

# Mediation in Family Cases — Empowering Parties to Create Their Own Solutions

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# RULE 9-205. MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES

## **(b) Duty of Court.**

(1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:

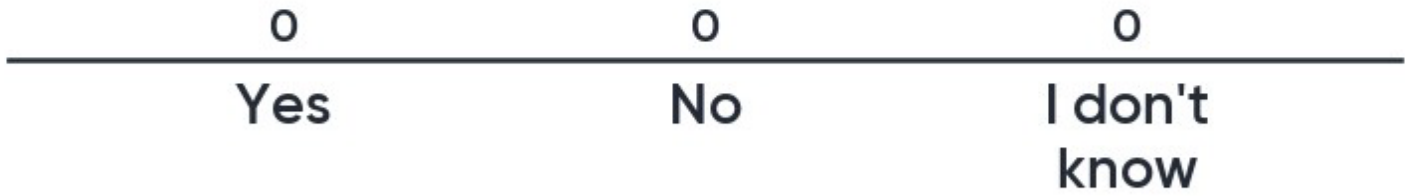
(A) mediation of the dispute as to custody or visitation is appropriate and likely would be beneficial to the parties or the child; and

(B) a mediator possessing the qualifications set forth in section (c) of this Rule is available to mediate the dispute.

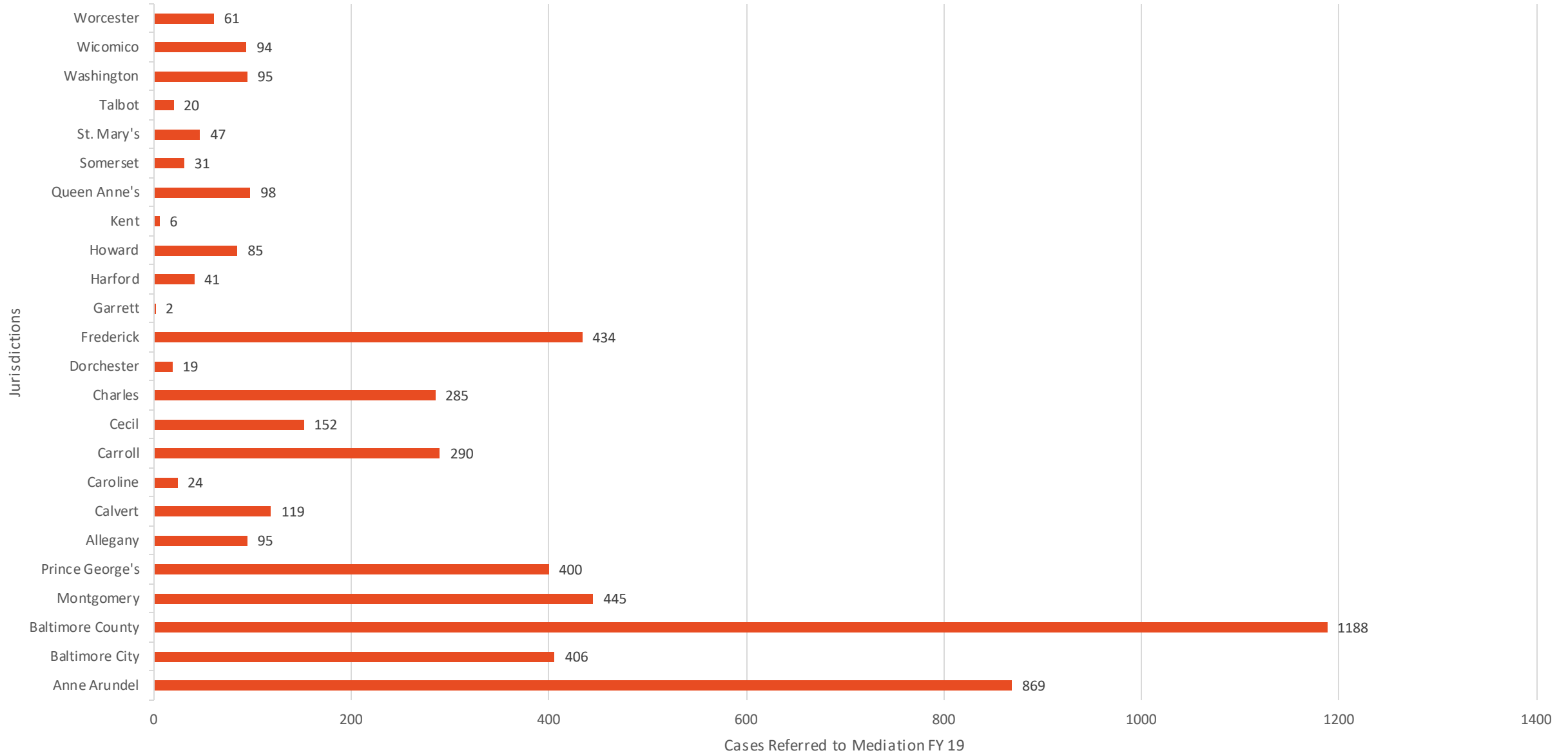
(2) If a party or a child represents to the court in good faith that there is a genuine issue of abuse, as defined in Code, Family Law Article, § 4-501, of the party or child, and that, as a result, mediation would be inappropriate, the court may not order mediation.

(3) If the court concludes that mediation is appropriate and likely to be beneficial to the parties or the child and that a qualified mediator is available, it shall enter an order requiring the parties to mediate the custody or visitation dispute. The order may stay some or all further proceedings in the action pending the mediation on terms and conditions set forth in the order.

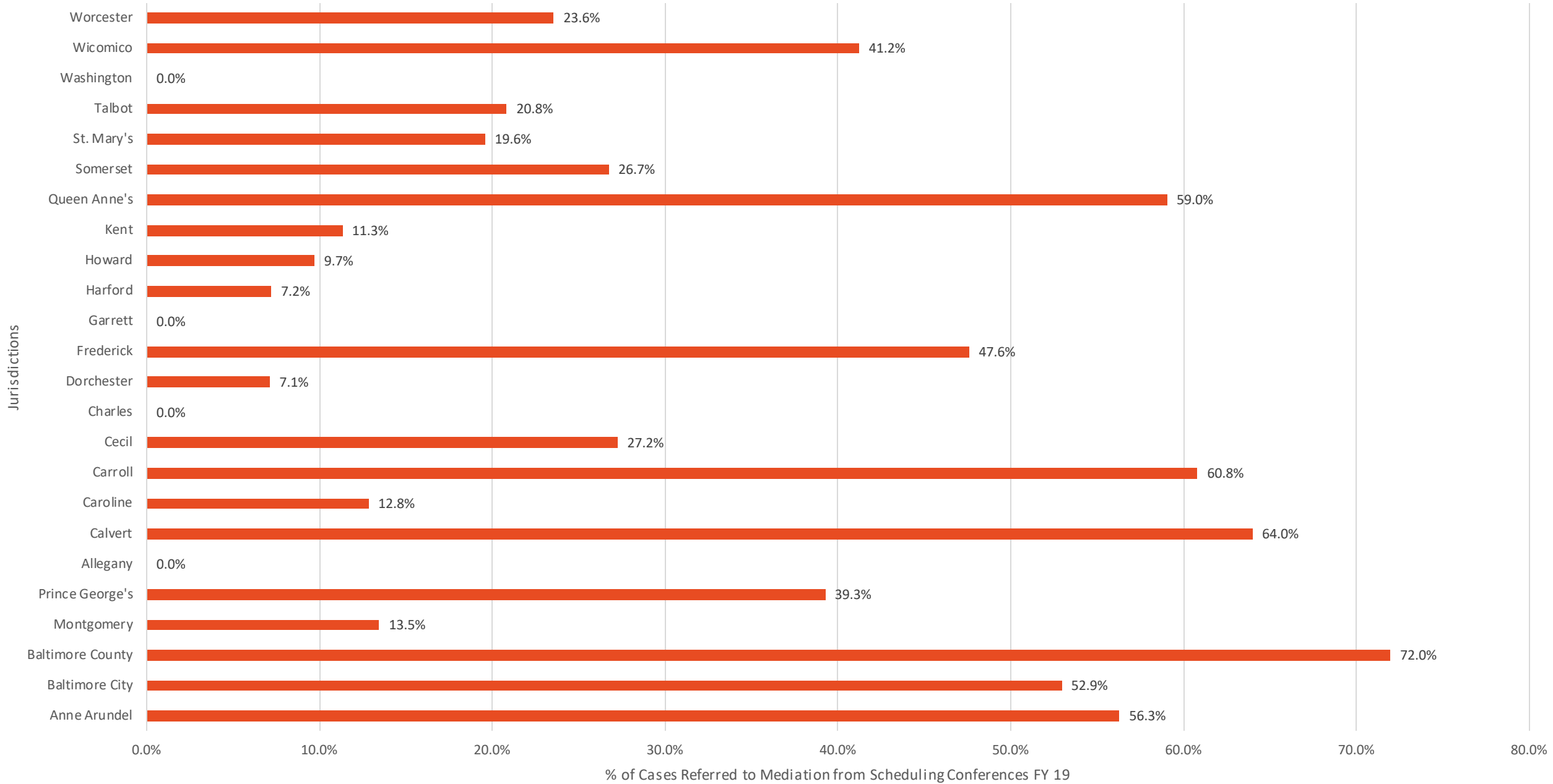
**Do you believe your court refers all family cases that are appropriate for mediation, to mediation?**



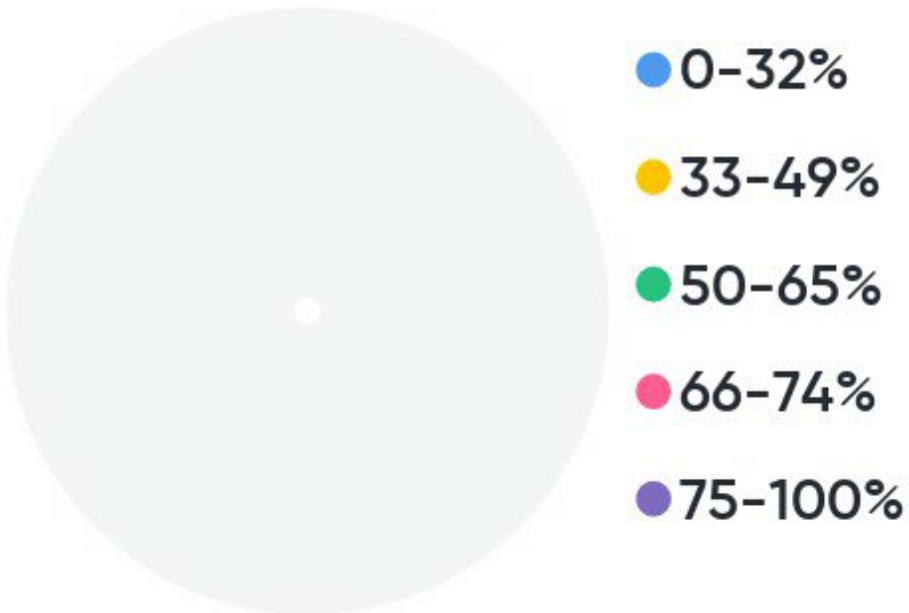
# Family Cases Referred to Mediation FY 19



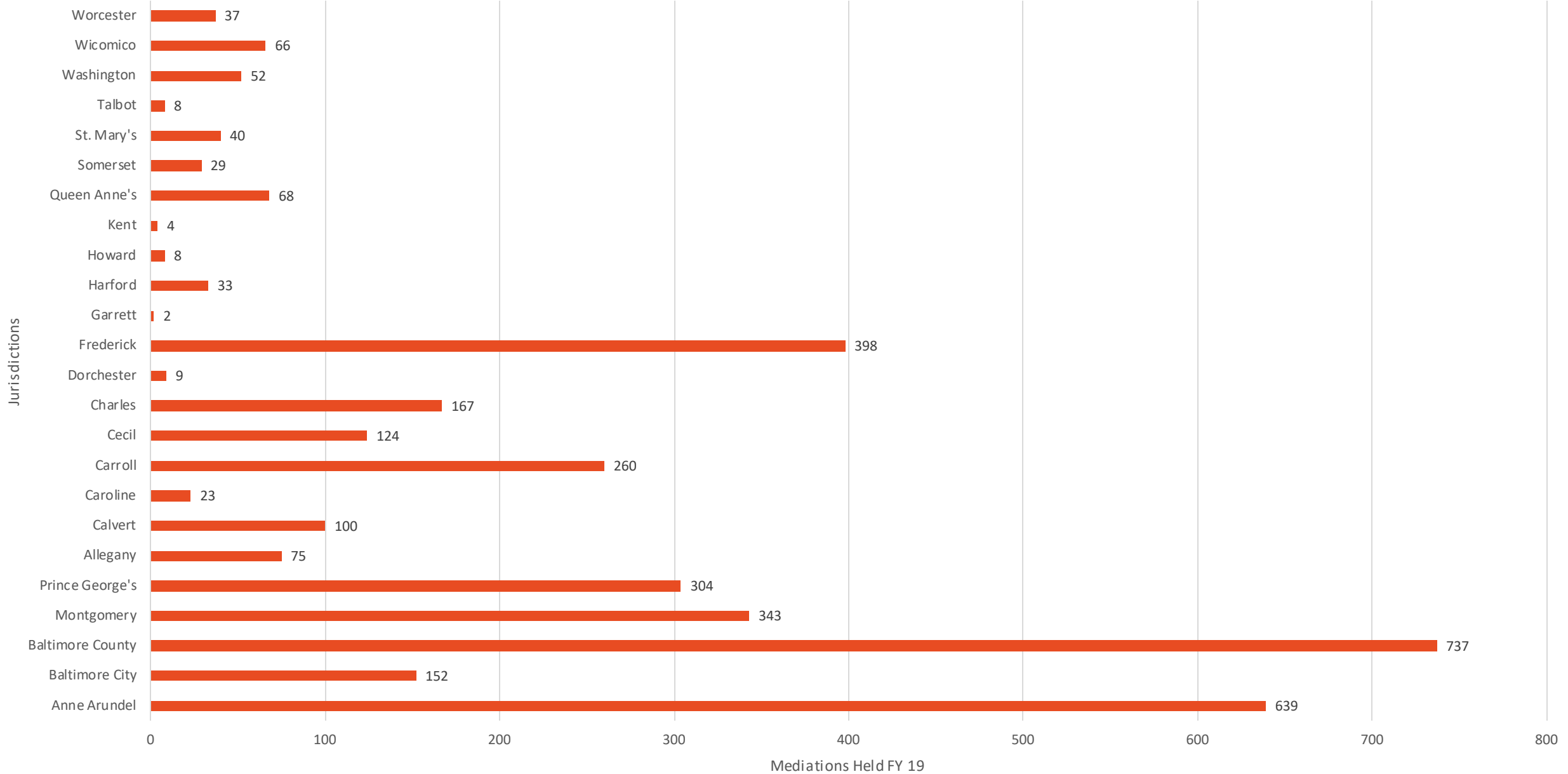
# % of Cases Referred to Mediation from Scheduling Conferences



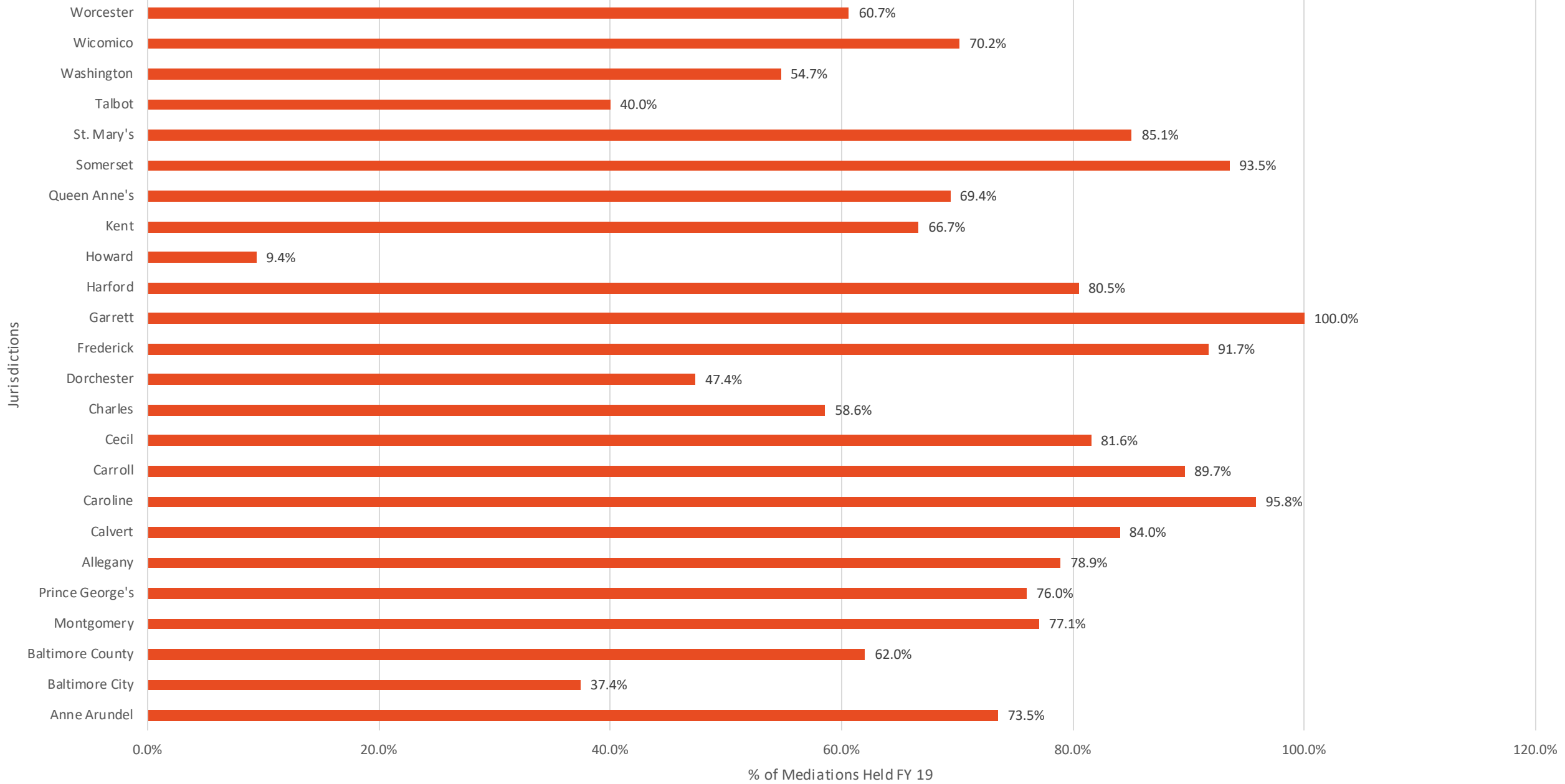
# What % of family cases referred to mediation statewide get held?



# Family Mediations Held FY 19

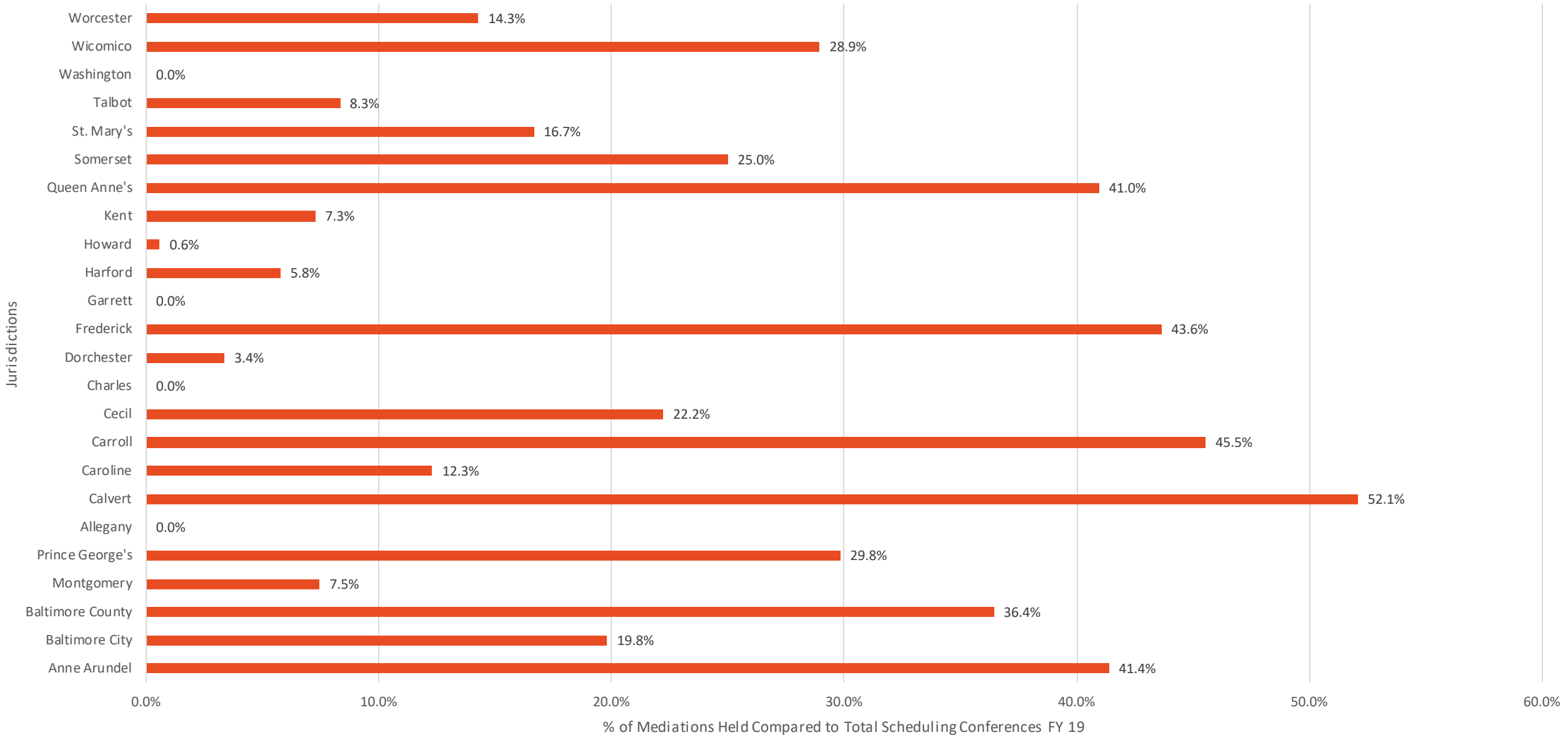


# % of Mediations Held





# % of Mediations Held Compared to Total Scheduling Conferences FY 19

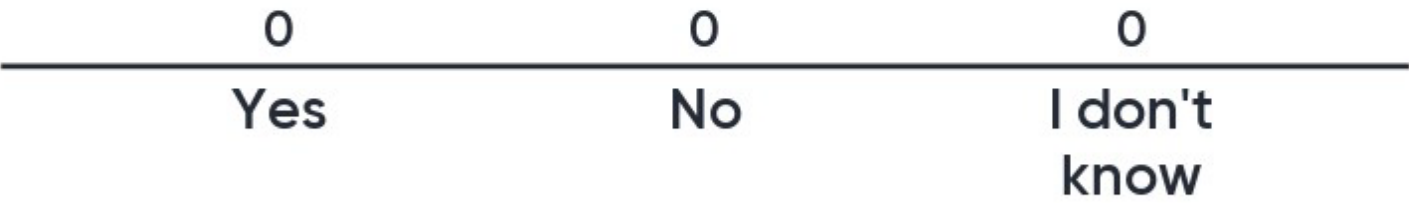


# How do most of your family cases get referred to mediation?



- Judge/Magistrate at Scheduling Conference
- Judge/Magistrate at Hearing/Trial
- Family Coordinator/Other Admin Staff after reviewing file
- Self-Help Office Referral
- Some Other Method

# Does your court screen family cases for intimate partner violence (IPV) before referring to mediation?

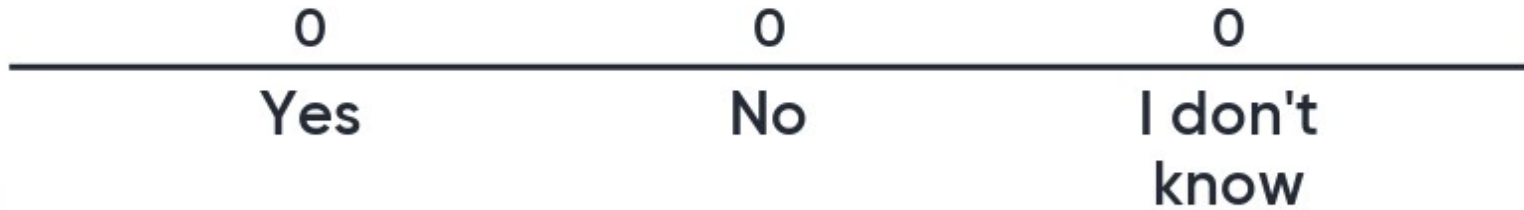


# Who does the screening for IPV in your court?



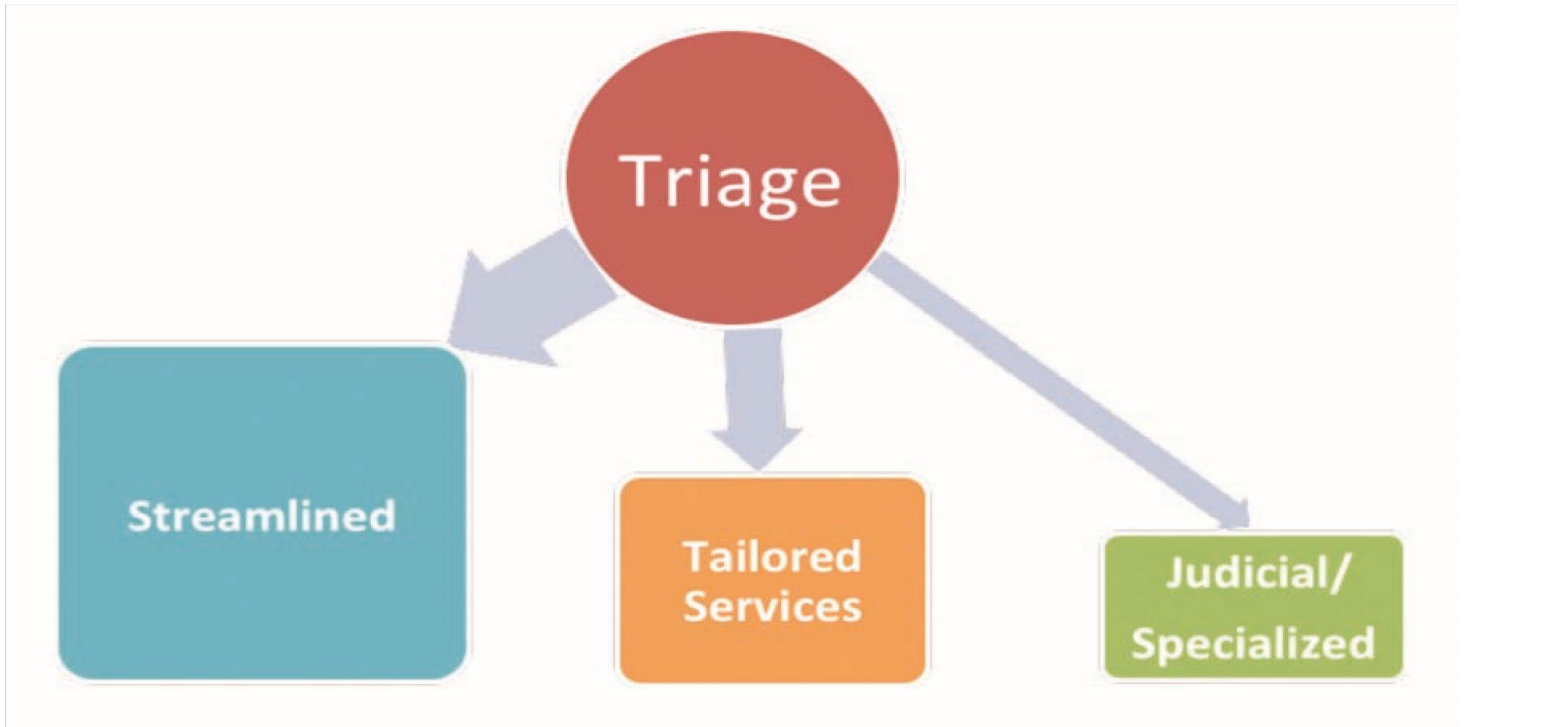
- Judge
- Magistrate
- Social Worker
- Mediator
- Family Coordinator
- DCM Coordinator
- Attorney
- Other

# Does your court use a screening tool?



# Do family cases that receive a custody evaluation in your court also get referred for mediation?





Taken from "A Model Process for Family Justice Initiative Pathways," National Center for State Courts, 2019



# New Services for Families in the DC Superior Court

*By Jeannie M. Adams, Amy G. Applegate, Connie J. Beck, Amy Holtzworth-Munroe, and Fernanda S. Rossi*

Until recently, because of concerns about safety and parties' abilities to make good decisions in cases with a history of high intimate partner violence or abuse (IPV/A), in the District of Columbia's Superior Court such cases were screened out of mediation and sent back to the family court. But two big program additions — videoconferencing and shuttle mediation — have allowed parties in these cases to consider mediation.

The Multi-Door Dispute Resolution Division of the DC Superior Court (Multi-Door) implemented this change after several years of preparation: its administrators added safety measures, provided in-depth training for staff and mediators, and consulted with experts to design a research study to compare videoconference, shuttle mediation, and the prior practice of returning these cases to court.

## Service expansion

Families coming to the DC Superior Court with issues related to child custody, child support, parenting time, or divorce are likely to be referred to

mediation at Multi-Door, where staff members use a comprehensive intake process, including a thorough screening for abuse, violence, and coercive controlling behaviors that are indicative of IPV/A. Most families are referred to traditional joint mediation. For the safety of the families and mediation staff, however, joint mediation is not an option under Multi-Door policy for parties reporting high levels of IPV/A during the intake process. There are now two dispute resolution options for these families: videoconference mediation, which allows the parties to hear and see each other and the mediator on computer screens but still gives the mediator the opportunity to meet via video or in person separately with the parties; and shuttle mediation, in which parties remain in separate rooms and the mediator moves back and forth between them. In both videoconference and shuttle mediation, the parties are never in the same room. In both forms of mediation, the topics under discussion are child support, custody, parenting time, divorce, and any other related matters that the parties bring to

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[T]he researchers have studied three processes: shuttle mediation, videoconference mediation, and the return of cases to court (where the parties receive no mediation services).

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the table. The subject of mediation is never whether the domestic abuse or violence actually occurred.

Multi-Door staff dispute resolution professionals work with the families all through the process, from intake to agreement (if one is reached), conducting separate intake sessions, determining exactly what form of mediation can be a safe option, informing people what to expect from the process, and scheduling the first mediation session. The staff also works with the mediator to help with paperwork and scheduling, among other responsibilities. If an agreement is reached, the mediator drafts it. With or without agreement, at the end of mediation, the parties must return to court to obtain court approval of their agreement or schedule their next hearing.

### How did the program get here?

Nearly a decade ago, Multi-Door staff started to question its policy of sending families with a history of high IPV/A back to family court. Several basic assumptions were questioned: (1) Are survivors of IPV/A incapable of negotiating? (2) Does mediation result in one party coercing another into an agreement that is not in their or their children's best interests? (3) Is mediation for IPV/A survivors less safe than court? Program administrators and staff sought the advice of experts in the field of domestic violence, which led to a partnership with researchers from Indiana University and the University of Arizona (these researchers are co-authors of this article). Through this partnership, Multi-Door has served as the site of a multi-year study of IPV/A and custody decisions in family mediation.

With funding from a grant from the National Institute for Justice, the researchers have studied three processes: shuttle mediation, videoconference mediation, and the return of cases to court (where the parties receive no mediation services). Participation in the study has been voluntary for both parties and mediators; parties have understood that by agreeing to participate in the study, they might be offered shuttle or videoconferencing mediation. No party reporting IPV/A was required to mediate. Recruitment for the study ended in 2017, and the results and analysis will be completed and submitted for possible publication later this year.<sup>1</sup>

“ Some mediators have reported that once in session, they see little difference between IPV/A cases and cases where intimate partner violence or abuse is not present: mediation gives parties the opportunity to resolve problems privately and with dignity. ”

### Safety and security

Multi-Door's basic objective is to provide families with mediation services in a safe environment where parties are supported by professional court staff and mediators and have the opportunity to create agreements that are safe, workable, and in interests of the parties and their children. When a family arrives with a civil protection order in place, if — and only if — both parties agree, the protection order can be modified by a judge to allow the mediation to take place. Multi-Door staff always encourage parties to identify and perhaps have with them a support person, someone they can consult with and lean on during the mediation process.

Multi-Door has long had significant security for all its mediations, including court security officers and buttons in every mediation room to summon help. New safety protocols for shuttle and videoconference mediations include staggered arrival and departure times, staff escorts to and from mediation rooms and the program building, and different rooms in separate, secured suites. Staff members and mediators have all received specialized and required training in assessment, screening measures such as MASIC, (which stands for *The Mediator's Assessment of Safety Issues and Concerns*)<sup>2</sup> family dynamics and IPV/A, and the mechanics of successful videoconference and shuttle mediations.

### Anecdotal evidence

Although the study data is still being analyzed, mediators, staff, and participants have all provided significant feedback. Some parties in IPV/A cases, including those with civil protection orders, have

expressed a preference to be in the same room (though this is not possible in either form of mediation). Others have preferred shuttle mediation because they said it gave them time to think through proposals without interruption. Mediators have reported that although the technology can be challenging, with loss of connection during the process, videoconference mediation can be more productive because parties can see and hear each other and convey feelings directly. Mediators have noted that parties often seem more willing to talk if they know that the other party is in another room, as is the case in both video conference and shuttle mediation. Some mediators have reported that once in session, they see little difference between IPV/A cases and cases where intimate partner violence or abuse is not present: mediation gives parties the opportunity to resolve problems privately and with dignity.

Multi-Door's staff has debated whether to continue to offer videoconference and shuttle mediation once the study has finished; based on preliminary favorable immediate outcomes to date,<sup>3</sup> the program officials have decided to do so. They continue to evaluate these new services and plan to use the study's data to guide decisions.

### Cautionary words

This expansion of services helps Multi-Door work toward its goal of providing access to justice for all. But any organization considering offering mediation

in IPV/A cases must take care, avoiding mandatory mediation, creating effective safety protocols for everyone involved, conducting comprehensive training for mediators and staff, and consulting with judicial officers and local domestic violence activists and experts before implementing any mediation program for families reporting high levels of IPV/A. As one Multi-Door Dispute Resolution Division staff member says, "It takes a highly trained team to make this work." ■

### Endnotes

1 This study was supported by Award No. 2013-VA-CX-0044 of the National Institute of Justice, Office of Justice Programs, US Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect those of the Department of Justice.

2 The first version of the MASIC appeared in Amy Holtzworth-Munroe et. al, *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse*, 48 FAM. CT. REV. 4 at 646-662 (2010).

3 Immediate outcomes were collected at the conclusion of the mediation for cases referred to either form of mediation and the resolution of the court case for cases referred back to court. Analyses of study data are ongoing and final results will be submitted to peer-reviewed journals for possible publication. At that time, the reader is welcome to request updated, final, published study findings.



**Jeannie M. Adams** is the Director of the Multi-Door Dispute Resolution Division at the Superior Court of the District of Columbia. As Director, she oversees staff members and mediators and is responsible for the design and implementation of alternative dispute resolution programs that support the civil, small claims, landlord/tenant, family, tax and probate courts. She can be reached at [Jeannie.Adams@dsc.gov](mailto:Jeannie.Adams@dsc.gov). **Amy G. Applegate** is a Clinical Professor of Law at the Indiana University Maurer School of Law in Bloomington, where she teaches mediation and directs a mediation clinic through which law students provide mediation services to indigent and low-income litigants in disputed custody, parenting-time, and other family law cases. She can be reached at [aga@indiana.edu](mailto:aga@indiana.edu). **Connie J. Beck** is an Associate Professor in the psychology department of the University of Arizona. For the past 25 years she has researched short- and long-term outcomes for divorcing couples experiencing intimate partner violence and mediating their disputes. She can be reached at [Beck@email.arizona.edu](mailto:Beck@email.arizona.edu). **Amy Holtzworth-Munroe** is a Professor of psychology in the psychological and brain sciences department at Indiana University-Bloomington. She has conducted research on intimate partner violence since the early 1980s and for more than 10 years has studied family law interventions for separating and divorcing parents, including mediation, parent education programs, and IPV screening methods. She can be reached at [holtzwor@indiana.edu](mailto:holtzwor@indiana.edu). **Fernanda S. Rossi** is a postdoctoral research fellow at the Veterans Affairs Palo Alto Health Care System's Center for Innovation to Implementation and the Stanford University Center for Health Policy and Center for Primary Care and Outcomes Research. She can be reached at [fsrossi@stanford.edu](mailto:fsrossi@stanford.edu)

A MODEL PROCESS FOR  
**Family Justice  
Initiative Pathways**



# A MODEL PROCESS FOR Family Justice Initiative Pathways



The Family Justice Initiative (FJI) is guiding courts toward improved outcomes for families, while managing costs, controlling delays, and facilitating healthy outcomes.

FJI is a partnership of the National Center for State Courts (NCSC), the Institute for the Advancement of the American Legal System (IAALS), and the National Council of Juvenile and Family Court Judges (NCJFCJ). It is supported with a grant from the State Justice Initiative (SJI).

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2019



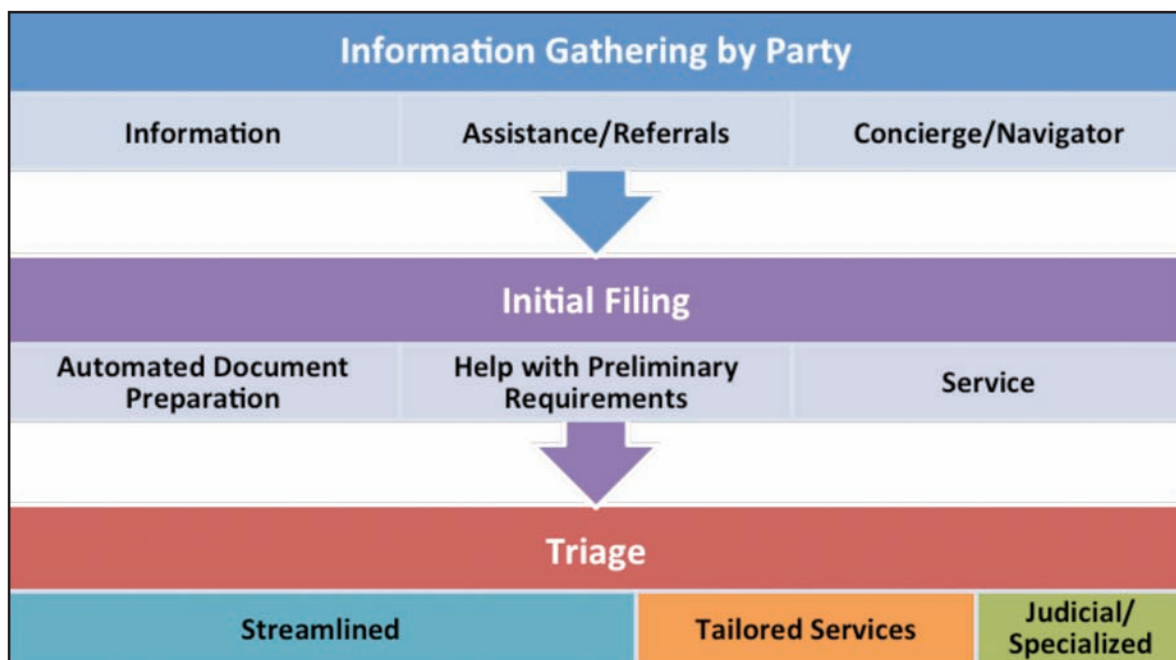


# A Model Process for Family Justice Initiative Pathways

The Family Justice Initiative: Principles for Family Justice Reform establishes a flexible approach to triaging domestic relations cases that matches parties and cases to resources and services. This document sets forth best practices for this approach, but specific practices can and should be adapted to local realities.

Courts<sup>1</sup> must assess their community’s needs, practices, and resources and implement triaging processes, to the extent possible, that are consistent with the Principles. Because these suggestions represent a change in practice, community partners—especially any specialty bar, advocacy group, and other professional organization—should be engaged to promote collaboration and support from all stakeholders.

The following graphic provides a simple overview of a model Pathway approach.



<sup>1</sup>This includes any court entity with the capacity to make changes that implement the principles. This could be the court system as a whole, making broad rule or policy changes, or individual courts, making changes in their own day-to-day operations.

## INFORMATION GATHERING

The first stage, information gathering, is when most litigants have their first contact with the court, obtaining information and assistance in determining their legal needs and how to address them.

This graphic represents typical ways people may become aware of a legal need and sources they use to gather information about the court process.<sup>2</sup>



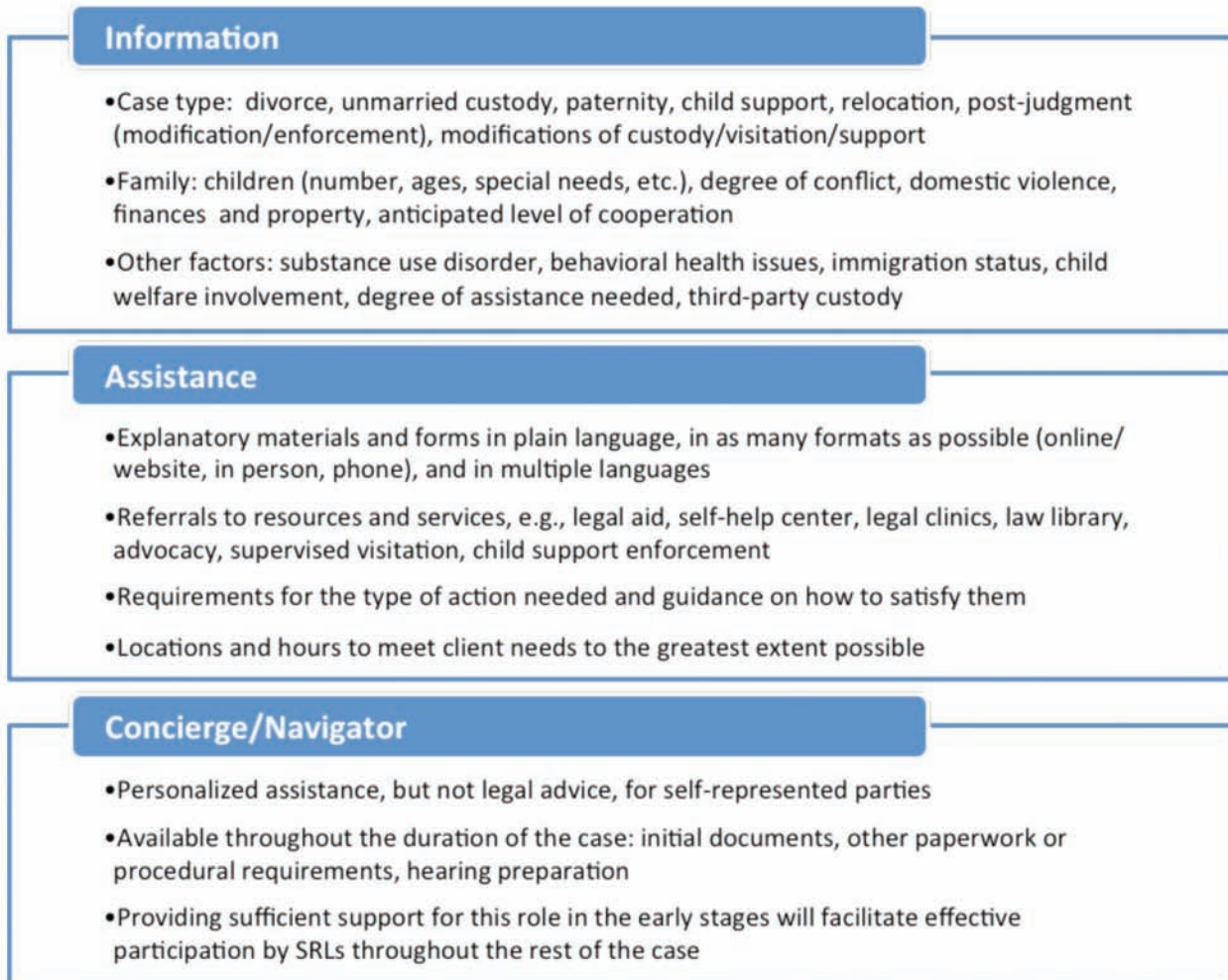
To foster a “no-wrong-door” approach, the court should take reasonable steps to ensure that information available to potential parties through these sources is accurate and easy to understand and provides guidance on how to access the court via the “door” appropriate to the parties’ legal needs. For sources managed by the court itself, court staff should be trained and provide appropriate resources and referrals.<sup>3</sup> Additionally, the court can facilitate information gathering by having mobile-friendly websites embedded with wayfinding functions. Sources not managed directly by the court should receive informational materials (including sufficient copies for the public and potential parties) and should be offered training on court resources, access, and processes. Courts can also use Law Day presentations, ask-a-lawyer, or lawyer-in-the-library events to improve outreach.

<sup>2</sup> Please note that this list is not exhaustive; others may exist in a particular jurisdiction and should be included.

<sup>3</sup> A wealth of information is available on effective resources and services. See, e.g., <https://www.ncsc.org/>, <http://iaals.du.edu/>, <http://ncjfcj.org/>, <https://www.srln.org/>, <https://www.courtinnovation.org/>.

Some people will simply need basic information from one of these sources. Others will need more information than these sources can provide, or they know they will need to commence or respond to a domestic relations court action.

## INFORMATION GATHERING BY PARTY



Courts and clerk’s offices should make information available in as many formats as possible, such as online, print, in-person (e.g., helpdesk or self-help center), or by telephone. Referrals to services, such as legal aid, a self-help center, advocacy, supervised visitation, or child support enforcement, among others, should be offered. Additional assistance can be given by allowing customers to obtain maps and instructions for getting to these resources. All information should be in plain language, should avoid legalese, and should be available in multiple languages. Care should also be taken to use language and processes that neutralize conflict wherever possible.

Parties who have counsel, and parties with or without counsel who have agreements they developed without court help, usually will not need direct access to these sources of information and can go straight to the initial filing. Nevertheless, many represented parties will find such information, presented in plain language and easily accessible,

to be helpful to their understanding of the process. Self-represented parties will find it useful to pattern any written agreements on available forms or templates. All parties should be able to access information about available process and service options, including triage pathways, and the implications of each.

Self-represented<sup>4</sup> parties report that personalized assistance is most helpful, so a concierge or navigator model of assistance is especially useful.<sup>5</sup> In addition, self-represented parties may need assistance to identify their legal and nonlegal needs and the appropriate case type, and then to determine what will be required of them and what assistance they might need. They will also benefit from document-preparation software and assistance with service or other preliminary requirements.

## INITIAL FILING

Initial filing begins the formal court process. Represented parties will likely need no assistance to file the initial pleading and other paperwork.<sup>6</sup> Self-represented parties, in contrast, often need assistance, as they have many questions about paperwork, legal requirements, and the process. Helpful tools include sending parties information and forms, providing automated document-assembly processes that guide parties through the forms, and allowing parties to complete and file forms remotely, online.<sup>7</sup>

Service is mentioned specifically because it can be such a major hurdle for self-represented parties. Easily understood and specific information for self-represented petitioners on how to complete service will help avoid processing delays due to service problems. The use of technology can help reduce obstacles for sending and receiving documents, increasing self-represented parties' likelihood of success.

Most jurisdictions have other requirements beyond the initial pleading and service, including additional paperwork and classes. The concierge/navigator can be tremendously helpful to self-represented parties in meeting these requirements promptly, allowing cases to move through the process quickly and efficiently rather than encountering delays due to missing or improperly completed requirements. This may include helping to gather information about related cases (e.g., criminal, protection orders, child welfare) to include in the cover sheet (described below). The concierge/navigator can also serve as an individualized case manager to help parties navigate, schedule, and develop

<sup>4</sup> A debate continues about the appropriate term to refer to individuals who pursue a court case without counsel—"unrepresented" or "self-represented." The latter term is used more frequently in the literature, so it is the term used in this document. *See, e.g.*, N. A. Knowlton, L. Cornett, C. D. Gerety, and J. L. Drobinske, *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* (Denver: Institute for the Advancement of the American Legal System, 2016), available at [http://iaals.du.edu/sites/default/files/documents/publications/cases\\_without\\_counsel\\_research\\_report.pdf](http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf); and J. Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report," May 2013, available at <https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf>. The scope of the debate and reasoning for each position is beyond this document's scope.

<sup>5</sup> Several states use this type of position, including Alaska, California, Maryland, and Oregon. *See, e.g.*, <http://www.courts.alaska.gov/shc/family/selfhelp.htm>, <https://mdcourts.gov/family/familylawassistance>, <https://www.courts.oregon.gov/programs/family/selfhelp/Pages/default.aspx>, <http://www.courts.ca.gov/selfhelp-family.htm>.

<sup>6</sup> Should implementation of the recommendations require any change in practice, such as the addition of a cover sheet or modification to an existing form to gather more complete data to assist in triage, the local bar should be engaged and encouraged to partner in developing and implementing any such changes.

<sup>7</sup> Commercial vendors and free open-source providers offer this software. Examples of states that use this type of tool include Idaho and Illinois; *see* <https://www.ncsc.org/microsites/access-to-justice/home/Topics/Forms-and-Document-Assembly.aspx>.



a plan for the process. Finally, information about issues such as domestic violence, child abuse, and substance use disorders will be important to the triage determination. The concierge/navigator, if trained and equipped with appropriate resources (e.g., private rooms), could play a role in screening represented and self-represented parties for these issues.

The information provided by parties as part of the initial filing will become part of the continuing court record. Parties should be made aware of this, and confidentiality issues should be addressed explicitly before parties submit information to the court.

## INITIAL FILING

### Automated document assembly process

- An assisted automated assembly process allows parties to complete a guided interview online and inserts information into proper forms; in the alternative, this would be an electronic, case management automated process
- Software designed for easy use by self-represented parties, including online dispute resolution tools; concierge/navigator can provide additional support if needed

### Help with preliminary requirements and information

- Classes: parenting, process classes, etc. (e.g., Missouri; concierge/navigator can provide information to both self-represented and represented parties about any such requirements and how to satisfy them)
- Additional forms: financial declaration, fee waiver, cover sheets, etc.; concierge/navigator can help ensure filings are complete, avoiding delays caused by missing documents
- Screen for domestic violence, child abuse, substance use disorder, etc.

### Service

- What service? Why is it necessary? Who is authorized to provide service? What are the costs of service?
- Obtaining and filing proof of service
- Counsel for represented parties will typically ensure service is complete; concierge/navigator can provide help to self-represented parties who are often confused by how to complete service

## TRIAGE

Having sufficient information at the time of assignment will enhance the suitability of the track assignment. Much of this information can be collected with a well-designed cover sheet or other tool to capture critical data. Information about the degree of conflict and whether a history of domestic violence exists will largely influence whether the case may require specialized services. Some resources (e.g., supervised visitation, custody evaluation) are available only when children are involved. The financial aspects of the case will also affect pathway assignment. The definition of the tracks and the criteria for assignment in the initial triage instrument will necessarily be court-specific and should be based on research. The tracks, criteria, and instrument will be refined over time based on evaluation and experience.

Upon completion of the cover sheet and perfection of service, the case is ready for triage and assignment to the appropriate track: streamlined, tailored services, or judicial/specialized. Using artificial intelligence (AI), or machine learning, to identify cases with factors that reliably indicate suitability for a streamlined pathway, such as Alaska’s model, can foster efficiency.

### Triage Process

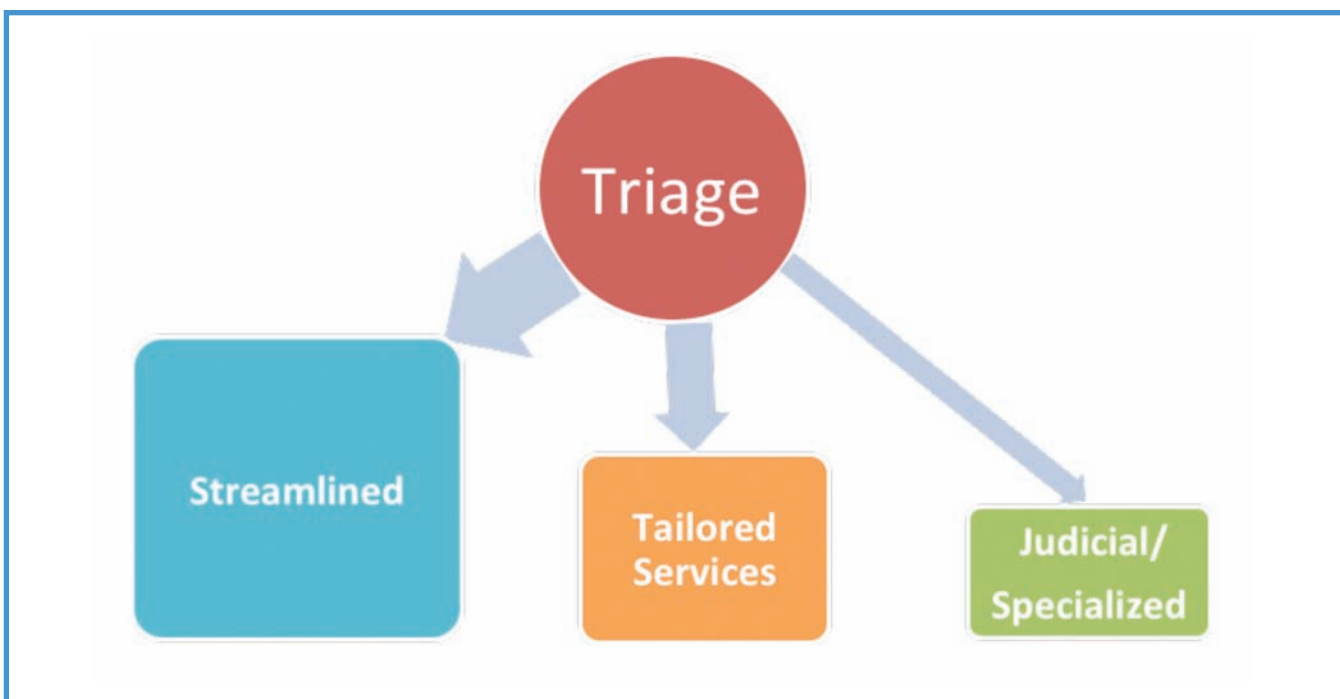
- Review information about the case: type of proceeding, facts about the family, presence/absence of complex factors, degree of conflict, parties' requests, parties' capacity to participate effectively in case/parties' need for assistance
- Initial assignment to a resolution track based on best information available by a judge at an early case conference, or by court staff based on documents or at an early meeting with the litigants and/or counsel
- Provision of a method for reassignment when the initial track proves unworkable, e.g., because of receipt of additional information or subsequent events

### Tracks

- **Streamlined:** simple and/or limited issues, checklist approach with little or no discretion for decision maker, resolution quick and with minimal resources
- **Tailored services:** not suitable for streamlined track but no specialized knowledge or training necessary for judicial officer or other court-related professionals to address issues, unlikely to use experts/professionals
- **Judicial/Specialized:** one or more factors in the case require specialized training to address safely and appropriately (e.g., domestic violence, substance abuse, child abuse), may include use of experts/professionals (e.g., custody evaluation, mental health professionals, financial experts), greatest level of judicial control and resources

The system should allocate sufficient resources in the case's early stages to promote accurate track assignments. Depending on the resources and staff available in a particular court, the triage determination may be automated, at least in part.<sup>8</sup> The parties also should be able to request their desired pathway, and if the case meets the criteria, particularly for the streamlined pathway, the request should be granted, and the case allowed to proceed as expeditiously as possible. In some states, statutes that impose a mandatory waiting period pose a barrier to efficient and prompt resolution of even simple cases; when possible under those statutes, courts should consider waiving the waiting period. In some jurisdictions, a case manager may review filed documents, such as pleadings, financial documentation, and the cover sheet, and may meet with the parties and/or their counsel. In other courts, the judge may hold an early case management conference at which a pathway assignment can be made. An online triaging portal can be created to assist users to assess and refer the case to the most appropriate resources. Other options are, of course, possible, and how a court implements the process will be highly specific to that jurisdiction's structure, staffing, resources, and community partners.

Once sufficient information is gathered, a preliminary assignment to one of three tracks is made: (1) streamlined process, (2) tailored services, and (3) judicial/specialized training and judicial oversight. Flexibility to reassign a case from one track to another at any stage of the proceedings must be built into the system.



<sup>8</sup> Alaska, for example, has had success using AI to identify cases suitable for a streamlined process.

## STREAMLINED

### Stipulated Resolution

- No or minimal decision-maker discretion
- Generally decided based on standard paperwork
- Evaluation by a master/referee/commissioner/magistrate may be appropriate and efficient
- Include safeguard to provide remedy if standard result not appropriate in particular case; to maximize efficiency, inform parties when their proposal does not comply with applicable guidelines or requirements to allow revision before it is submitted to court or, if deemed appropriate, to permit justification by explaining reason for deviation

### Administrative in Nature

- Limited issues, e.g., child support
- Result based on charts, very little if any discretion
- Option to seek deviation in extraordinary cases (e.g., special-needs child, safety concerns)

### Default

- Failure to respond is deemed agreement to the facts and proposed remedies
- No hearing unless required to document or prove a critical issue
- A quick review to ensure the results promote safety and well-being of any children in the case or provision of method to set aside if shown to be appropriate

This track is assigned when a streamlined process, requiring little exercise of discretion and usually no hearing, is appropriate. Examples of typical processes that fit this track are administrative proceedings focused on limited issues (e.g., child support enforcement), default proceedings, and simple cases where the parties seek an order approving a stipulated result.<sup>9</sup>

The goal is to grant the parties a swift resolution with minimal court resources. Nevertheless, safeguards should be in place to allow a different result in the event a case warrants an exception to the standard process (e.g., deviation from standard child support, option for motion to set aside a default or default judgment, discretion to order a hearing to review a stipulated result that seems extremely one-sided, especially if indicators of coercion are present, such as a related protection order).

<sup>9</sup> For example, Nevada’s and Colorado’s joint divorce petition processes.

## TAILORED SERVICES

These cases, while not suitable for the streamlined track, are fairly typical and do not include sensitive matters or issues likely to need expert or specialized training to be adequately addressed. Virtually all of these cases will be suitable for some form of facilitated settlement. Almost half of the states require mediation (or some form of alternative dispute resolution) in at least some cases or for certain issues, and only one state does not expressly permit it.<sup>10</sup> Proponents of tailored-services resolution note that the result is more likely to meet the family's needs if the parties are invested and have agreed to the outcome.

If the parties are unable to agree, or if they agree on some issues but remain in dispute on others, the court should consider simplified processes when appropriate. Enabling litigants to appear by telephone or videoconference and using online dispute resolution where available can increase flexibility for all parties involved and increase efficiency for the parties and the court.

### Facilitator

- Trained, neutral third party (e.g., mediator) helps the parties find points of agreement
- Training should include techniques of the facilitation format, child development, and the law of the jurisdiction; should have basic understanding of common issues such as domestic violence, trauma, substance use disorder, and behavioral health issues but specialized expertise not necessary

### Parties Have Increased Role

- Parties set priorities
- Concierge/Navigator can help litigants prepare for proceedings
- If agreement reached, judicial role limited, primarily to review for compliance with legal requirements

### Simplified Processes Where Possible

- If facilitated settlement is not reached, informal trials or other simplified processes are often appropriate and should be encouraged
- Final resolution may use services or technological aids to smooth communication and reduce conflict

<sup>10</sup> National Council of Juvenile and Family Court Judges, "Custody Mediation Where Domestic Violence Is Present," Reno, Nevada, 2014, available at <http://www.ncjfcj.org/sites/default/files/chart-mediation-dv-present.pdf>.

## JUDICIAL/SPECIALIZED

Cases involving domestic violence, child abuse, substance abuse, or mental health issues require specialized knowledge and expertise to handle them safely and appropriately. These cases benefit from a greater degree of judicial involvement, provided that the judge is adequately trained on these issues. Such cases can be suitable for a facilitated settlement if the facilitator has sufficient training and if appropriate safeguards are taken (such as shuttle mediation, staggered arrival and departure times, separate waiting areas); some form of alternative dispute resolution may be preferable since litigation can be traumatizing. These cases, at least when the parties are represented by counsel, are more likely to include formal discovery and the use of experts or court-appointed professionals. Any such professionals should be selected carefully to ensure they have the required expertise for the issues in the case.

### Resources or Services

- "High conflict"
- Substance use disorder (especially untreated/uncontrolled)
- Mental health issues
- Family violence
- Child welfare involvement
- Extended family involvement
- Immigration issues/foreign status
- Complex finances

### Judicial Oversight and Specialized Training

- Judge has more control over the case as it proceeds, tailors processes to needs of family and factors involved
- Judge may be decision maker or may have stronger oversight role of facilitated settlement processes
- Broad training for the judge, and any court-related or appointed professionals, on the issues involved in the case will help ensure the outcome is fair, safe, and meets the family's needs so as to foster compliance

### Services

- Final result may involve use of services such as supervised visitation and exchange, parent coordinators, technological aids to reduce conflict and foster safety
- May use professionals such as custody evaluators or guardians ad litem to assist court
- Experts much more common than in other tracks
- Efforts to secure legal services, including unbundled or remote, may be worthwhile and extremely helpful to litigants and the court; if unsuccessful, concierge/navigator may provide some assistance in preparing for proceedings

When one or both parties are self-represented, these cases can be extremely challenging for judges. Clear guidance on the appropriate role of the judge in cases with self-represented parties is helpful, as is training on effective management of these cases. Efforts to secure some level of legal services would be appropriate here and encouragement of unbundled representation may be desirable.

Allowing remote attendance at court hearings and digital submission of evidence can assist in streamlining some services in high-conflict cases. Higher complexity also introduces the importance of maintaining a list of parties' personal needs, which helps ensure needed services are arranged (e.g., supervised visitation, parenting coordination, substance use or mental health treatment). Investment of adequate resources for these cases will help ensure that the outcome meets the parties' needs, thereby avoiding post-decree motions and reducing noncompliance.









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## Statewide Evaluation of Court ADR

The Maryland Judiciary commissioned independent researchers to conduct the following studies as part of its long-term commitment to build alternative dispute resolution (ADR) programs in Maryland and to provide the highest quality ADR services to Marylanders. The research was led by the Administrative Office of the Courts and funded in part by a grant from the State Justice Institute.

**Alternative Dispute Resolution Landscape: An Overview of ADR in the Maryland Court System.** This report provides a comprehensive snap-shot of the court-affiliated ADR programs throughout Maryland, based on interviews of Court ADR Program Managers and courthouse staff conducted from July 2010 through January 2013.

- [ADR Landscape](#)

**Criminal Court - Impact of Mediation on Criminal Misdemeanor Cases.** This study examined the effect in terms of cost to the court system for cases which are referred to mediation compared to cases which are not referred to mediation. It also explores the effect on the participants regarding how the situation has worked out for them.

- [Criminal Court Two-Page Summary](#)
- [Criminal Court Full Report](#)

**District Court Comparison - Impact of ADR on Responsibility, Empowerment, and Resolution.** This study compared the attitudes and changes in attitudes of District Court litigants who went through ADR to an equivalent comparison group who went through the standard court process

- [District Court Comparison Two-Page Summary](#)
- [District Court Comparison Full Report](#)

**District Court Strategies - What Works in District Court Day of Trial Mediation.** This study examined the effect of mediator strategies (i.e. techniques) and program factors on case outcomes in day of trial mediations in the Maryland District Court.

- [District Court Strategies Two-Page Summary](#)
- [District Court Strategies Full Report](#)

**Family - Effectiveness of Mediator Strategies in Custody Mediation.** This study examined the effect of mediator strategies (i.e. techniques) in child custody cases in three Maryland circuit courts.

- [Family Two-Page Summary](#)
- [Family Full Report](#)

**Collaborative Law: The Current and Prospective Use of Collaborative Law in Maryland.** This report presents the emerging area of collaborative law through an examination of previous research in this area, and through interviews and surveys of court personnel and attorneys practicing collaborative law in Maryland.

- [The Current and Prospective Use of Collaborative Law in Maryland \(September 2013\)](#)

### MARYLAND JUDICIARY

MEDIATION AND CONFLICT RESOLUTION OFFICE (MACRO)

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<http://mdcourts.gov/courtoperations/adrprojects.html>

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# Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution

## Impact of Mediation on Criminal Misdemeanor Cases

This is the first study of its kind that compares mediated and non-mediated criminal misdemeanor cases with such great attention to creating a comparison group. This report explores the impacts in terms of cost to the court system for cases which are referred to mediation compared to cases which are not referred to mediation. It also explores the impact on the participants regarding how the situation has worked out for them. *This handout summarizes a multidimensional study that includes sophisticated data collection instruments and analysis tools. Information on accessing the full report can be found on the back of this flier.*

### Short Term Outcomes

The study found that mediation had a statistically significant impact in reducing the likelihood of:

- judicial action
- jury trial prayer
- supervised probation or jail-time

Mediated cases were five times less likely to result in judicial action, five times less likely to result in jury trial prayed, and ten times less likely to result in supervised probation or jail-time.



### Long Term Outcomes

Mediated cases were almost five times less likely to return to criminal court in the subsequent 12 months than those that were not mediated.

Mediation did not have a statistically significant impact on:

- individuals finding themselves in civil court in the subsequent 12 months



### Participant Follow-Up

Participating in the mediation has a positive and significant impact on participants reporting several months after the intervention that:

- the outcome is working
- the issues have been resolved
- they are satisfied with this process



This reinforces the findings on case outcomes, and generally points to long term resolution.

Overall, participant reports and case level analysis reinforce each other and indicate that **mediation resolves issues** with outcomes that work in the long term and keep cases from returning to court with subsequent criminal charges. **Mediation results in the use of fewer court and law enforcement resources in the short and long term.**

## DATA COLLECTION

The data for this study were collected from two Maryland counties: Washington and Frederick. Washington County and Frederick County are adjacent, and share similar geographic and demographic characteristics. These similarities led researchers to be confident that the two groups being compared were equivalent enough in ways other than the intervention itself. This allowed researchers to properly assess the impact of mediation. The Washington County State Attorney's Office (SAO) refers some criminal cases to mediation prior to a trial date and these cases served in the mediation (treatment) group. The Frederick County SAO does not offer mediation for criminal cases, and therefore those cases were used in the non-mediation (comparison) group.

The mediation group cases were identified from cases referred to mediation by the Washington County SAO. Researchers were then present for all mediation sessions they could attend, and cases were included in the data when mediation participants consented to inclusion in the study.

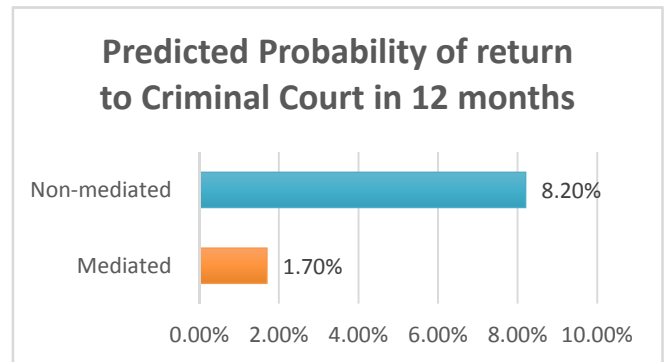
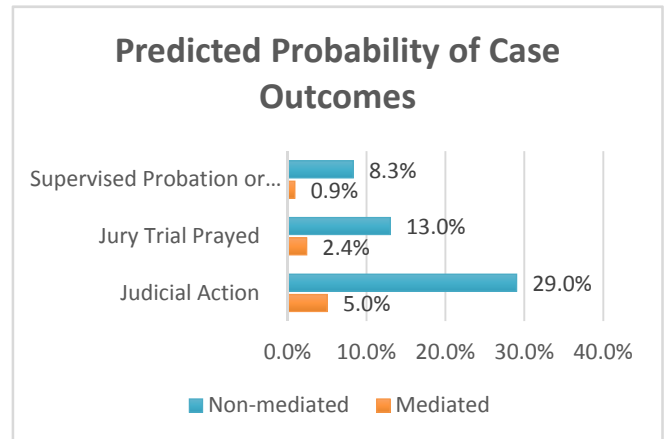
Non-mediation group cases from Frederick County were selected by researchers based on mediation referral criteria gathered from interviews with the Washington County SAO. This resulted in a group of cases that would have likely been referred to mediation had the option been available.

The Maryland Judiciary commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders, which includes ADR.

## PROCESS & ANALYSIS

The research methodology included the use of propensity score matching to consider possible selection bias and ensure cases being compared were essentially equivalent according to the variables measured. Additionally, the methodology used logistic regression analysis to isolate the effect of mediation and consider other factors that may influence the outcome.

As illustrated in the graphs below, the study found that mediated cases had far lower predicted probabilities for both continuing with court procedures or actions and returning to criminal court within a year than cases that were not mediated. These predicted probabilities were calculated after taking into consideration the many other factors that may affect these outcomes.



This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at: [www.mdcourts.gov/courtoperations/adrprojects.html](http://www.mdcourts.gov/courtoperations/adrprojects.html)



# Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution Effectiveness of Mediator Strategies in Custody Mediation

Maryland court rules require judges to refer all contested child custody cases to attend mediation, except in situations of abuse. Statistical analysis of actual mediations revealed four groups of mediator strategies for study. **Mediators often use more than one set of strategies: the groupings described are strategies commonly used together. These are not labels for types of mediators.**

## Reflecting Strategies:

- Reflecting emotions & interests
- Clarifying topics to work on
- Reflecting what participants say (LT)
- Open-ended questions (LT)

## Reflect



The greater percentage of reflecting strategies used, the more likely it is that participants will:

- Say the other person listened & understood
- Become more able to work together
- Develop more personalized agreements

The less likely it is they will:

- Dismiss the other's perspective
- Reach an agreement

### Long Term Results (LT)

Six months after mediation, the greater percentage of reflective strategies used, the more likely it is that participants will:

- Become more able to work together
- Prioritize their children's needs and consider the other parent's perspective

## Directing Strategies:

- Introducing & enforcing guidelines
- Explaining one participant to another
- Advocating for one participant's ideas

## Direct



The greater percentage of directing strategies used, the less likely it is that participants will:

- Report the mediator listened to them and respected them

### Long Term Results (LT)

Twelve months after the mediation, the greater percentage of directive strategies used, the more likely it is that participants will:

- Return to court and file an adversarial motion and the more adversarial motions they are likely to file

## Eliciting Strategies:

- Asking participants to think of solutions
- Summarizing solutions
- Asking how solutions might work for them

## Elicit



The greater percentage of eliciting strategies used, the more likely it is that participants will:

- Reach an agreement
- Say the other person listened & understood
- Become clearer about their desires
- Say the underlying issues came out
- Become more able to work together

## Telling Strategies:

- Sharing opinions
- Offering solutions
- Assessing legal options
- Introducing topics

## Tell



This strategy was not statistically significant in any positive or negative outcomes.

### When Reflecting and Eliciting are combined:



Participants are more likely to: report a positive shift in their ability to work together, say that the other person listened and understands them better, indicate that the underlying issues came out, and **reach a personalized agreement.**

## Data Collection

Data for this study were collected in the Family Court mediation programs in Anne Arundel County, Baltimore County, and Charles County. The mix of programs and mediation approaches allows for enough diversity to **measure the impacts of the different components** of the process.

Trained researchers observed 135 cases including 270 participants, and tracked the mediator strategies and participant behaviors using a common guide of 35 possible behaviors.

Many survey questions were asked of participants both before and after the mediation, to measure their change in attitude. Researchers also reviewed each court case file to examine the final parenting agreement, consent order or court decree relating to custody.

The Maryland Judiciary has a long-term commitment to building ADR programs in Maryland. The Administrative Office of the Courts commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders.

## Additional Findings

In addition, this research found that participants who reported that they found the location of the mediation to be convenient were more likely to reach an agreement. This finding underlines the importance of holding mediation sessions in convenient locations.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of Court ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by the Community Mediation Maryland, and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at: <http://www.mdcourts.gov/courtoperations/adrprojects.html>

## Impact of Caucusing

The impact of caucusing is interesting in that it leads to positive reports about the mediator but negative outcomes for participants' ability to work together. The greater the percentage of time spent in caucus, the more likely the participants were to report the mediator respected them and did not take sides.

Greater percentage of time in caucus also resulted in the following changes in participants attitudes from *before to after the mediation*.

Participants were

- More hopeless about the situation
- Less likely to believe they could work with the other participant
- Less likely to believe there are a range of options for resolution

## What it Means

In family mediation, mediators can engage with parents in ways that support parents making their own decisions, by seeking to understand parents' values and by asking them about their ideas for possible outcomes. Alternatively, mediators can engage ways that assume parents need the mediators' ideas and suggestions.

Our research found that when mediators seek to understand parents and elicit their ideas, parents believe they can work together and make decisions for their family. The mediator strategies of eliciting parents' ideas are also the only strategies that were more likely to reach an agreement and consent order.





# Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution

## Impact of ADR on responsibility, empowerment, and resolution

This research is the only research in the country that compares the attitudes and changes in attitudes of participants who went through ADR to an equivalent comparison group who went through the standard court process. In this study, we measured: 1) attitude toward the other participant; 2) a sense of empowerment and having a voice in the process; 3) a sense of responsibility for the situation; 4) a belief that the conflict has been resolved; 5) satisfaction with the judicial system; and, 6) the likelihood of returning to court for an enforcement action in the subsequent 12 months. *This handout summarizes key points; the full report provides technical details and statistical equations.*

### Short Term Outcomes

The study found several areas where ADR had a statistically significant impact on participants' experiences and attitudes, compared to participants who went through the standard court process.



Those who went to ADR, regardless of whether they reached an agreement in ADR, are more likely to report that:

- 1) They **could express themselves, their thoughts, and their concerns.**
- 2) All of the **underlying issues came out.**
- 3) The **issues were resolved.**
- 4) The issues were **completely resolved** rather than partially resolved.
- 5) They **acknowledged responsibility for the situation**

### Short Term Shifts in Attitude

The study measured shifts in attitude from before to after and compared the shifts in treatment and control groups.



We found that participants who went through ADR are more likely than those who went through the standard court process:

- 1) To have an **increase in their rating of their level of responsibility** for the situation from before to after the intervention.
- 2) To **disagree more with the statement "the other people need to learn they are wrong"** from before to after the process.

### Satisfaction with the Courts

The study measured how attitudes differed in satisfaction with the courts when an agreement was reached in ADR as opposed to in court.



Participants who developed a negotiated agreement in ADR were more likely to be satisfied with the judicial system than others, while participants who reached negotiated agreements on their own (without ADR) were not more likely to be satisfied with the judicial system than those without negotiated agreements

This seems to imply that the process of reaching an agreement in ADR is the factor that led to higher satisfaction, rather than just the process of having negotiated a settlement.

### Long Term Shifts in Attitude

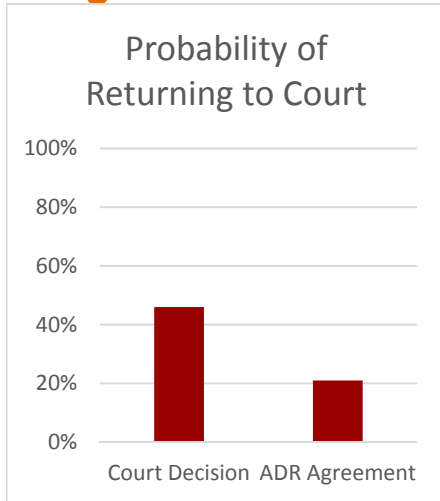
The present analysis finds the following in terms of the long-term impact of ADR on the self-reported outcomes we measure.



Participants who went through ADR are more likely than those who went through the court process to report:

- 1) An improved relationship and attitude toward the other participant measured from before the intervention (the ADR session or trial) to 3-6 months later.
- 2) The outcome was working.
- 3) Satisfaction with the outcome.
- 4) Satisfaction with the judicial system 3-6 months after the intervention.

## Long-Term Costs to Court



The long-term analysis also indicates that cases that reached an agreement in ADR are less likely to return to court for an enforcement action in the 12 months following the intervention compared to cases that did not get an agreement in ADR (including those that reached an agreement on their own, ADR cases that did not get an agreement, and cases that got a verdict).

Reaching an agreement in ADR decreases the predicted probability of returning to court for an enforcement action. Cases that reached agreement in mediation are half as likely (21%) to return to court for enforcement actions compared to cases that reached a verdict (46%).

The Maryland Judiciary commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders, which includes ADR.

## Demographics

This research also explored whether ADR had a different effect for different demographic groups. With a few exceptions which are detailed in the full report, ADR did not have a different impact on different demographic groups.

## Data Collection

In any study that seeks to identify the impact of an intervention on a particular outcome, one needs to be certain that the two groups being compared are equivalent in all ways other than the intervention itself. We surveyed participants in cases agreeing to participate in ADR, and then suspended the ADR program and surveyed participants in similar cases who were never offered ADR. The researchers reviewed case characteristics, demographics, and pre-test attitudinal variables to identify differences between the groups. The groups were determined to be generally comparable. Characteristics that were identified to be different between the two groups were included in the regression analysis to account for any possible difference. (For details on this or any aspect of the research methodology, please see the larger research report.)



## Our Process

To measure the impact of ADR on potential shifts in participants' attitudes and perspectives, we took into account that there are a range of factors that could affect these shifts and perspectives. Participants' roles in court (plaintiff or defendant), whether they are represented by an attorney, their general outlook before they got to court, the history of the relationship between the litigants, the history of the conflict, and the type of case can all have an effect on attitudes and perspectives. Our research methodology, called *regression analysis*, allows us to isolate the impact of ADR as opposed to other variables that may affect the outcome. By doing this, we can reach conclusions about the impact of ADR itself, confident that we are not inadvertently measuring one of these other factors.

One other unique aspect of this study is that we separate the impact of reaching an agreement from the impact of the ADR process. We look at people who got an agreement through ADR, and those who settled on their own. By doing this, **we are able to isolate the impact of the process of ADR**, separate from its effect on reaching an agreement.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at:

<http://www.mdcourts.gov/courtoperations/adrprojects.html>



# Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution

## What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short-Term and Long-Term Outcomes

Maryland court rules permit judges to order or refer civil cases in the District Court to mediation or a settlement conference. This study identifies the mediator strategies and program factors affecting case outcomes. Statistical analysis of actual mediations revealed four groups of mediator strategies for study. **Mediators often use more than one set of strategies: the groupings described are strategies commonly used together. These are not labels for types of mediators.**

### Reflect

#### Reflecting Strategies:

- Reflecting emotions & interests



**SHORT TERM:** Reflecting strategies are positively associated with participants reporting:

- that the other person took responsibility and apologized
- an increase in self-efficacy (belief in one's ability to talk and make a difference)
- an increase from before ADR to after ADR in their sense that the court cares

**LONG TERM:** This strategy was not statistically significant in any positive or negative outcomes.

### Elicit

#### Eliciting Strategies:

- Asking participants to suggest solutions
- Summarizing solutions that have been offered
- Asking participants how those solutions might work for them



**SHORT TERM:** Eliciting participant solutions was positively associated with participants reporting that:

- they listened & understood each other & jointly controlled the outcome
- the other person took responsibility and apologized

Eliciting was positively associated with reaching an agreement in ADR.

Eliciting participant solutions was negatively associated with participants reporting ADR practitioner:

- controlled the outcome
- pressured them into solutions and prevented issues from coming out

**LONG TERM:** Participants were more likely to report a change in their approach to conflict and were less likely to return to court for an enforcement action.

### Offering / Tell

#### Offering Strategies:

- Offering opinions
- Advocating for their own solutions
- Offering legal analysis  
(long term only)



**SHORT TERM:** This strategy was not statistically significant in any positive or negative outcomes.

**LONG TERM:** The more offering strategies are used, the less participants report:

- The outcome was working
- They were satisfied with the outcome
- They would recommend ADR
- They changed their approach to conflict

### Caucus

Caucusing is the practice of meeting with the participants on each side of the case separately and privately.

#### **SHORT TERM:**

The greater the percentage of time participants spend in caucus, the *more likely* participants report:

- the ADR practitioner: controlled the outcome, pressured them into solutions, and prevented issues from coming out.
- an increase in a sense of powerlessness, an increase in the belief that conflict is negative, and an increase in the desire to better understand the other participant.

The greater the percentage of time in caucus, the *less likely* the participants report:

- they were satisfied with the process and outcome, and the issues were resolved with a fair and implementable outcome.

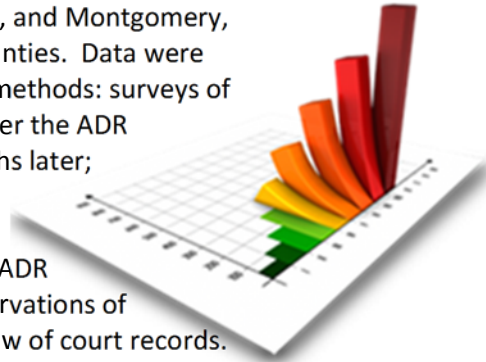
**LONG TERM:** The greater the percentage of time participants spend in caucus, the *less likely* participants report:

- consideration of the other person,
- self-efficacy (belief in one's ability to talk and make a difference), and
- a sense that the court cares about resolving conflict from before the ADR session to several months later.

*Long-term analysis finds that greater the percentage of time participants spend in caucus, the more likely the case will return to court in the 12 months after mediation for an enforcement action.*

# Data Collection

Data for this study were collected in the District Court Day of Trial programs in Baltimore City, and Montgomery, Calvert, and Wicomico Counties. Data were collected through several methods: surveys of participants before and after the ADR session as well as six months later; surveys of the ADR practitioners; behavior coding of participants and ADR practitioners through observations of the ADR process; and review of court records.



Researchers were present on days when ADR practitioners were scheduled to appear for a court docket. Once the ADR practitioner received a case referral and solicited the parties' agreement to participate in ADR, researchers requested the parties consent to participate in the research study. In all four counties, pre-intervention questionnaires were given before the ADR process. Next, researchers observed the ADR process and coded the behaviors of the ADR practitioners and the participants. At the conclusion of the process, participants were escorted back to the courtroom to either record their settlement or proceed with their trial. At the conclusion of the court process, post-intervention questionnaires were given.

Three months following the ADR process, researchers called participants to conduct a follow-up interview. Finally, 12 months after the court date, researchers reviewed the electronic court records of each observed case to determine if the parties had required further intervention by the court. When the electronic record was not clear, researchers reviewed the original case file at the Clerk's office.

# Analysis

This two page flier simplifies a rigorous study which used a variety of statistical tools to determine the results. A detailed discussion of the data collection instruments and analysis tools can be found in the full report; see below for more information.

# Returning to Court

## More likely to return to court:

**Caucus:** Cases in which a greater percentage of time was spent in caucus are more likely to return to court.

## Less likely to return to court:

**Eliciting:** Cases in which ADR Practitioners used more eliciting strategies are less likely to return to court.

**Mediation experience:** Cases in which the ADR practitioner had greater ADR experience in the previous 12 months are less likely to return to court.

# Racial Match

Having at least one ADR practitioner at the table match the race of the responding participant was **positively** associated with participants reporting that they listened and understood each other in the ADR session and jointly controlled the outcome, and an increase in a sense of self-efficacy (belief in one's ability to talk and make a difference) and an increase in the sense that the court cares from before to after the ADR session.

The Maryland Judiciary has a long-term commitment to building ADR programs in Maryland. The Administrative Office of the Courts commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at:

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