may receive the final agreement. The mediator may file the report with the court immediately after the ADR session, or the final agreement may be filed before the next court date by one of the attorneys in the case. In other courts, the attorneys may bring the agreement to the court for the next hearing, where the judge goes over the agreement to ensure that the parties know the terms of their full or partial agreement. If there is no agreement, the mediator should simply return a form to the court that states that no agreement was reached.</p>
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