

# Elkins Family Law Task Force Draft Recommendations

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INVITATION TO COMMENT  
OCTOBER 1, 2009 - DECEMBER 4, 2009



ADMINISTRATIVE OFFICE  
OF THE COURTS

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CENTER FOR FAMILIES, CHILDREN  
& THE COURTS

## **Elkins Family Law Task Force Invitation to Comment on Draft Recommendations**

*In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family law litigants should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding governed by the rules of evidence established by statute. It is at least as important that courts employ fair proceedings when the stakes involve a judgment providing for custody in the best interest of a child and governing a parent's future involvement in his or her child's life, dividing all of a family's assets, or determining levels of spousal and child support. The same judicial resources and safeguards should be committed to a family law trial as are committed to other civil proceedings*

*Elkins v. Superior Court (2007) 41 Cal.4th 1337, 1368 [163 P.3d 160]*

### **Overview**

#### **The Significance of Family Law Cases**

Family law cases are critically important to litigants, children, and families as well as the community at large. Decisions by the family court can have a lasting impact on people's lives: they involve important and sensitive issues such as with whom a child will reside, the safety of the parties, child and spousal support, and the division of a family's assets and debts. When the parties cannot agree, the family law judicial officer must make these important decisions.

#### **Limited Resources for Increasing Volume and Complex Cases**

For many years, our family courts have experienced growing demands on their limited resources. Family law judicial officers have had to cope with high volumes of cases and steadily increasing numbers of self-represented litigants. In many communities, more than 75 percent of family law cases have at least one self-represented party. Despite the greater numbers of people finding themselves in family court without attorneys, family law and procedure have been getting more complex, not less. Despite the best efforts of legal aid and court-based self-help centers to provide assistance, many self-represented litigants find it difficult to follow legal rules and procedures, which were created with the assumption that everyone in family court would be represented by an attorney. In addition to the high volume of cases and increasing number of self-represented litigants, family courts have been severely underresourced and, as a result, struggle every day with limited personnel and services to meet the needs of family law litigants.

### **Limited Resources for Representation**

Self-represented litigants in family law cases often find themselves in court dealing with issues that can be legally as well as factually complex. In addition to child custody and support there may be property issues, which can include the valuation and sale of homes and the division of businesses, pension plans, stock options, and the like. To resolve the variety of issues that arise in family court, family law judges, attorneys, and litigants need to know family law and procedure as well as many other areas of civil law, including contract law; accounting principles; federal and state income tax law; and pension, bankruptcy, and probate law. The litigants themselves are often under significant emotional and financial stress when they come to court, which makes the family court experience even more challenging.

Given the complexity of family law, why do people represent themselves? All too often the answer is that they have no choice. There is no right to appointed counsel in family law matters. Given tremendous funding limitations, legal services agencies in California are able to serve relatively few persons who have family law issues. Generally, because of funding restrictions, only victims of domestic violence can be provided representation—and far too few of those victims can be served.

Legal services agencies serve low-income people. But those with low income are not the only people who are finding themselves in court without lawyers. The average family law attorney in California charges more than \$300 per hour and requires a retainer of approximately \$5,000. Families increasingly are finding themselves with no paycheck, a diminished amount of equity in their homes, and reduced savings, leaving them unable to afford attorneys. Even people who start out with attorneys at the beginning of their cases often run out of money and become self-represented before their cases are over.

California's courts have responded to this new reality of family law litigation with a variety of strategies designed to ensure access to the courts. While ideally every person facing the challenge of a divorce, child custody, or domestic violence proceeding would be provided with an attorney, the courts and legal services agencies are developing self-help programs that attempt to provide as much assistance to court users as possible—in as cost-effective a manner as possible. Nevertheless, self-help assistance is often not enough, and the lack of legal representation is clearly an enormous barrier to accessing justice in the family court.

To cope with the influx of self-represented litigants and crowded family law calendars, many courts have adopted local rules and procedures in an attempt to more efficiently process their high volumes of family law cases. Unfortunately, many of these rules and procedures have created barriers for both represented parties and the self-represented in getting their day in court. A California Supreme Court case in 2007 illustrates the impact of these rules, particularly on self-represented litigants.

In 2005, Mr. Jeffrey Elkins represented himself during a marital dissolution trial in the Superior Court of Contra Costa County. A local superior court rule and a trial scheduling order in the family law court provided that, in dissolution trials, parties must present their cases by written declaration. The testimony of witnesses was not allowed except that upon request parties were permitted to cross-examine the people who made the declarations. The parties were also required to establish in their pretrial declarations the admissibility of all the exhibits they sought to introduce at trial.

Mr. Elkins's pretrial declaration failed to establish the evidentiary foundation for all but 2 of his 36 exhibits. Accordingly, the court excluded the 34 remaining exhibits. Frustrated that his exhibits were not accepted and that he could not present his case or establish a foundation for his exhibits through oral testimony, Mr. Elkins rested his case. Subsequently, the court divided the marital property substantially in the manner requested by Mr. Elkins's former spouse. The court's rule, which had been adopted to promote efficiency in processing family law cases, had effectively barred Mr. Elkins from presenting his case in court.

Mr. Elkins filed a writ challenging the court's local rule. The writ was supported by the local bar association, which argued that the local rule was not only a barrier to self-represented litigants but also to represented litigants because it required attorneys to spend more time preparing declarations than they would have spent presenting their case through a traditional hearing. As a consequence, attorney fees were higher and fewer people were able to afford them. The attorneys were concerned that the Contra Costa rule, as well as many of the other local rules that had been adopted by various courts to make case processing more efficient, were impinging on the due process rights of the parties. In August 2007 the California Supreme Court found that the Contra Costa rule conflicted with existing statutory law and held that marital dissolution trials should "proceed under the same general rules of procedure that govern other civil trials."<sup>1</sup>

The Supreme Court recognized that family courts were underresourced and that the increasing numbers of self-represented litigants were creating unique challenges to the courts' ability to provide meaningful access to justice. The court recommended that the Judicial Council of California establish a task force to "study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ensure access to justice for litigants, many of whom are self-represented."<sup>2</sup> In response to this recommendation, the Elkins Family Law Task Force was appointed.

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<sup>1</sup> *Elkins, supra*, 41 Cal.4th at p. 1345.

<sup>2</sup> *Elkins, supra*, 41 Cal.4th at p. 1369.

### **About the Elkins Family Law Task Force**

The Elkins Family Law Task Force, chaired by Associate Justice Laurie D. Zelon of the Court of Appeal, Second Appellate District (Los Angeles), was appointed in May 2008 to conduct a comprehensive review of family law proceedings and recommend to the Judicial Council of California proposals that increase access to justice for all family law litigants, ensure fairness and due process, and provide for more effective and consistent family law rules, policies, and procedures.

The 38-member task force includes appellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help center attorneys, court executives, family court managers, court administrators, and legislative staff. Members have extensive experience in all aspects of family law and represent courts and diverse cultural and economic communities from throughout the state. All of the task force members are committed to making recommendations that improve the family court experience for all participants. A roster of members is included at pages 8-10.

At its initial meeting in June 2008, the task force defined values to guide its work and recommendations:

- Ensuring justice, fairness, and due process in family law;
- Ensuring meaningful access for all litigants;
- Using innovative techniques to promote effectiveness and efficiency;
- Improving the status of, and respect for, family law litigants and the family law process; and
- Securing adequate resources, including existing, reallocated, and new resources.

Over the past year, the Elkins Family Law Task Force has held six in-person meetings and numerous working group conference calls. In developing these draft recommendations, we have collected input and information from multiple sources, including focus groups consisting of family court users, judicial officers, attorneys, and court staff; a survey of attorneys; a meeting dedicated to receiving input from family court users and advocate groups; and extensive public comments at task force meetings and received through the mail and the Elkins Family Law Task Force Web site.

### **Concerns Identified by Litigants**

We have heard from many family court participants who are frustrated with the family law system and who believe that they were not given an opportunity to fully present their cases in court. Some of these individuals were represented by counsel and some were not. They identified numerous barriers to presenting their cases to judicial officers: cost, not being able to afford an attorney, procedures that were difficult to understand, crowded calendars that made it difficult to

obtain adequate hearing time, and the use of special masters, evaluators, and mediators who gather information from the parties and make recommendations to judicial officers in child custody cases. Some participants expressed their belief that the law is not fairly and uniformly applied by the courts.

### **Concerns Identified by Judicial Officers, Attorneys, and Court Personnel**

We have also heard from judges, attorneys, and other court personnel who were frustrated by the lack of adequate resources devoted to family law. Inadequate resources have led to overwhelming caseloads for judicial officers, family court mediators, self-help center staff, and other court staff. These overwhelming caseloads create significant backlogs in obtaining hearing dates and other services such as child custody mediation. To address these significant backlogs, courts have had to resort to adopting local rules and procedures that provide, from the court's perspective, more efficient means of processing cases. Unfortunately, many of these local rules and procedures have interfered with attorneys' ability to fully present their clients' cases in court and in many instances have added to their fees by creating additional work in preparing and presenting their cases. For the self-represented, some of these rules and procedures have simply created additional barriers to getting their day in court.

The task force understands that California is facing unprecedented fiscal challenges and that it is unlikely that the courts will soon be receiving significant additional resources given current budget cuts. Therefore many of our recommendations call for using existing resources differently, implementing policies that are already in place, or phasing in proposals over time in order to reduce reliance on new funds. Some recommendations have little fiscal impact, focusing on structural issues within the courts.

In drafting these recommendations, the task force sought to set forth a road map for making the processing of family law cases more effective while addressing barriers to justice. However, while many of the barriers may be addressed by new streamlined procedures that use existing resources more efficiently, the task force also realizes that additional resources will be required to fully implement all of the proposals. While current budget restraints may affect the timing of securing additional resources, that does not mean that the recommendations should not be fully considered and prepared for implementation. The recommendations represent a long-term blueprint for change. All of the recommendations are important, and all should be put into place as soon as the resources can be secured. We believe that improving the family court must be a priority in order to restore and maintain the public's trust and confidence in the courts.

## An Invitation to Comment

The Elkins Family Law Task Force invites the public and interested stakeholders to join in the dialogue for change in the family courts by providing comments on these draft recommendations. The draft recommendations have been organized under topic headings reflecting the broad range of issues in family law and the comprehensive approach the task force has taken in seeking to improve family court practice and procedure:

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The task force will review all feedback on these draft recommendations received during the public comment period and will present final recommendations to the Judicial Council in spring 2010.

The public comment period will begin on October 1, 2009, and run until December 4, 2009. The easiest method for commenting is through an online comment form available on the California Courts Web site at [www.courtinfo.ca.gov/invitationstocomment](http://www.courtinfo.ca.gov/invitationstocomment). A comment form, attached to this document, may be submitted by mail, fax, or e-mail:

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Please include your contact information with your comments. Note that all comments will be submitted to the task force for consideration and will be accessible as a public record.

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## **Guiding Principles of the Elkins Family Law Task Force**

1. Courts will ensure consistent and timely access to equal justice for all individuals, families, and children in family law proceedings.
2. Statutes, rules, procedures, and practices will protect procedural fairness and the due process rights of parties as well as seek to increase efficiency, effectiveness, consistency, and understandability. Simplification must not diminish due process rights. Task force recommendations will be evaluated for their potential impact on due process, fairness, and effective and timely access.
3. Court services, procedures, and calendaring should address the needs of parties whether they are represented by attorneys or self-represented. They should also be adapted to the complex and diverse needs of individuals, families, and children in court. In making its recommendations, the task force will be cognizant of the various challenges litigants may have in accessing the courts, including language barriers, cultural barriers, and disabilities.
4. The task force will identify the resources that courts require to handle increasingly complex and demanding family law caseloads. Investing in the modernization of family law courts will improve the quality of outcomes for Californians and enhance the priority given to and the status of family law proceedings.
5. The task force is aware of the unique opportunity to make far-reaching, positive changes in family law. The task force is mindful of the long-term impact of family law on individuals, families, children, and society.
6. The task force will develop its recommendations through an inclusive process that relies on consultation with interested stakeholders and the public, as well as coordination and collaboration with ongoing related projects and efforts to improve family law.

# 1. Right to Present Live Testimony at Hearings

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*In re Marriage of Reifler* (1974) 39 Cal.3d 479 [114 Cal.Rptr. 356] held that evidentiary declarations may be used lieu of live testimony in a postjudgment modification of support and attorney fees. The *Reifler* court further held that the determination whether to use declarations or live testimony should be made by the court on a case-by-case basis and not be the subject for a rule governing all cases. Currently, many overburdened family courts appear to have responded to the press of business by adopting a general rule essentially limiting the right to present live testimony at any hearing on an order to show cause or motion.

Live testimony enhances the court's ability to make critical determinations regarding credibility when written declarations submitted to the court contain conflicting facts and hearsay statements.

Family law cases involve many pretrial motions for temporary relief that request substantive relief regarding the fundamental issues in controversy. Parties in family law cases need immediate orders for child custody, support, and protection from violence. In some cases, these temporary orders can last longer than those granted in a judgment because judgments for custody and visitation can always be modified as circumstances change. Temporary orders for child support, spousal support, and attorney fees may be appealed immediately. The significance of the impact on the daily lives of the parties made by custody, visitation, and support orders is not necessarily determined by whether those orders were granted at a hearing before a trial, based upon a trial or agreed-upon judgment, or at a hearing to modify that judgment.

Thus, it is extremely important that judicial officers get the information they need to make these important family law decisions at all points in the case—not just at trial or at a modification of a judgment. The manner in which these applications for orders are handled varies widely among California courts. Some courts rely almost exclusively on supporting declarations in the decisionmaking process while others routinely take live testimony from litigants.

According to the surveys conducted and the response of the members of the public who presented testimony to the task force, these limitations on the right to present live testimony and the resulting exclusive use of declarations are significant concerns to attorneys and the self-represented alike. This practice deprives litigants of their day in court, increases workload for attorneys and judicial officers, and increases attorney fees.

The need to take live testimony does not have to mean extensive hearing time because judicial officers can control the scope of the testimony that is presented pursuant to the California Evidence Code. In many cases, a judicial officer may simply choose to swear the parties and ask them questions. Judicial officers in family law courts around the state have found that they can take relevant live testimony in an efficient and effective manner on an ordinary order-to-show-

cause or noticed-motion calendar with litigants' being sworn and routine examination and cross-examination proceeding from counsel table.

The Elkins Family Law Task Force recommends:

1. **Rule of Court.** The Judicial Council should adopt this recommendation as a California rule of court. Existing rule 5.118 (f) should be amended in conformance with this recommendation.
  - A. **Live Testimony.** At the hearing on any order to show cause or notice of motion (or request for order) brought pursuant to the Family Code, absent a stipulation of the parties or a finding of good cause, the judge must receive any live competent testimony that is relevant and within the scope of the hearing and may ask questions of the witnesses.
  - B. **Good Cause Exceptions.** A finding of good cause not to receive live testimony should be made on a case-by-case basis. If the court makes a finding of good cause not to receive live testimony, it must state its reasons on the record or in writing. In making a determination of good cause not to receive live testimony, the court must consider all of the following:
    - a. Whether the issues relate to substantive matters such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or use and control of the property or debt of the parties;
    - b. Whether there are material facts in controversy;
    - c. Whether there is need to assess the credibility of the parties or other witnesses;
    - d. The complexity of the issues involved;
    - e. The right of the parties to question experts or investigators submitting reports or other information to the court;
    - f. Whether other relevant evidence on which to base a decision is necessary;
    - g. Whether the pleadings adequately provide the facts the court needs for a determination of the issue; and
    - h. Any other factors that the court determines are relevant to the inquiry.

## 2. Expanding Legal Representation and Providing a Continuum of Legal Services

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The task force recognizes that legal information and advice are critical in family law matters as the emotional and financial impact of family law issues cannot be overestimated. While some litigants will be able to effectively handle their family law matters with self-help, many will need legal advice to help make critical decisions, some may need representation in court only on selected matters, and others may need representation throughout their family law cases.

To meet the needs of litigants in as cost-effective a manner as possible, it is critical that a continuum of services be available: from providing legal information, assisting with forms and explaining legal processes, giving legal advice, and providing mediation or settlement assistance to representing a litigant on a portion of a case, providing full representation in the trial courts, and providing representation in appellate matters. All these resources should be expanded in order to address the needs of family law litigants in our legal system.

Cases in which one side has counsel and the other does not can pose a variety of potential difficulties for the unrepresented litigant, the attorney, and the judicial officer. Representation may be available in more of these cases through changes in awards of attorney fees.

Far too many Californians are unable to afford counsel. The task force believes that we need to take steps to provide litigants with the appropriate levels of assistance they need to proceed with their cases.

The Elkins Family Law Task Force recommends:

1. ***Attorney fees***
  - A. ***Statewide rules and forms.*** The Judicial Council should adopt statewide rules regarding the information that needs to be submitted to the court to obtain an award of attorney fees. A form setting out these requirements should be considered. Consistency in these requirements would allow attorneys and self-represented litigants seeking attorneys to provide the information needed by the court for an award of attorney fees.
  - B. ***Early needs-based fee awards.*** Courts should give careful attention to making early needs-based attorney fee awards rather than deferring the issue to trial. This would minimize the imbalance in ability to hire counsel between litigants in a family law case. When a request for needs-based attorney fees is made, the court should make findings regarding whether the award of fees is necessary, whether there is a disparity in access to funds or income, and

whether one party is able to pay. If the findings demonstrate need, disparity in access and ability to pay, the court should make an order awarding attorney fees.

- C. ***Assistance in preparing request for fees to obtain counsel.*** Court-based self-help centers should provide information and assistance with motions to request fees to hire counsel. Courts should allow limited scope appearances for the purpose of obtaining early needs-based attorney fees.
2. ***Referrals to private attorneys.*** Local lawyer referral services should be encouraged to develop modest-means/low-fee family law panels as well as panels of attorneys who offer unbundled legal services. As courts cannot refer to individual attorneys, these panels are essential to enabling the courts to make appropriate referrals for legal advice and representation to those litigants who are not able to afford full representation.
3. ***Funding for legal services.*** There should be increased resources provided for litigants unable to afford private attorneys.
  - A. ***Increased funding for legal aid to assist with family law matters.*** Increased funding should be provided to legal aid agencies to provide representation to low-income litigants in family law matters in addition to domestic violence.
  - B. ***Funding for representation.*** Family law cases affect critical needs in many families' lives. Issues regarding custody of one's children, support to care for those children, possession of one's home, and domestic violence are of tremendous importance. Challenging legal issues are often compounded by highly stressful situations for litigants, which can make effective self-representation impossible. Funds should be sought for counsel in cases that involve such critical needs and in which litigants are unable to self-represent. If funds are being made available for a right to counsel in civil matters that concern critical human needs, family law should be considered one of the highest priorities for that funding. This is particularly important in cases where one side is represented and the other is not.
  - C. ***Expanding legal services programs for appellate cases.*** Because few family law litigants can afford appellate relief, that essential check-and-balance does not operate as effectively as it should in family court. The self-help appellate program operated by Public Counsel in collaboration with the Court of Appeal, Second Appellate District should be considered for statewide implementation.
4. ***Expanding self-help services.*** Among the most helpful services identified by litigants, judicial officers, court staff, and attorneys are court-based self-help centers. These programs, which include the family law facilitator's office, currently provide services to more than 450,000 litigants throughout the state each year. Operating under the direction of an experienced attorney, the self-help center provides assistance to litigants in preparing documents, understanding their

legal situations, and navigating the court system. In many cases parties can effectively handle their own matters with this basic assistance.

- A. ***Increased funding for self-help services.*** Self-help assistance is an important part of the continuum of services and should be expanded as a way to assist litigants who can effectively represent themselves in all or a part of their case. The assistance of the self-help center in preparing paperwork, explaining the court process, and providing legal information is of tremendous value to litigants and the court. There is a tremendously high demand for these services, and all too often litigants must be turned away because of limited resources. Additional funding should be provided for self-help assistance.
  - B. ***Self-help services expanded.*** Self-help services should be expanded to include instructions and/or training materials on evidence and the manner in which information can be presented to the court. Self-help centers should have resources available to assist self-represented litigants with hearings, trials, and appeals, such as information related to rules, forms, and timelines.
5. ***Availability of attorneys.*** Efforts should be undertaken to increase the number of attorneys who practice family law in California.
- A. ***Mentoring programs.*** Courts should encourage local bar associations, professional organizations such as the Family Law Section of the State Bar of California, and local chapters of the American Academy of Matrimonial Lawyers and Association of Certified Family Law Specialists to implement mentoring programs for new attorneys in family law. Family law attorneys are mainly in small and solo practice, and providing adequate training can be challenging.
  - B. ***Court-based mentoring.*** Whenever possible, courts should provide work-study or internship opportunities for law students in their local family law facilitator or family law self-help center offices.
  - C. ***Pro bono opportunities.*** Pro bono opportunities should be provided to assist lawyers in enhancing their professional experience. Training should be offered to encourage attorneys to take more complicated pro bono cases. Courts should make use of the “Pro Bono Toolkit,” available on the California Courts Web site, to help encourage attorneys to take on pro bono cases.
  - D. ***Limited scope representation.*** The state and local bar associations should continue to encourage limited scope representation by providing training for attorneys on offering those services appropriately and clearly identifying to the client and the court which services are outside the scope of the representation agreed upon by the client.

### 3. Caseflow Management

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Family law cases involve an extraordinary range of issues, from the most simple, uncontested case with no children and no property to cases involving complex legal issues, highly personal and difficult conflicts over children, or serious issues of domestic violence and/or child safety. Unlike general civil, complex civil, juvenile, probate, mental health, or criminal cases, family law is the last general jurisdiction case type in California that does not provide a procedure for the fair, timely, and efficient disposition of a case. Instead, the parties, who are most often self-represented, must take the initiative to obtain appropriate orders and a judgment.

As a result, it is not unusual for family law cases to linger in the judicial system for years. Many litigants who have default or uncontested matters simply do not know that they need to obtain a judgment or other final determination regarding the status of their marriage or domestic partnership. Some remarry in the mistaken belief that their divorce is automatically final because it was filed more than six months prior. Meanwhile, the resolution of contested cases may be greatly delayed because judicial resources are not effectively allocated. In contested cases, parties and attorneys may find it difficult to resolve their cases because of the ineffective allocation of judicial resources. This is partly because courts generally process family law cases in the same way, without regard to for the procedural and substantive factors unique to each case. A case with two people who have been married for two months and are in total agreement about the terms of their divorce is treated in the same manner as a case in which the parties have been married for 20 years, cannot talk civilly to each other, and have a house, pension, and business to divide or in which the parties have never been married but have children together and serious concerns have been raised about the children's safety.

This current practice results in an ineffective and inefficient allocation of court and judicial resources and an inefficient, often confusing, and frustrating experience for the parties. Establishing a statewide caseflow management system based on the principle of "differentiated case management," would reduce these inefficiencies and provide a framework for allocating resources more effectively. The system would focus on individual case characteristics to develop a case management plan designed to achieve the earliest disposition of the case possible consistent with fairness and due process. The case management plan can be modified as the case progresses and circumstances change or more information becomes available.

While it is true that some cases need to proceed at their own pace because of individual issues, such as the possibility of reconciliation, most family law litigants want their matters concluded in a timely manner. Allowing cases to languish unresolved does not help the parties, the court, or the children involved in the litigation. All too often, greater problems result because of delay.

Based on the experience of other jurisdictions with caseload management and observing its use in other casetypes, the key element in reducing delay and thus promoting the timely and appropriate disposition of cases is early and continuous court involvement and management of cases based on statewide goals and standards. In other case types, statutes, the California Rules of Court, and the California Standards of Judicial Administration firmly establish caseload management rules, goals, and standards used to promote the timely disposition of cases in a manner that protects the due process rights of the parties. Family law deserves nothing less. The requirement that the parties stipulate to permit case management, unique to family law, should therefore be eliminated.

What is at stake is the experience and long-lasting results for parties who are involved in a legal process that affects the most fundamental and important aspects of their lives. The benefits of caseload management to parties include a greater understanding of the legal system and their rights, options, and responsibilities; an increased opportunity to have input and involvement in the course of their family law case; and more timely efficient and meaningful access to justice.

The Elkins Family Law Task Force recommends:

1. ***Caseload management established.*** Rules and procedures should be adopted that efficiently allocate judicial resources in a manner consistent with the substantive and procedural complexities of each case to enable parties to resolve their family law matters in a timely manner with appropriate assistance.
2. ***Caseload management beginning at case initiation.*** Caseload management should begin when the initial pleadings are filed and continue through any postjudgment motions. Cases should be assessed based on the type of case (dissolution, legal separation, domestic violence, governmental child support, and establishment of parentage.) They should also be assessed for procedural issues (default, default with agreement, contested), substantive issues (such as property, custody, visitation, child support, and spousal support), and individual case factors such as allegations of domestic violence, whether one or both parties is self-represented, whether one or more parties has limited English proficiency or has other challenges preventing them from accessing the court, and the parties' interest in alternative dispute resolution (ADR) to resolve their case.
3. ***Checkpoints established.*** Based upon the factors in the case, checkpoints should be established to assist the court in monitoring the case to ensure that issues are being resolved as efficiently and expeditiously as appropriate to the specifics of the case. These checkpoints can allow the court and parties the opportunity to identify issues that often create delay, confusion, and frustration, particularly for those parties who are self-represented but who would otherwise be able to proceed by default or mutual agreement. Examples of such issues include lack of service on the respondent and failure to exchange financial information including declarations of disclosure.

Methods to automate these checkpoints should be incorporated into the design of the California Case Management System. For example, the system should be able to identify cases where proof of service of the petition has not been filed within a specified period, such as two months. The system could then allow the court to send a reminder alert to the petitioner, and, if self-represented, he or she could be referred to the self-help center for information on service of process. Checkpoints could be established at regular intervals in a case, such as at the four-month point to discuss discovery and settlement efforts to date and consider a schedule for exchange of information. In general, the court should check in with the parties about the status of the case no less than once a year.

As additional information becomes available to the court throughout the case, it should consider the interventions that would be of most assistance to the parties. If parties are attempting to reconcile, are mediating their case outside of court, have extensive discovery to complete, or otherwise need additional time between checkpoints, these circumstances should be considered in setting any future dates for checkpoints. A future review should always be scheduled so the case is not lost in the system.

4. ***Early interventions.*** Special attention should be paid to giving the parties the opportunity to reach an early disposition of as many issues as possible to help them stabilize their living situations, identify those issues that remain in dispute, and establish a plan for resolution of those issues.
5. ***Information for litigants.*** The court should provide education and information to litigants about the court process, including courtroom processes, with the goal of educating the litigants so that they are better able to make informed decisions about resolving their cases and increasing their awareness of how the court actually works. This information is more fully described in the recommendations in the Litigant Education section.
6. ***Streamlined procedures for defaults and uncontested cases.*** In a high percentage of cases, the parties can obtain a judgment without appearing before a judicial officer. Unnecessary court appearances increase the cost and inconvenience to the parties and are not a wise use of limited judicial resources. When the parties do not wish to appear before a judicial officer, when there is no legal requirement in their case for a court appearance, and when there are no other circumstances causing the court to believe that an appearance is necessary to advance the matter, the court should avoid implementing procedures that would create a requirement for a court appearance in the case. Pleadings may be reviewed by the judicial officer and appearances requested if necessary to determine whether the proposed judgment complies with the law. A goal of caseflow management should be to minimize or eliminate the need for court appearances in those cases that can be resolved by default or agreement of the parties.

7. **Resources available for ADR.** Settlement assistance should be available throughout a case to assist parties in resolving all or a portion of their cases. However, ADR should not be utilized in such a manner as to limit a party's right to a full and fair hearing of any issues in dispute.
8. **Cases requiring hearings and trial.** Direct involvement and case management by a judicial officer is required in some cases with substantive and/or procedural issues and complexities. Effective caseload management practices should increase the availability of judicial officers to hear those matters not suitable for resolution by default or agreement of the parties. For example, cases involving alleged child abuse or domestic violence should be scheduled with the goal of ensuring a prompt hearing before a judicial officer and minimizing the need for ancillary experts paid for by the parties.
9. **Flexibility in design.** Statewide caseload management rules should give local courts flexibility in designing procedures consistent with the resources of the court provided those procedures are not inconsistent with the due process concerns articulated by the Supreme Court's decision in *Elkins*. For example, a large court may choose to hire experienced attorneys to review case pleadings and monitor cases, while a smaller court may be able to accomplish this with a judicial officer and existing court staff. Some existing case management systems can be programmed to signal automatic checkpoints by means of more sophisticated variables (such as checking when a self-represented litigant has not filed a proof of service within two months of filing the petition) and can automatically generate notices regarding service requirements, while others require significant staff time to conduct such reviews. While best practices are being established in the area of family law caseload management, it is particularly important to allow courts to conduct pilot projects to test the most effective ways of offering services.
10. **Efficient use of time.** We should not require that every family take the time to appear before a judicial officer or other officer of the court if that is not needed for the prompt and just resolution of their case. Caseload management procedures need not necessarily require a court hearing or mandatory appearance if it appears that the matter can be resolved and/or adequately monitored by the court without direct judicial involvement. Furthermore, in all cases, the court should encourage innovative alternatives to personal attendance at case management conferences, such as by telephone appearances or e-mail statements regarding the status of the case when appropriate. Court time should be used in a productive manner for litigants, counsel, and judicial officers.
11. **Courtroom management tools—legislation required.** Judicial officers should, with input of the litigants and their attorneys, have the ability to control the manner and pace of the litigation by a method appropriate to each case, consistent with the Code of Civil Procedure, which may include establishing discovery schedules and cut-off dates, setting dates for exchange of expert witness information, and other pretrial orders. Under current law these orders can be made only upon stipulation by the parties.

Judicial officers in family law should have the same authority to work with the parties to develop case management plans that judicial officers have in civil cases. These plans may include early neutral case evaluation, alternative dispute resolution, a discovery plan or limitations on discovery, use of telephone conferences, the appropriate waiver of requirements of procedural statutes, jointly selected or court-appointed expert witnesses, bifurcation of issues for trials, and allocation and awarding of attorney fees and costs. Establishing such a plan can eliminate unnecessary motions, encourage timely resolution of the case without using unnecessary experts, and identify areas where early settlements are possible, thereby saving the parties significant costs without compromising their due process rights.

Legislation should be pursued to authorize the Judicial Council to promulgate rules giving judicial officers the authority to manage family law cases from initial filing through postjudgment. Family Code sections 2450, 2451, 2032, and 2034 should be modified to provide the courts with greater authority and flexibility to more effectively manage the full range of family law cases.

12. ***Sanctions against attorneys.*** Rule 2.30 of the California Rules of Court (Sanctions for rules violations in civil cases) should be amended to include family law matters or a similar rule should be adopted into the family law rules. Currently, the only option that a judicial officer has for sanctioning inappropriate or delaying behavior is to order the offender to pay a portion of the other party's attorney fees. This should be expanded to allow imposition of sanctions that the attorney should pay, not the interested party. In addition, where parties are both self-represented, the judicial officer should be permitted to order the parties to pay sanctions to the court.
13. ***Written orders after hearing.*** Whenever possible, the preparation of orders after hearing should be incorporated into the court's process: the orders would be completed by court or self-help staff and reviewed by the judicial officer within a set time period (preferably immediately after the hearing) and a copy served on all parties, including attorneys who appeared. In cases where counsel is directed to prepare orders after hearing, clear rules should be established for their timely preparation and review.

Self-represented parties who reach a settlement without a hearing should also be assisted in preparing written agreements that will be filed with the court.

14. ***Systems to finalize older cases.*** Courts should establish a process to examine files and determine if divorce and parentage cases filed before case management procedures were instituted are actually final and also should establish a mechanism to alert litigants if additional steps need to be taken to complete those cases. This effort should be publicized with the goal of encouraging litigants and attorneys to check their own files to see if their cases are completed in the event they have moved and the court cannot notify them of problems.

15. ***Time standards.*** There are currently no time standards for family law matters other than a limitation that the parties to a dissolution cannot be restored to the status of single persons until six months have elapsed from the date of service. Because of limited resources, courts prioritize those matters that have time standards, such as criminal, juvenile, and civil matters. The Judicial Council should adopt rules setting out a framework for timely disposition of family law cases. These rules should recognize that some cases need significantly more time than others because of the complexity of the issues or desire of the parties to have additional time to attempt reconciliation, but should also provide the opportunity for those litigants who would like to have their matter resolved to have it heard promptly. Any preliminary standards should be studied and reviewed. Based on current information and procedures in effect in other jurisdictions, realistic goals for reasonable case completion by the courts might include these:

- Twenty percent of cases should be resolved within 6 months from petition to judgment. This would include default and stipulated matters.
- Seventy-five percent of cases should be resolved within 12 months from petition to judgment.
- Ninety percent of cases should be resolved within 18 months from petition to judgment.

## 4. Providing Clear Guidance Through Rules of Court

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Because family law is a type of civil case, many of the statewide civil rules apply to family law proceedings, but others do not. It is confusing and difficult for a practitioner, let alone a self-represented litigant, to be able to navigate the various rules that apply to family law. Statewide family law rules do not address many areas of practice, and thus trial courts have developed rules and procedures to address the gaps. Unfortunately, local rules often serve as traps for the unwary. Even attorneys sometimes have problems in following local rules, and these issues are exacerbated for the self-represented. If we are to ensure that all family law litigants are similarly treated, then we should provide consistent rules about what is expected in court.

Consistent rules will facilitate the education of judicial officers, clerks, attorneys, and litigants regarding the proper procedures to follow. Limiting the scope of local rules will assure attorneys who practice in more than one county that if they comply with the California Rules of Court on a particular issue, they will not violate a local rule and the rights of their clients will not be put at risk.

The Elkins Family Law Task Force recommends:

1. ***Statewide family law rules.*** The family law rules should be revised to be more comprehensive and to incorporate best procedural practices from local rules that are not currently covered by statewide rules but that lend themselves to statewide implementation. The rules should be written in plain language and organized logically. There should be common statewide rules for continuances of matters, ex parte proceedings, evidentiary objections in declarations, settlement conferences, trials, meet-and-confer, and other requirements.
2. ***Centralized statewide rules.*** The Judicial Council should identify all relevant statewide rules of court and organize them into a unified family law section that references all general rules of court as well as the civil rules, such as those pertaining to discovery and settlement sanctions that are applicable to family law. This would enable judicial officers, attorneys, and self-represented litigants to quickly find appropriate rules and be aware of the variety of rules that pertain to family law. The rules should strive to simplify the procedures that parties must follow. To the extent that complexity is caused by statute, legislation should be proposed to address these issues.
3. ***Local rules.*** Local rules should be eliminated except as required by statute or rule of court. They should be consistent with and complementary to the California Rules of Court and should not cover those areas of procedure or law specifically addressed by statute or the California rules of court. Local rules should not set court evidentiary “policies” or standards inconsistent with the Evidence Code.

4. ***“Local local” rules.*** There should be no “local local” (courtroom-specific) rules used by judicial officers. Some judicial officers have developed their own “local local” rules or standing orders for their courtrooms. This makes compliance extremely difficult for those who are unaware of those rules, including self-represented litigants and attorneys who do not regularly practice before that judicial officer.

Local rules are circulated for public comment and review prior to adoption. They are also available for anyone to find online and in publications. These protections are critical for due process and access to the courts. While case-specific orders are appropriate for managing individual cases based on their specific issues and other features, general rules for a courtroom that are only applicable to that courtroom pose substantial barriers.

## 5. Children's Voices

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Family law cases often involve children who are directly or indirectly affected by court processes and decisions. In many instances, their participation or input is important to achieve proper resolution of the matter or to ensure that they feel heard by the court or other court-connected professionals. Nevertheless, because of their emotional and psychological vulnerability, it is important that children not be automatically involved in or called as a witness in every case. Parental decisionmaking authority and the discretion of the court remain crucial factors in determining the need for a child's involvement as well as the manner in which participation may occur.

For many years the courts have been successful in helping parties resolve child custody disputes through early intervention programs such as coparenting education, counseling, and mediation, which have helped prevent children from becoming ensnared in parental disputes while appropriately allowing them to express their points of view. In some cases, however, when such efforts prove unsuccessful and courts assume the role of decision maker in a litigation setting, it is equally important to recognize children's needs and their vulnerability and to consider developing a variety of ways to include the voice of the child, when appropriate, in the determination of his or her best interest. The Elkins Family Law Task Force heard from many people about the importance of finding ways to both include children, where appropriate, and protect them from additional, case-related conflict. In order to include the child's voice, the legal process should be designed to:

1. Protect the child from psychological damage from feeling caught in the middle and from confusion about the process or not knowing what to expect; allow for meaningful participation by the child when appropriate, in court, in chambers, in proceedings on the record (similar to juvenile court), or through other processes such as participation in mediation or evaluation;
2. Allow judicial officers to retain discretion in determining whether there is a need to hear testimony from the child, and when that testimony is necessary and appropriate, the judicial officer should follow established guidelines for exercising such discretion in determining the manner in which additional information from the child will be presented to the court; and
3. Clearly define the role of minor's counsel.

The Elkins Family Law Task Force recommends:

1. ***Input from children.*** In appropriate cases, judicial officers should consider whether and how a child might meaningfully participate in a given family matter. There are general legal and psychological, as well as case-specific, reasons to consider:

- a. Studies have recognized the importance of hearing from children in matters that affect their lives and have shown that children do better when they are aware of the process and how decisions will be made;
- b. Family Code section 3042(a) requires the court to consider the wishes of the child in custody disputes if the child is old enough to have formed an intelligent preference;
- c. Family Code section 7890 et seq. requires the court to consider the wishes of the child in termination of parental rights proceedings and to take testimony of a child who is 10 years of age or older; and
- d. In some cases, a child is a percipient witness and has important information that the court needs to consider in deciding the dispute before it.

## 2. *Providing for child safety and well-being in court proceedings*

- A. ***The judicial officer must control the examination of the child witness to protect the best interest of the child (Fam. Code, § 3042(b).)*** Decisions concerning the child's best interest arise in the context of a wide variety of disputes. They range from, for example, disputes about which parent is going to take the child to a piano lesson or soccer practice to challenging, prolonged, highly conflicted custody disputes.<sup>3</sup> This variety calls for developing several different methods for obtaining input from the child, each appropriate to the issues involved, the age of the child, and other developmental and procedural concerns.
- B. ***Children's input should not necessarily need to be equated with testifying in a courtroom.*** A child's input may not be needed at all, as in the case of a young child<sup>4</sup> or a case where parents are able to agree on decisions. Input may be received in the mediation or evaluation process. In cases where courts decide to have the child directly participate in the court process, precautions or protocols should be developed to avoid subjecting the child to unnecessary trauma. For example, the court should make certain that the child has been acquainted with the courtroom environment and knows what to expect. Minor's counsel could be appointed to assist in preparation of the child and in the delivery of the child's testimony (see Minor's Counsel section). The questioning of the child could take place in chambers.<sup>5</sup> The court could be assisted in questioning the child by professional staff associated with family court services or private mental health practitioners who have been trained to interview children.

<sup>3</sup> Although cases involving allegations of child abuse and/or violence can cause a high degree of conflict, we have placed these cases in a separate category because of their unique attributes and the safety issues involved.

<sup>4</sup> For example, a Court of Appeal has found that it is well within a family court's discretion to decline to personally interview a five-year-old child under Family Code section 3042 because it is doubtful that such a young child could realistically determine his or her own best interest. See *Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 659, 103 Cal.Rptr.2d 545.

<sup>5</sup> See, e.g., *Marriage of Okum* (1987) 195 Cal.App.3d 176, 180 [240 Cal.Rptr. 258] (court used Evidence Code section 765 to justify questioning outside parent's presence in acrimonious proceedings; court reporter was instructed not to transcribe notes of chambers proceedings).

3. ***Exercising discretion and finding the least traumatic method for child involvement.***

- A. ***Parental involvement.*** Where parents are able to agree and no allegation of child abuse is involved, the court should refrain from interfering with parental authority. In these cases, the court should not require that children be brought to court unless a specific purpose or reason is identified for doing so.
- B. ***Involving other professionals and providing information.*** In disputed cases where their participation seems warranted, children first should be provided the opportunity to meet with a mediator or an evaluator working with the parents in order to give them a sense of being heard and to assist them in understanding court procedures and the decisionmaking process. Parents and the court could obtain information about the child's point of view from the mediator or evaluator, which may lead to a resolution without the necessity of further child involvement. Courts should encourage parents to allow children to participate in programs that provide information to families and children about the divorce/separation process. Family law judicial officers should consider participating in these programs or presentations that allow children to find out more about the divorce/separation process so that the children can become informed and have the opportunity to participate, even if it is only by understanding the court process.
- C. ***Involving the child.*** In those contested custody cases that present the greatest challenge of finding a way to involve the child in the proceedings while protecting the child from feeling caught in the middle or experiencing other trauma, the court, should, on a case-by-case basis, find a balance between protecting the child, the statutory duty to consider the wishes of the child, and the probative value of meaningful input from the child. Courts should consider the following in determining the appropriate action to take:
- a. Whether it would benefit the court to question the child;<sup>6</sup>
  - b. Whether it would benefit the child to be questioned by the judicial officer;
  - c. Whether there are drawbacks to questioning the child; and
  - d. Whether a given child should testify at all, and, if so, whether testifying is best done in chambers or in open court.

Upon deciding to take the testimony of a child, the judicial officer should balance the necessity of taking the child's testimony in the courtroom with parents and attorneys present with the need to create an environment in which a child can be open and honest. Courts should consider the

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<sup>6</sup> It must be remembered that unsworn statements of children are not evidence and cannot be used as the basis for the court's determination on an ultimate issue or fact. See *In re Heather H.* (1988) 200 Cal.App.3d 91, 95-96 [246 Cal.Rptr. 38].

variety of possible settings for taking children’s testimony, including an open courtroom; a closed hearing with only attorneys present; in chambers questioning without attorneys and parents present, using questions submitted in advance by the attorneys or the parties; in chambers questioning with attorneys present but with the judicial officer questioning the child; or in chambers questioning with only the judicial officer and court reporter present.

## 6. Domestic Violence

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The Elkins Family Law Task Force endorses the recommendations developed by the Judicial Council's Domestic Violence Practice and Procedure Task Force as received and approved by the Judicial Council and contained in the task force's report dated January 2008. The Elkins Family Law Task Force also supports the work currently being undertaken to implement those recommendations by the council's Domestic Violence Practice and Procedure Implementation Task Force. In furtherance of those efforts, the Elkins Family Law Task Force developed the following additional recommendations for improving the handling of domestic violence matters in family law.

The Elkins Family Law Task Force recommends:

1. ***Survival of orders.*** Proposed legislation should be developed to provide clarification concerning the ability of support and custody orders to survive the termination of a permanent restraining order.
2. ***Paternity and domestic violence cases.*** Family law courts hearing Domestic Violence Prevention Act (DVPA) cases should be able to accept stipulations regarding paternity and enter paternity judgments in uncontested paternity matters without the parties' having to file separate paternity actions. Legislation allowing this process should be developed that would support increased access to the courts, use court resources more efficiently, more effectively protect children in these matters, and enable courts to issue custody orders that survive the expiration of restraining orders in a DVPA case.
3. ***Family law court access to Paternity Opportunity Program.*** To facilitate the making of paternity determinations and appropriate custody orders, all family law judicial officers should be provided with greater access to the Paternity Opportunity Program (POP) declarations provided to the court. Such access should include proper training and protocols to protect confidentiality.
4. ***Procedural changes.*** Any procedural changes courts make must preserve the due process rights of the parties and protect the right to a fair hearing in which a party is permitted to give testimony and call witnesses, subject to the court's ability to properly control the process.
5. ***Children's participation.*** Just as in cases involving abuse and neglect, the court must give appropriate consideration to the question of whether the child's point of view and the information the child has regarding the violence would be probative in determining the risk posed to the child and the ultimate decision regarding his or her best interest.

6. ***Settlement processes.*** The court, in referring or ordering litigants to settlement processes, must consider whether domestic violence is an issue in the case and ensure that such orders include provisions for meeting separately with litigants so as to provide safe and appropriate services.
7. ***Form changes.*** The Judicial Council should make appropriate changes in the relevant existing forms to accommodate these changes.
8. ***Statewide consistency.*** Local domestic violence procedures must conform to statewide rules of court and current statutory requirements.

## 7. Enhancing Safety

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Family law courts are often confronted with issues involving allegations of child abuse, neglect, and violence in the home. The task force has heard many concerns about the safety and well-being of children and issues of children's participation in court proceedings.

The Elkins Family Law Task Force recommends:

1. ***Appropriate procedures***

A. ***Related procedures.*** Cases involving allegations of child abuse in which the child is called upon to testify with respect to the allegations should follow juvenile court procedures dealing with the control and conduct of proceedings with respect to the testimony of the child. As set forth in Welfare and Institutions Code section 350, except when there is a contested issue of fact or law, proceedings should be conducted in an informal, nonadversarial atmosphere with a view to obtaining the maximum cooperation of the child and all persons interested in his or her welfare.

B. ***Hearing from children in chambers.*** In determining how to hear testimony from children, consideration should first be given to whether hearing from a particular child in chambers or in the courtroom would be preferable. Courts should follow the process established for taking the testimony of a child in termination of parental rights proceedings that is set forth in Family Code section 7892, which is identical to the process in juvenile court under Welfare and Institutions Code section 350(b). This process includes determination by the court whether testimony in chambers is necessary to ensure truthful testimony or whether the child would be intimidated by a formal courtroom setting if the child is afraid to testify in front of his or her parents. Such a determination by the court must be supported by clear and convincing evidence.<sup>7</sup>

2. ***Expedited handling.*** There should be expedited handling of cases involving serious allegations of physical or sexual child abuse, including emergency procedures so that the judicial officer can quickly analyze the situation and determine what orders are appropriate. There should be expedited access to the courts and special training for mediators, investigators, and judicial officers. The cases should move as quickly as possible to ensure child safety and access and fairness to all parties.

3. ***Child welfare services.*** Child welfare or protective services should be required to become involved in all cases involving child abuse and neglect. Child protective services (CPS)/child

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<sup>7</sup> Courts should note the hearsay option as set forth in *In re Cindy L.* (1997) 17 Cal.4th 15 [69 Cal.Rptr.2d 803].

welfare services should not treat those cases differently from cases involving the same or similar issues in juvenile court simply because one parent has sought relief in family court. Rather, CPS should be required to assist the court in fully investigating and providing appropriate resources as they would to children handled through their protection system. (See, for example, Welf. & Inst. Code, § 328.) Children in these cases should have access to counsel, to child welfare services, to social workers, and to Court Appointed Special Advocates (CASAs).<sup>8</sup> Statutory, rule, or regulatory changes that may be necessary to implement this recommendation should be undertaken.

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<sup>8</sup> We recognize that juvenile proceedings could result in the permanent loss of parental rights and for that reason children and parents are provided legal representation. Although parental rights can be seriously curtailed and eventually lost in family law proceedings, the right to representation has not yet been recognized except when termination becomes imminent. Thus, in family courts, there are increased challenges to protecting parties and children without the buffer of legal representation and therefore there is an even greater need for assistance from social services.

## 8. Contested Child Custody

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Contested child custody matters often involve complicated issues with long-term implications for families and children and, in some instances, require significant court resources. In addition to providing for judicial decisionmaking in these cases, for more than 25 years California has mandated that contested child custody matters be sent to mediation where parties may have the opportunity to develop a parenting plan on their own prior to a final judicial determination regarding the care of the children. Over the years, courts have developed a variety of approaches to providing child custody mediation services as well as related services designed to reduce acrimony and respond to the needs of families.

During the task force's work, concerns have been raised about the confusion some litigants experience when mediators provide recommendations to the court as is permitted by local rule under the current statutory framework. In its recommendations in this area, the task force seeks to recognize the value of various approaches to assist families in these matters, including not only mediation and facilitation of agreements but also methods of providing information to the court that will assist in judicial decisionmaking. Additionally, despite changes in the types of cases and litigants appearing in family court (for example, an increased number of self-represented litigants), resources for mediation and other services have been limited, posing additional challenges for courts in attempting to respond effectively to the range of issues families face. In an effort to improve access to child custody mediation services and provide increased consistency in the delivery of this service throughout the state.

The Elkins Family Law Task Force recommends:

### 1. *Information provision*

A. ***Methods to obtain information.*** Judicial officers need relevant, useful information for making judicial determinations in contested child custody cases. No matter how such information is provided to the court, litigants' due process rights, which include the rights to notice and an opportunity to be heard, must be protected. While information can be provided in a variety of ways, efforts should be made to have the parties themselves provide necessary information directly to the court in those instances in which they have not been able to reach agreement. To provide the judicial officer with such information, courts might consider developing forms requesting key information (such as the family's work and child-care schedule and locations), providing assistance to parties to make sure relevant information is included in court documents, and offering detailed information during orientation sessions about what the legal process involves and the type of information the court may need from parties.

- B. ***Investigators and evaluators.*** In those cases where additional information is needed, courts should have investigators and evaluators available. Court orders should clearly indicate whether an investigation (to determine facts and not to make assessments, recommendations, or evaluations) or an evaluation is being ordered.
  - C. ***Opportunity to respond.*** Any information provided to the court by investigators or evaluators must also be provided to the parties, and parties must be given an opportunity to explain or respond to such information.
  - D. ***Opportunity for cross-examination.*** Due process requires that those providing information or recommendations to the court be made available to testify and be cross-examined.
2. ***Child custody mediation services.*** Current law provides that court-connected child custody mediation is confidential and that recommendations may be made to the court under specific circumstances (see Fam. Code, §§ 3177, 3183 & 3184). The statutory framework that supports confidentiality while also allowing for recommendations in specific instances reflects two important goals in family court:
- a. Supporting parental decisionmaking by assisting in effecting settlement of child custody disputes; and
  - b. Providing the court with good information on which to base its decision when parents are unable to agree on parenting time (i.e., custody and visitation issues).

Depending on their resources and court culture, California's family courts have attempted to address these goals in a variety of ways. The severe underresourcing of family court services and family law courts over many years has resulted in the need for innovative responses to effectively handle a wide variety of contested child custody cases. One of the challenges of developing innovative responses is a lack of uniformity throughout the state in nomenclature and procedures in this area.

To address concerns raised as part of its work, the task force recommends that pilot projects be implemented throughout the state to provide litigants initially with the opportunity to mediate their contested child custody matters confidentially. Pilot programs should include those superior court jurisdictions in both large metropolitan areas and suburban areas that currently authorize recommendations by local court rule.

As part of those pilots, if the parties are able to come to a full or partial agreement with the assistance of the mediator, that agreement should be submitted to the court and incorporated into a parenting plan or child custody order. If the parties are unable to come to an agreement, the pilot court should either hold hearings at which the court determines temporary or final orders or, under specific conditions, order additional processes, such as investigations or evaluations, to provide information to the court to assist in resolving the child custody matter. In these pilots,

this subsequent process should be conducted by someone other than the mediator who provided confidential mediation so as to guard against bias, perceived or otherwise. To ensure due process, these pilot efforts must include procedures to properly inform parties about any reports or recommendations that may be made and to enable parties to call investigators or evaluators to testify.

3. ***Resources for child custody mediation services.*** Courts should identify the amount of time a particular case needs in mediation and provide mediation services according to those needs. Courts should increase the time available for initial sessions and/or allow the parties to schedule follow-up sessions. Superior courts that use day-of-court mediation should consider expanding the time available for mediation through expanded use of prescheduled appointments.
4. ***Appropriate number of mediators.*** Each court should ensure that it has an appropriate number of family court services mediators based on the population of the county and number of child custody mediations in that county.
5. ***Access to family court services.*** Courts should ensure that parties have the option to request family court services mediation prior to filing a custody/visitation motion. This voluntary service should be confidential, and no recommendation or report should be provided to the court.
6. ***Information from family court services and evaluators.*** To address concerns about procedural fairness and due process, information provided to the court from family court services should be provided in writing to the parties and their attorneys prior to a hearing on the matter. Under Family Code section 3025.5, if recommendations are included in the report, the report must also be filed in the confidential portion of the family law court file. In addition to reviewing the report and recommendations, the court must give the parties the opportunity to be heard on the recommendations and reports so that judicial decisionmaking and orders reflect input received from the parties directly as well as the recommendations. Recommendations should not be presented as final court orders unless and until they are incorporated as such into an order or a judgment.
7. ***Child custody language.*** The phrase “parenting time” should be used in legislation and rules of court where applicable instead of “custody” and “visitation.” Any statutory or rule changes should recognize that the intent of these changes is not to change substantive law but rather to use nomenclature that more respectfully describes the time parents are responsible for, or spend time with, their children.
8. ***Culturally competent mediation services.*** Training should address how mediators and evaluators can provide culturally competent mediation services so that all litigants will have the greatest opportunity to access court services and resolve their disputes effectively.

## 9. Minor's Counsel

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In California family law matters, if the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of a child in a custody or visitation proceeding. California Rules of Court, rule 5.240 currently provides guidance to judicial officers contemplating such an appointment. Under rule 5.240(a) appointment considerations should include:

1. Whether the issues of child custody and visitation are protracted;
2. Whether the child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
3. Whether counsel would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
4. Whether the dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;
5. Whether it appears that one or both parents are incapable of providing a stable, safe, and secure environment;
6. Whether counsel who is knowledgeable about the issues being raised regarding the child is available for appointment;
7. Whether the best interest of the child appears to require independent representation; and
8. If there are two or more children, whether any child would require separate counsel to avoid a conflict of interest.

Currently, courts sometimes appoint minor's counsel as a result of the limited availability of other resources such as family law investigators or child custody evaluators and the need the court may have for additional information on which to base a child custody decision. To the degree that courts do not have investigation, evaluation, or assessment resources a child's direct participation becomes more and more necessary as courts must consider the desires of the child and information from the child that has probative value in determining his or her best interest. To be responsive to the complexities inherent in the types of cases that may involve minor's counsel and the challenges attorneys, parties, and children may face when such appointments are made or perceived to be necessary, the Elkins Family Law Task Force recommends the following so that the role of minor's counsel can be more clearly delineated and responsibilities of such counsel more clearly defined; so that there is greater transparency and clarity regarding how such appointments are made and how complaints regarding performance of appointed counsel will be addressed; and so that research may be conducted and education and training made available to provide the best possible representation for children in these matters.

## 1. *Minor's counsel's role*

- A. ***Role definition.*** The role of minor's counsel should be clearly defined for the benefit of the attorney, client, family, and the court. Attorneys representing children sometimes face the challenge of maintaining the attorney-client relationship in the face of information that may raise concerns about what the child-client desires and whether those desires reflect the best interest of that client. Reflecting this notion, under current statutory law (Fam. Code §§ 3150, 3151) minor's counsel in family law proceedings has the responsibility of representing "the interests of the child." Minor counsel's role is to function as an attorney in representing these interests on behalf of his or her client and, as Family Code section 3151 further indicates, to gather facts relevant to the proceeding. Orders, conduct, and training should reflect recognition of this important role.
- B. ***Acting within the scope of that role.*** While judicial officers desiring to have the information necessary for a well-reasoned determination might consider appointing minor's counsel who may appropriately gather information and investigate the case on behalf of the child, because minor's counsel is acting as an attorney, minor's counsel should never be called upon to stand in the place of a mental health evaluator or to replace the court's weighing and determination of the facts with his or her own. The results of counsel's investigation or fact gathering should only be presented in the appropriate evidentiary manner so that the parties' due process rights are adequately protected. Family Code section 3151(b) should be amended to eliminate the requirement that, at the court's request, counsel must prepare a written statement of issues and contentions.

## 2. *Counsel's responsibilities in representing the minor child's interests*

- A. ***Providing information.*** The goal of counsel's representation should be to provide the court factually correct information through the presentation of reliable, admissible evidence in a proper court proceeding. Because minor's counsel is acting in the role of an attorney, he or she should not make "recommendations," file a report, testify, or present anything other than proper pleadings.
- B. ***Providing information on child's wishes.*** Section 3151 should be amended to remove minor's counsel's ability to independently determine under Family Code section 3042 whether his or her client is "of sufficient age and capacity to reason so as to form an intelligent preference in the custody issues before the court." Rather, counsel should be required to present evidence to the court so that the court itself can make the appropriate determination. If the child wishes to have his or her desire expressed to the court, it should be a mandatory duty on the part of counsel to express the desire of the child to the court.

3. ***Courts' responsibilities in ensuring accountability and transparency in appointment of minor's counsel***

A. ***Implement Rule.*** To most effectively and appropriately utilize minor's counsel, courts must implement California Rules of Court, rules 5.240–5.242, which address:

- a. Appointment considerations;
- b. Content of orders appointing minor's counsel;
- c. Complaint procedures;
- d. Termination of appointment;
- e. Matters related to compensation and ability to pay;
- f. Education, experience, and training requirements; and
- g. Responsibilities of counsel and other considerations regarding counsel appointed in these complex matters.

B. ***Develop procedures.*** As part of implementing these existing statewide rules of court, courts must develop procedures to ensure that minor's counsel are adhering to the following requirements:

- a. Filing a declaration with the court indicating compliance with the education and experience requirements of rule 5.242 no later than 10 days after being appointed and before beginning work on the case (the Judicial Council form *Declaration of Counsel for a Child Regarding Qualifications* (form FL-322) or local forms may be used for this purpose); and
- b. Notifying the court within five days of any disciplinary action taken by the State Bar of California, stating the basis of the complaint, result, and notice of any removal, probation, or suspension.

C. ***Complaint procedures.*** Implementation of the rules of court also include developing a local procedure for handling and responding to complaints regarding minor's counsel as required effective January 1, 2010 (under Cal. Rules of Court, rule 5.240). Such procedures should be published and available to litigants and counsel and should allow for expeditious and effective handling of complaints. Additionally, the Judicial Council should promulgate statewide approaches through rules, forms, information sheets, and other methods to provide for consistency in the handling of complaints statewide.

D. ***Meeting requirements.*** Any lists maintained from which the court might appoint counsel should be reviewed at least annually to ensure that those on the list meet the education and training requirements. Courts should ask attorneys annually to update the list and to notify the court if any changes would make them unable to be appointed under the current law.

E. ***Review of costs.*** Courts should routinely review costs and bills being sent to parties for privately paid minor's counsel.

4. ***Education on the appropriate use of minor's counsel.*** All family court judicial officers, including temporary judges, should be required to take an educational class on the appropriate use of minor's counsel. Currently there appear to be many instances in which family law judicial officers are appointing minor's counsel in place of a child custody evaluator and asking the attorney to make recommendations to the court about what custody/visitation would be in the best interest of the child. This is an inappropriate use of minor's counsel as minor's counsel is not qualified to provide such an opinion and recommendation. Education will assist judicial officers and attorneys in better understanding the appropriate role of minor's counsel and will address the court's goal to have attorneys provide admissible evidence upon which the court can rely in making good decisions. Education will also help support judicial officers in fulfilling their obligation (1) to appoint minor's counsel only when other interventions have failed to produce adequate evidence regarding the desires and the best interest of the child, and (2) to employ, not delegate, their decisionmaking power in complex child custody proceedings. (See also Judicial Branch Education section.)

## 10. Scheduling of Trials and Long-Cause Hearings

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Many major trials and hearings are not heard completely in one or more consecutive court sessions but instead are broken up into multiple shorter sessions, sometimes separated by many weeks or months. This is ineffective and inefficient for everyone. It significantly increases the aggregate time trials and long-cause hearings take and require additional time for judicial officers to make detailed notes and to review them to facilitate their recollection of previous sessions. It increases attorney preparation time and expert witness preparation, adds to litigants' financial costs and anxiety, and can result in unprofessional treatment of the issues at hand. Combined with good caseflow management, scheduling trials and long-cause hearings so that they can be heard in consecutive court sessions is consistent with direct judicial assignment in family law in the same manner it is consistent with direct judicial assignment in other types of civil cases.

Family courts must also recognize some of the other burdens placed on attorneys, their clients, and self-represented litigants when trial scheduling is poorly managed. For example, litigants can lose time from work needlessly, attorneys fees will climb upward, and frustration will mount as litigants and counsel wait at the courthouse only to be sent home at the end of the day without having had their cases heard. Good trial scheduling in direct calendar departments requires ongoing time estimation by both attorneys and judicial officers and good communication between the bench, the bar, and the self-represented litigants whose cases are set for trial. For example, if a trial is running longer than estimated, then the court should give as much notice as possible to the attorneys or self-represented litigants in the next scheduled case or cases so that they can readjust and plan their own time accordingly.

The Elkins Family Law Task Force recommends:

1. ***Day-to-day trials and long-cause hearings.*** To enhance the quality of family law trials and long-cause hearings, improve court efficiency, and reduce costs to litigants, the Judicial Council should adopt a rule of court requiring that long-cause hearings and trials that cannot be completed in one day must, absent a finding of good cause, be continued on consecutive trial days until completed.
  - A. ***Procedure.*** Once a trial or long-cause hearing is commenced, it should take precedence on the trial calendar over all other family and civil matters not otherwise entitled to preference.
  - B. ***Consecutive Trial Dates.*** Courts should conduct such trials and hearings on consecutive trial days unless the court makes a finding of good cause on the record or in writing.

- C. **Notice.** If a trial or long-cause hearing will not be able to commence as scheduled, the court should provide notice to attorneys and self-represented litigants at the earliest possible opportunity and reschedule with the goal of avoiding needless court appearances and time lost from work.
  
- D. **Court Organization.** Courts should structure judicial assignments and calendars to facilitate compliance with this rule.

## 11. Litigant Education

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The family law process can be confusing and intimidating. Education for litigants about the court process and basic legal principles can help minimize stress, encourage appropriate agreements, and assist the parties in resolving their cases in a timely manner. When litigants understand their legal rights and procedural requirements, court processes can be more effective and efficient, less frustrating, and more responsive to their needs. Additionally, information about settlement options and assistance in preparing written agreements can help parties arrive at solutions more tailored to their family situation. This can avoid the expense and difficulties of a high-conflict case that may divert parents' time, energy, and money from otherwise being used for the benefit of the children.

The Elkins Family Law Task Force recommends:

1. ***Orientation and ongoing information and education on the family law court process.***

Orientation on the court process and procedures should be provided at the beginning of a case to educate the litigants so that they are better able to make informed decisions about resolving their cases, understand the range of options available to them, and be aware of how the court actually works. Ongoing education should be provided to ensure that parties receive the information they need throughout the life of their family law case. Courts should use flexible, coordinated approaches to providing litigant education. Appropriate staff to provide litigant education includes, but not is limited to, self-help and family law facilitator staff, case coordinators, and family court services staff.

A. ***Introductory Information.*** Courts should provide introductory information to parties upon the filing of a petition or response in family law cases that describes the steps in the process. Courts should provide clearly written information in multiple languages about court policies and procedures, including how to access self-help center workshops, Web-based information, databases, and court calendars. Any additional resources that are available for self-represented litigants should be highlighted.

Parties should be provided with information about their procedural rights in family law cases. Parties should receive information about legal resources including brochures from the State Bar, free or low-cost legal clinics, legal services, and county bar lawyer referral panels; information about limited scope representation; and information about options such as mediation and collaborative law. Orientation information should be uniform statewide, made available online, and offered in a variety of languages. It should be presented in a variety of ways, such as informational handouts, flowcharts and checklists, a legal resource guide, and videos, audiotape, and multimedia presentations. To the extent possible, orientation resources should be developed and made available for statewide use.

- B. **Information about challenges of self-representation.** Self-represented litigants should receive education at the initial stages of their cases that addresses the challenges of self-representation and highlights the issues that are complex and may require the expertise of an attorney, an accountant, or another professional.
- C. **Review of current education.** Courts and their partner agencies should review their current education and self-help programs to ensure that litigants from every family structure are better able to identify the process, navigate the legal system, and attain final resolution of their cases. For example, never-married litigants should be given information specific to their circumstances regarding how to proceed to judgment in parentage actions.
- D. **Information throughout the case.** Courts should provide additional opportunities for litigants to obtain information and education about court processes and procedures throughout the life of the family law case. Workshops on preparing for trial or finalizing required paperwork may enable litigants who did not originally need information to more effectively resolve their matters and finalize their cases. In addition, the self-help center or family law facilitator’s office should provide litigants general information about evidence and the burden of proof in the form of guidelines directed to all parties, in keeping with the appropriate role of the self-help center and facilitator. Care should be taken to provide these opportunities in ways that do not interfere with attorney-client relationships for those who are represented.

- 2. **Orientation to child custody mediation.** Parties referred to child custody mediation must be provided with orientation or parent education as prescribed by law. California Rules of Court, rule 5.210(e)(2) and (e)(2)(A)–(D) require that all court-connected child custody mediation processes include:

Oral or written orientation or parent education that facilitates the parties informed and self-determined decision making about: . . . [t]he types of disputed issues generally discussed in mediation and the range of possible outcomes from the mediation process; . . . [t]he mediation process, including the mediator’s role; the circumstances that may lead the mediator to make a particular recommendation to the court; limitations on the confidentiality of the process; and access to information communicated by the parties or included in the mediation file; . . . [h]ow to make the best use of information drawn from current research and professional experience to facilitate the mediation process, parties’ communication, and co-parenting relationship; and . . . how to address each child’s current and future developmental needs.

- A. **Mediation orientation.** For parents in contested child custody cases, an orientation program prior to mediation must be provided by the court at no cost. The program should focus on

children's needs, explain the mediation process, and show how mediation can contribute to successful outcomes. It should also include information about domestic violence law and parties' rights.

- B. **Parenting education.** Parenting education programs should be made available in different media, including Web-based programs and in print, and, reflecting the diversity of court users, translated into as many languages as possible.
- C. **Information on evaluation.** Courts should provide information about local resources for low-cost limited and full custody evaluations conducted by experienced and well-trained professionals who place a high commitment on neutrality and accuracy in reporting.
- D. **Information on parenting resources.** Courts should provide information on the availability of supervised exchange and visitation programs, parent education, parenting classes, divorce education for children, family counseling, and treatment programs so that the best interest of children can be assured.
- E. **Information on parenting plans.** To improve access, expanded information on parenting plans should be made available on court Web sites. Multilingual videos or DVDs should be created and made available at self-help centers or law libraries for litigants who do not have computer access. Videos or DVDs allow for dubbing in various languages, are cost effective, and can be shared statewide.
- F. **Avoid delays.** The orientation program should be made available in a way that adds no delay to the scheduling of mediation.

### 3. **Enhanced parent education prior to mediation**

- A. **Referrals.** In addition to court-based orientation programs, courts should develop referrals to parenting education classes that provide information on children's developmental needs. Programs and materials should address a variety of possible differences depending on, for example, the age of the children and the nature and length of the parents' relationship.
- B. **Parenting classes.** Courts should consider offering or encouraging agencies in the community to offer separate parenting classes so that parents do not need to attend the same class when joint attendance might cause undue conflict or present a safety risk.

- 4. **Settlement opportunities.** Settlement opportunities should be provided to litigants prior to mediation or litigation and information about those opportunities should be provided to parties and their attorneys. To inform litigants of possible options, self-help centers and/or family court services offices should offer sample parenting plan templates for use by parents who are in basic agreement on a parenting plan but need assistance in drafting an enforceable agreement. Given

that an orientation session on child custody mediation may provide an opportunity for settlement, courts should consider making family court services or self-help center staff available following the orientation to finalize agreements for those parties simply needing assistance with preparing a stipulation.

Education regarding settlement opportunities should make clear the importance of making settlements or agreements voluntarily and through an informed process. The courts should balance support for settlement with recognition that many litigants come to family court seeking protection and have concerns regarding adult or child safety that may prevent or interfere with the development of voluntary and informed agreements. Given the wide range of issues and case types arising in family court, educational materials and information should avoid a bias that supports settlement over litigation; those litigants who are unable to settle and may require court assistance in resolving their matters for any number of reasons should be provided with information about proceeding through the court process. Judicial involvement and supervision in mediation of disputes is encouraged.

5. ***Enforcement of orders.*** Courts should provide information about enforcement of orders. While orders need to be tailored to the family and parents should choose the level of detail they want in their agreements, parties should also be made aware of enforcement issues and understand that if a dispute arises later, they may benefit from having a more detailed order.

## 12. Expanding Services to Assist Litigants in Resolving Their Cases

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Many litigants involved in family law cases would prefer not to be “litigants.” They would prefer to be able to sit down with the other party and resolve the issues in their case without the necessity of appearing before a judicial officer. They prefer to avoid the stress of hearings, want more control over the decisions made regarding their family, want to discuss issues that may not be legally relevant but which are important to them, and want to maintain a more peaceful relationship with the other party.

When parties are able to resolve their matters outside of the courtroom, not only can they obtain a more positive outcome but it also means that more court time will be available in those instances where one or both parties have requested that a judicial officer decide their case.

Currently, many courts offer mediation services only for custody disputes in family law matters. Those that have expanded those services to assist with child support, property division, and other matters report that many cases can be resolved in this manner—either with a full settlement or with issues that remain in dispute significantly narrowed. They report that litigants are often happier with the result and may be able to lower the amount of attorney fees, thereby allowing them to retain an attorney throughout the entire case.

Often parties are not aware of settlement options, and, without lawyers, it is often difficult for people who are trying to resolve difficult family issues to do so without the assistance of a skilled third party to help them focus their discussions, reflect back potential solutions suggested by the parties, and draft a written agreement.

Any person working to help parties mediate or otherwise settle family law matter must have appropriate training and skills. In particular, the neutral must be aware of the issues of power imbalances between parties, particularly when domestic violence is present in a relationship. Mediation may be inappropriate in some of these cases, and opportunities for shuttle discussions, mediations held by videoconference, or other methods should be considered to allow parties the opportunity to try to resolve their issues without physical coercion.

The Elkins Family Law Task Force recommends:

1. ***Services to help parties with settling cases.*** Financial and property settlement opportunities with qualified attorney settlement officers should be available to both self-represented litigants and represented parties at all stages of a case. The settlement program should be managed by an attorney experienced in family law and court staff who are appropriately qualified and trained in family law. The qualifications and training should meet the basic minimum standards set out in

the *Guidelines for the Operation of Self-Help Centers in California Trial Courts*.<sup>9</sup> Judicial officers should be available to assist with mandatory settlement conferences prior to trial.

2. ***All forms of ADR available.*** As a component of caseflow management, all forms of ADR, including mediation, arbitration (binding and nonbinding), and settlement conferences should be available to litigants consistent with the litigants' needs and the court's resources. A court should be able to consider the use of ADR at any time during the process, and caseflow management rules should establish, as a matter of policy, a preference for early ADR to assist litigants in settling their cases if possible. This would include both court-based and non-court-based options. Information about the case, such as declarations of disclosure, should be exchanged prior to ADR and education about the legal issues in their case and potential solutions should be provided to litigants prior to their participating in ADR so that they can reach knowing and voluntary agreements.
3. ***Appropriate family law training for ADR providers.*** There are clear rules and required training for court-based custody mediators. Similar rules should be developed for mediators working on property and support, settlement officers, family law arbitrators, and other ADR providers. The training should address not only substantive family law issues but also domestic violence, the possibility of power imbalances in family law cases, issues in working with self-represented litigants, limited English proficiency populations, and guidelines for working with interpreters.

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<sup>9</sup> Admin. Off. Of Cts., *Guidelines for the Operation of Self-Help Centers in California Trial Courts* (2008), [www.courtinfo.ca.gov/reference/documents/self\\_help\\_center\\_guidelines.pdf](http://www.courtinfo.ca.gov/reference/documents/self_help_center_guidelines.pdf).

## 13. Streamlining Family Law Forms and Procedures

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Family law proceedings in California are largely form-driven. Statewide forms were initially developed in 1971 upon the passage of the Family Law Act, which instituted no-fault divorce. They were designed to assist attorneys in fully pleading their cases and judicial officers in deciding the elements of cases given that major change in the law. Standardized forms allow for ready development of computerized forms completion programs and make it easier for regular form users to find the information required and relief requested because of standardized placement.

The standardization of the forms statewide has provided a framework for some basic uniform procedures in family court processing; however, the number, variety and complexity of forms have increased dramatically over time. Not all the forms are easily usable by attorneys and self-represented litigants. Furthermore, courts have created their own local forms and procedures to address matters not covered at the state level. The differences in procedures among the local courts make meaningful access difficult for attorneys and self-represented litigants who are unfamiliar with local practices.

The Legislature has specifically directed the Judicial Council to develop certain procedures and forms with self-represented litigants in mind. The council intends that statewide forms be made more accessible to attorneys, the court, and self-represented litigants alike.

There are also family law tasks that should not involve complex procedures, such as submitting agreements to the court. An important goal of the family court should be to identify those tasks and ensure that attorneys and self-represented litigants are not burdened with unnecessarily bureaucratic processing steps or paperwork.

The Elkins Family Law Task Force recommends:

1. **General form review.** Forms should be easy to use, allow parties to provide critical information requested by the court, and be readily accessible.
  - A. **Judicial Council forms.** Family law forms should be reviewed with the goal of making them clear and easy to complete.
  - B. **Local forms.** Just as many local rules contain very helpful provisions that statewide rules of court do not currently address, many courts have developed excellent local forms. These forms should be reviewed to determine which forms might be adapted for statewide use. Local forms should not be in conflict with statewide Judicial Council forms. If local forms are adopted, they should be made optional.

2. ***Simplifying forms for litigants who are in agreement.*** Parties who are able to reach agreements and choose not to have court hearings should be given more streamlined options. This will provide more time for those parties who do wish the assistance of the court and make the process easier for those with agreements.
  - A. ***Simplified stipulated judgment process.*** Legislation should be sought to create a simplified stipulated judgment process that would be available to parties who are able to reach an agreement prior to filing initial pleadings with the court. This new procedure would enable the parties to submit a joint petition, with full preliminary and final disclosures exchanged prior to or as part of filing of the petition. A proposed judgment would be submitted at the same time. As compared to the current summary dissolution procedures, there would be no restrictions on children, property, or length of marriage. The parties would have the full right to set aside or modify the judgment after it is entered as allowed or restricted by current law. The parties would not be allowed to file a motion until the divorce or legal separation was final except in case of emergency. A party could file a notice revoking the joint agreement prior to its being finalized.
  - B. ***Summary dissolution process.*** Legislation should be sought to modify the current summary dissolution process to allow the parties to file their proposed judgment at the time of filing the joint petition and having that judgment go into effect six months after the petition has been filed without requiring litigants to file additional pleadings. Parties would retain the ability to revoke the summary dissolution pleadings. Family Code section 2400 should also be amended so that the five-year limitation on use of this procedure should be measured from the date of marriage to the date of separation, rather than as currently, from the date of marriage to the date of filing the joint petition.
3. ***Simplify forms for motions.*** In family law cases there are currently two ways to bring an issue before the court: a notice of motion and an order to show cause. In most counties, they are used almost interchangeably. In other counties, they are used for distinct purposes, although the intended differences are not written and may not be accessible to self-represented litigants or attorneys who do not regularly practice in the county.
  - A. ***Develop one comprehensive Request for Order form.*** To eliminate confusion and to standardize practice across the state, the Judicial Council should develop a new *Request for Order* that would replace the *Order to Show Cause* (FL-300) and the *Notice of Motion* (FL-301), for use in all matters except domestic violence and contempt. The new form would incorporate the current *Application for Order and Supporting Declaration* (FL-310), which is an attachment to those two documents. The *Request for Order* would be used in those matters where it is not jurisdictionally necessary to use an order to show cause. The *Request for Order* would also be used for those matters that are motions as defined in the Code of Civil Procedure. The inconsistent statutory provisions in the Code of Civil Procedure, Civil Code,

civil rules of court, and family rules of court regarding motions and law and motion practice need to be reconciled. Instructional materials regarding the *Request for Order* and its use should be developed.

4. ***Simplify forms for discovery.*** Many attorneys have indicated that the procedures for discovery are cumbersome and cause unnecessary fees when parties do not comply with discovery requests. *In re Marriage of Feldman (2007) 153 Cal. App. 4th 1470* has noted the critical importance of exchanging information in family law matters. All forms should be reviewed with that principle in mind.
  - A. ***Declaration of disclosure forms.*** Declaration of disclosure forms should be reviewed to try to simplify and streamline them. This includes the *Declaration of Disclosure* (FL-140), *Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration* (FL-141), *Schedule of Assets and Debts* (FL-142), and *Income and Expense Declaration* (FL-150). Instructional materials should be developed to help parties fully and accurately complete the forms and make full disclosure as required. Disclosure forms should add a provision that the parties have exchanged all tax returns that they have filed for the last two years. Deadlines should be established through rules of court or legislation for the completion and service of preliminary declarations of disclosure so that they are served either concurrently with the petition or within 60 days of filing of the petition. When no property or spousal support is at issue, the requirement of the preliminary and final declaration of disclosure can needlessly delay the resolution of a case. Legislation should be considered to allow a judicial officer discretion to excuse the preliminary declaration of disclosure in appropriate cases.
  - B. ***Expanded discovery forms.*** While much need for discovery could be eliminated by full compliance with declaration of disclosure requirements, other cases will continue to need discovery tools. The Judicial Council should consider whether there are any other methods to encourage full exchange of information without requiring formal discovery devices. It should consider developing a production of documents form for family law similar to what is available in civil cases. A form for a motion to compel discovery should also be considered.
5. ***Simplify procedures for service of process.*** A number of recommendations regarding difficulties with service of process are designed to encourage clarity and more effective service of process.
  - A. ***Service by posting.*** When litigants are unable to locate the other party, there are procedures to allow for service by publication after good cause is shown to the court. Indigent litigants who cannot afford the costs of newspaper publication are able to ask the court to post the pleadings on a bulletin board at the courthouse. In order to increase the likelihood that the respondent will actually get notice of the pending case, the Administrative Office of the

Courts (AOC) should investigate the possibility of establishing a Web site for documents that are to be served by posting.

- B. **Clarification of service requirements on certain postjudgment motions.** Family Code section 215 should be amended to clarify that service of postjudgment requests to modify custody, visitation, or child support can be served on the opposing party by mail, even though service on the attorney of record may not be sufficient if there has been no prior postjudgment modification activity. Personal service on the opposing party is not required by section 215. If service is made by mail, proof of service must include verification of the responding party's current address. Parties must be required to keep the court informed of their current addresses.
6. **Simplifying procedures for establishing parentage.** Far too many litigants believe that they have established parentage when the court has made temporary custody and support orders. They do not file the necessary forms to obtain judgments of parentage, which can cause great problems if one of the parents dies and social security and other benefits are implicated.
- A. **Uniform Parentage cases.** A checkbox should be added to the *Application for Order and Supporting Declaration* (FL-310), asking that a judgment be entered if parentage is established at a hearing regarding child custody, visitation, or support.
  - B. **Dissolution cases.** The *Petition—Marriage* (FL-100) should be modified to make it a presumption that parentage will be established for any children of the relationship born to the parties prior to the marriage. A provision should also be added allowing the parties to ask for parentage testing so this issue can be resolved early in a case.
7. **Declarations.** Declarations, which are attached to requests for orders, provide important information to the court and the opposing side in a case about what is being requested to allow them to prepare for the hearing. All too often, declarations cover issues that are not material to the issues before the court, are inflammatory, and contain inadmissible hearsay.
- A. **Declaration templates.** To provide a framework to enable attorneys and self-represented litigants to prepare appropriate declarations, templates that identify the types of information that the court will need to determine specific issues should be developed. Models from courts where such templates have been developed in collaboration with the bar and bench should be examined. Page limits for declarations should be considered to encourage the declarant to focus on relevant issues.
8. **Agreement templates.** When self-represented litigants have reached agreement about issues in their case, they often have difficulty preparing a written document that clearly sets out the terms of their agreement.

- A. ***Standard parenting plan template.*** A standard agreement should be developed to allow the parties to prepare agreements in custody and visitation matters.
  
- B. ***Other sample agreement templates.*** Sample agreements should be developed for other common issues that include language required by statute. This might include a template to allow parties and their counsel to be able to stipulate to change venue rather than file a motion in court if that change is appropriate. The reason for the change of venue should be clearly stated so that the court can verify that appropriate grounds for the change exist.

## 14. Enhancing Mechanisms to Handle Perjury

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One common problem that family law litigants face is that there are few effective remedies for prosecuting perjury. While there are many situations where people remember situations differently or the information that is contested has no real relevance to the decision made by the court, there are situations where these statements have serious consequences. A procedure should be established to handle these cases.

The Elkins Family Law Task Force recommends:

1. ***New civil sanctions***. Legislation should be sought so that if a party can show by clear and convincing evidence that the other side knowingly or fraudulently misrepresented an essential element of evidence that caused some measurable damage to the other party, then the order could be set aside and the party could ask for sanctions and request payment for attorney fees and costs. Costs would include time off work for litigants to be in court.

## 15. Standardize Default and Uncontested Process Statewide

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Judgment processing procedures differ from county to county and from one court location to another even within the same county. Local rules differ in the way default and uncontested judgments are to be processed and served. This creates confusion for attorneys, litigants, and court staff as well as systemwide inconsistency. Significant percentages of default and uncontested paperwork are rejected as inaccurate or incomplete and returned repeatedly before ever being finalized because attorneys and self-represented litigants face an array of differing requirements in completing this process. The current situation poses a significant burden on the public and on court staff and serves as a major source of frustration and delay in disposition.

There should be a consistent statewide procedure for submitting and filing default and uncontested judgments.

The Elkins Family Law Task Force recommends:

1. ***Uniform default and uncontested process.*** The Judicial Council should adopt a rule of court setting out a statewide uniform protocol for the processing of default and uncontested family law judgments submitted pursuant to Family Code section 2336.
  - A. ***No additional requirements.*** Courts must not adopt a local rule or standing or general order imposing requirements beyond those stated in the California Rules of Court for the filing of paperwork for default or uncontested family law judgments being submitted pursuant to Family Code section 2336.
  - B. ***Full review of documents.*** To avoid multiple submissions of paperwork and ensure that all errors and omissions are identified as early as possible, the court must completely review the documents submitted for default or uncontested judgments pursuant to section 2336 before any of the documents can be rejected and returned to the attorneys or self-represented litigants who submitted them. All errors and omissions must be identified and highlighted, and instructions for correction of the defects must be included in any rejection and return of the paperwork to attorneys or self-represented litigants.
  - C. ***Hearing only if necessary.*** Courts should be required to allow judgments in default and uncontested cases to be submitted by declaration pursuant to section 2336 and should not implement by local rule or standing or general order a requirement that a hearing be conducted in all such cases.

## 16. Interpreters

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One of the most fundamental components of access to the courts is being able to understand the proceedings. All too often interpreters are not available in family law matters unless domestic violence is an issue or the case involves governmental child support. Litigants often have to provide their own interpreters. Some use relatives or other interested parties. Sometimes minor children are even used to interpret for parents. Having interpreters available on the day of the hearing would greatly reduce the need to continue a matter and thus provide greater access to justice for litigants.

The Elkins Family Law Task Force recommends:

1. ***Expansion of availability of interpreters.*** Interpreters should be available in all family law matters involving litigants with limited English proficiency (LEP) so that they can participate meaningfully in their hearings and trials, mediation, and other services in which litigants must participate
  - A. ***Out-of-courtroom services.*** Interpreters should also be made available for self-help services, mediation and other settlement assistance, and similar services provided by the court. Courts should recruit bilingual and bicultural staff to assist litigants with limited English proficiency.
  - B. ***Grant funding.*** Designated funds are currently available for interpretation in domestic violence matters at courtroom hearings, mediation, and court self-help programs. Similar funding should be sought for additional family law matters.
  - C. ***Protocols.*** Courts should develop protocols to best utilize interpreters available for criminal and other matters for use in family law matters whenever possible.
  - D. ***Early identification of need.*** The AOC should work with the courts to develop methods for identifying LEP litigants early in a case in order to notify the courts prior to hearings about the need for interpreters in family law matters.
  - E. ***Shared interpreter pool.*** The AOC should identify and publicize to the courts best practices of courts already implementing a “shared interpreter pool.”
  - F. ***Scheduling.*** Courts should consolidate and schedule calendars to optimize limited interpreter resources.

G. *Allocation of resources.* The Judicial Council should develop a rule of court vesting court administration with the ability to allocate interpreter resources as appropriate to meet the needs of the court.

## 17. Public Information and Outreach

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The AOC's 2005 Public Trust and Confidence survey<sup>10</sup> showed that the public's self-rated familiarity with the courts is low and that the public is much more likely to get information about the courts from the media than from the courts themselves. The public should have access to more information on their legal rights and options as well as the services that are available through the courts. Litigants or potential litigants may be unaware of services available to them, particularly in the early stages of their cases, which may result in lost opportunities to settle cases early or resolve issues underlying the case. Enhancing public information and outreach will help to ensure that court users make the most productive use of their time in court.

The Elkins Family Law Task Force recommends:

1. **Public information program.** The AOC should develop a public information program to educate the public about the availability and benefits of court services, particularly pre-filing services. The AOC should create core content that is applicable statewide, leaving local courts flexibility to tailor the materials to the specific needs of their communities.
2. **Community outreach.** Courts should give community presentations on available court services, with a particular focus on communities that may be currently underserved by the courts. Community partners should receive training on the content of informational materials and how to use them with the populations they serve.
3. **Informational materials.** Materials should be available in a variety of formats, including text and visual, to accommodate different learning styles among the court user population. Materials should be available in multiple languages.
4. **Resources.** To the extent that outreach efforts result in a higher volume of business for the courts, court resources should increase commensurately.

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<sup>10</sup> David B. Rottman & Admin. Off. of Cts., *Trust and Confidence in the California Courts, A Survey of the Public and Attorneys, Part I: Findings and Recommendations* (2005).  
[www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf).

## 18. Judicial Branch Education

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The ongoing need to offer education and training in the judicial branch provides opportunities to promote consistency throughout the state, share knowledge of and experiences with promising practices, and disseminate important information to judicial officers and court employees. While a wide range of educational programs have been developed for family law judicial officers and court staff, it is important that educational content be kept current and responsive to the types of cases and issues being adjudicated in family court.

Additionally, given the significant number of family law cases in California's courts, it is important that judicial branch leadership and other professionals who may provide services to families in family court become familiar with family law processes and procedures. The courts should ensure that every bench officer, family law facilitator, and family court services staff member that a family will encounter in the courthouse has high levels of expertise and experience. Courts should also ensure the same level of excellence when appointing experts, such as evaluators and minor's counsel. These issues should be addressed both in terms of specific content areas and in general family law education.

The Elkins Family Law Task Force recommends:

1. **Educational content.** The task force recognizes the important role that educational content plays in supporting family court processes and procedures and recommends the following:
  - A. **Children's needs.** The content of all judicial educational courses should include the best possible information about children's best interest, children's developmental needs, and types of parental behavior that may positively or negatively affect children. Judicial educational courses should also more effectively address children's needs and place greater emphasis on children's psychological needs. Judicial officers should receive training on how to interview children to best assess their needs.
  - B. **Family court.** Judicial education should include information about the role of family court and the impact and significance of decisions. The Judicial College curriculum and New Judge Orientation education should include courses that enhance the understanding of the importance of the family law court, not just by telling judicial officers (including judges, subordinate judicial officers, and temporary judges) in these courses how important it is, but by presenting empirical evidence of the effect of the court on the lives of children and families. Additionally, all judicial education, including courses addressing bias, should provide instruction to dispel misunderstandings and challenge stereotypes about family law proceedings and family law courts, and should address cultural, ethnic, socioeconomic, and language barriers encountered by litigants in the courts.

- C. ***Interpreters.*** More education should be provided to judicial officers and other court staff on the most effective strategies to employ in cases involving the use of interpreters.
- D. ***Enforceable orders.*** All judicial officers should be provided with training and education on how to craft court orders that are clear, specific, and able to be enforced effectively.
- E. ***Self-represented litigants.*** Educational programs should include information for judicial officers on handling family law matters involving self-represented litigants. Content should include specific information on handling cases in which both sides are self-represented and cases in which one side is represented by an attorney and the other is self-represented.
- F. ***Procedural justice.*** All family law judicial officers should be provided with education on the elements of procedural justice and the most effective ways to provide litigants with a meaningful voice in their cases.
- G. ***Attorney fee awards.*** Education for all family law judicial officers should include information on the need to make early awards of needs-based attorney fees.
- H. ***Limited scope representation.*** Education for all judicial officers should include information on limited scope representation.
- I. ***Minor’s counsel.*** Education for all judicial officers should include information on the appropriate use of minor’s counsel. Educational opportunities should be provided to inform judicial officers of California Rules of Court and statutory requirements for minor’s counsel and on the appropriate role of minor’s counsel in family law proceedings.
- J. ***Leadership and collaborative courts.*** The Family Law Institute and the Supervising Judge Institute curriculum and teaching methods should be enhanced with topics on leadership and model collaborative court approaches that would be helpful to consider in family law courts.
- K. ***Fairness, awareness of bias, and elimination of bias.*** Judicial education programs should place significant emphasis on issues related to fairness, awareness of bias, and elimination of bias in family law. The task force heard extensive concerns about issues of perceived bias toward and against both women and men in family law. Given the significance and sensitivity of the issues involved, the courts should strive to ensure that judicial officers receive ongoing education on these important issues.

## 2. ***General family law education***

- A. ***New family law judicial officer training.*** Newly assigned family law judicial officers should participate in training in their respective courts about the self-help center, family court services, and community services providers working in connection with the family court.

- B. ***Family law training for those in general assignments.*** Training on family law should be provided for judicial officers in general civil or criminal trial assignments so that if they are assigned family law cases, they will have greater familiarity with family law issues, processes, and procedures.
- C. ***Court-connected mediators.*** All court-connected mediators must be trained to recognize and handle cases involving domestic violence and other imbalance-of-power situations, as is required under existing statewide rules (Cal. Rules of Court, rule 5.215). All mediators should also receive cultural competency training as well as training in working with parties who have limited English proficiency (LEP) and with interpreters.
- D. ***Court clerks.*** All court clerks handling family law matters should be trained on relevant family law processes and procedures, including maintaining confidentiality and the access litigants have to their case information.
- E. ***Customer service training for court staff.*** Court staff and bailiffs/sheriffs must receive ongoing training on interacting with litigants in family law matters.
- F. ***ADR panels.*** Family law arbitrators and ADR providers should receive training that addresses substantive family law issues as well as domestic violence, the possibility of power imbalances in family law, and working with self-represented litigants, limited English proficiency populations, and interpreters.
- G. ***Ongoing family law judicial officer training.*** Following the family law overview course for judges newly assigned to family law, additional courses should be made available in a variety of formats on both substantive legal topics and procedural issues, including domestic violence, property division, financial and accounting statements, child development, contested custody, use of experts and minor's counsel, calendar management, demeanor, and working effectively with self-represented litigants.
- H. ***Interdepartmental training for court staff.*** Courts should hold interdepartmental training for court staff working in different departments or programs so they are aware of each other's services, provide consistent information, and can make appropriate referrals.
- I. ***Support for judicial training.*** The supervising family law judge and/or presiding judge should be responsible for supporting and advocating for the educational and other professional development needs of all judicial officers who hear family law matters, including those in a general trial assignment who may be assigned to family law trials. The court should have a range of resources, including a mentoring program, referral to educational programs, self-study, and a program for observing experienced family law judicial officers, to ensure that all judicial officers receive the professional support they need.

Presiding judges should accommodate the time away from the bench that family law judicial officers need to receive appropriate education and professional development, including training to better handle the stress associated with family law assignments.

## 19. Family Law Research Agenda

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Family law judicial officers and court administrators historically have not had access to basic data required to make informed decisions about resource allocation, evaluate the need for or effectiveness of new programs or services, or make requests for additional funding. Statewide statistical reporting has been largely limited to filings and dispositions, which, given the high incidence of filing of orders to show cause and motions and extensive postjudgment activity, does not represent the true workload of the family court. Additionally, current judicial needs and resource allocation models do not employ a weighting scheme to account for the variation in workload among the different case types within family law.

Local statistical reporting varies greatly depending on the sophistication of case management systems and the availability and training of staff to develop reports. Research and evaluation are often limited to small pilot programs or programs and services that touch on only one aspect of the family court's work. Furthermore, in the scope of court research more broadly, family law has received relatively little attention. As a result of the implementation of performance standards, federal funding and other grant requirements, and the novelty of certain programs, juvenile, criminal, and collaborative justice courts have been the subjects of a much wider body of research than have the family courts.

The Elkins Family Law Task Force recommends:

1. **Research agenda for family law.** A research agenda for the family courts should be developed and implemented by the AOC in partnership with the local courts. The research agenda would, at a minimum, include the elements outlined below.
  - A. **Basic statewide statistical reporting.** Staff from the AOC and the local courts; have designed family law management reports that will be available to users of the California Courts Case Management System (CCMS) when it is deployed. The AOC should promote the use of these reports and, prior to CCMS implementation; provide toolkits for the courts to collect similar statistics. The AOC should educate courts on the interpretation of and potential uses for the data.

The types of data to be included in the basic statistical reporting should include, but not be limited to:

- a. The number and percentage of cases with one side represented, both sides represented, and neither side represented;
- b. The number and percentage of cases involving children;

- c. The number and percentage of cases involving interpreters or litigants with limited or no English proficiency;
- d. Case aging (from time of filing and between key milestones) and time to disposition;
- e. The number and percentage of cases that reach judgment;
- f. Methods by which judgments were reached;
- g. The number of orders to show cause (OSCs) and motions filed per case, including the number of postjudgment OSCs and motions;
- h. The number of hearings per case or filing (both hearings scheduled and hearings held);
- i. The number of cases with trials or lengthy hearings;
- j. The number of cases that return to court and the frequency with which they return;
- k. The number of and reasons for continuances; and
- l. The number of failures to appear for court hearings and for mediation appointments.

In addition, data should be available and reported at both the case level and the family level to better capture situations where families are involved in multiple cases.

- B. ***Workload studies.*** Courts should use current workload studies to assess judicial and staff resource allocation. Moving forward, state-of-the-art methodologies should be used to improve and modernize the workload statistics gathered from courts to demonstrate respective judgeship and staffing requirements for family law as opposed to other case types. Workload studies should measure the work of both judicial officers and the full range of court staff working in family law (including family court services, family law facilitators, and self-help centers) and should differentiate among the various family law case types. Additionally, the results of workload studies should be used to explore the feasibility of developing caseload standards.
- C. ***Performance measures.*** The AOC, in consultation with the Family and Juvenile Law Advisory Committee, the Trial Court Presiding Judges Advisory Committee, the Court Executives Advisory Committee, and the National Center for State Courts (NCSC), should develop and pilot a streamlined trial court performance standards model and test it in various courts (e.g., small, medium, large). These performance standards will be specific to California and will focus on key performance areas, similar to those in NCSC's CourTools model, which provides courts with a set of 10 key performance measures in a simple, visual format, outlining for each measure a clear definition and statement of purpose, a measurement plan with instruments and data collection methods, and strategies for reporting results. After testing and full vetting with trial courts, the performance measures should be incorporated into the CCMS regular monthly reports module and reviewed by each court to determine its own levels of effectiveness and efficiency and potential areas for improvement.

The AOC should provide appropriate guidance to the courts in effectively using this information.

- D. ***Litigant surveys.*** The AOC should provide courts with tools to conduct periodic customer satisfaction surveys and snapshot studies on the demographics and other key characteristics of family law litigants. Customer satisfaction surveys should incorporate questions related to procedural fairness.
  - E. ***Studies to evaluate the effectiveness and replicability of court-connected programs or services.*** Court-connected programs and services—including but not limited to case management, mediation, evaluation, assessment, orientation, parent education, and specialty courts—should be evaluated to determine effective models and areas for improvement. In addition, any pilot projects undertaken pursuant to the task force recommendations, or other new projects that may be considered for statewide adoption, should be evaluated to identify best practices.
  - F. ***Evaluation of family law forms.*** The AOC should assess the usability or readability of family law forms, including the effectiveness of plain language or simplified forms and form translations. Assessing usability could include field testing forms prior to statewide adoption or borrowing design principles from other fields, such as marketing or survey research for guidance on the layout of forms, and Web site usability testing for guidance on how people read and process information.
2. ***Monitoring evolving issues in family law.*** The AOC should track caseload statistics and other relevant indicators to identify emerging case types or issues to ensure that court procedures and services are continuing to meet the needs of litigants. Evolving issues to monitor should include, but not be limited to:
- A. ***Minor’s counsel.*** The AOC should collect empirical data on cases in which minor’s counsel are appointed to determine positive and negative consequences of children’s greater participation in family law proceedings and the role minor’s counsel plays in that participation.
  - B. ***Crossover between family law and other case types.*** The AOC should track the frequency with which parties in family law cases are involved in cases in other court departments—including but not limited to juvenile dependency; probate guardianship, conservatorship, or estates; criminal domestic violence cases; and drug court—and assess what challenges they face, as well as their service needs.
3. ***Coordination between family and juvenile dependency courts.*** Research should be conducted to explore the legal viability and resource needs of employing a shared or multijurisdictional approach to allow for coordination between family and juvenile dependency court for family

court cases involving allegations of serious child abuse. Issues to consider should include, but would not be limited to, how cases would be identified for shared jurisdiction; what scope of services would be available to families; and whether a “hybrid” case might eventually move to dependency court based on additional investigation.

4. ***Expedited appeals in custody cases.*** In light of the need for timely decisionmaking in custody matters and for prompt resolution of issues that affect children’s lives, the adoption of and resources required to implement an expedited appeal process in custody cases, with timelines and processes similar to those in juvenile dependency appeals (see Cal. Rules of Court, rule 8.416), should be studied.
5. ***Review of research and best practices from other jurisdictions.*** The AOC and local courts should continue to explore best practices by reviewing research and reports from other jurisdictions, both nationally and internationally that have implemented new programs or services related to the family court.

## 20. Court Facilities

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Court facilities for family law matters should be designed to protect families from harm, foster settlement, and resolve expeditiously those matters requiring judicial decision. Judicial officers and court staff need technologically modern, flexible, well-planned courtrooms and facilities for all of the collaborative services offered for resolution of cases. Many of California's family law courtrooms are in converted commercial space or retrofitted, inadequate courthouse locations, in part because they do not need to accommodate juries and thus do not have the same space requirements as other courtrooms.

Family law litigants frequently cite the inconvenience and confusion they experience from needing to make multiple trips to court or travel to different court locations to handle different aspects of their court business. This issue may be particularly salient for litigants involved in both Department of Child Support Services (DCSS) and other family law cases.

Family court facilities should offer a welcoming environment for court users that respects the unique and sensitive nature of family law cases, takes into account the need for family law litigants to access a variety of court-connected services, and maximizes convenience for court users.

The Elkins Family Law Task Force recommends:

1. ***Trial court facilities standards.*** New and, to the extent possible, existing family court facilities should adhere to the *California Trial Court Facilities Standards*.<sup>11</sup> The AOC and trial courts should periodically review and revise standards for facilities housing cases affecting children and families for appropriate features such as adequate courtroom size, location, children's waiting areas, settlement needs, orientation, co-location of self-help services, security features, and dignified surroundings.
2. ***Courtrooms.*** Family law courtrooms should be adequate in number to properly accommodate the volume of family law matters being handled by the courts and large enough to accommodate all participants.
3. ***Private space for consultation and settlement.*** Courts should allow space for litigants and attorneys to have reasonably private discussions. Family law involves sensitive and private issues, and yet settlement negotiations often take place in crowded hallways. An atmosphere

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<sup>11</sup> Judicial Council of Cal./Admin. Off. of Cts., *California Trial Court Facilities Standards* (2006), [www.courtinfo.ca.gov/programs/occm/documents/06\\_April\\_Facilities\\_Standards-Final-Online\[1\].pdf](http://www.courtinfo.ca.gov/programs/occm/documents/06_April_Facilities_Standards-Final-Online[1].pdf).

conducive to settlement and demonstrating respect for the intimate issues discussed would be beneficial to the parties and attorneys.

4. ***Self-help services.*** Self-help centers and family law facilitators' offices should have adequate space to serve the volume of litigants seeking their services, including space for workshops and classes. As discussed in the *Guidelines for the Operation of Self-Help Centers in California Trial Courts*,<sup>12</sup> self-help centers should have the appropriate equipment and technology to facilitate service delivery, including but not limited to legal research materials such as rules, codes, and practice guides; computer workstations for staff use that include access to electronic court records; copy and fax machines; and long-distance telephone access.
5. ***Family court services.*** Family court services offices should have safe and private meeting rooms for parties involved in mediation and for child interviews. There should also be sufficient space for orientation, parenting classes, and other educational programs.
6. ***Children's waiting rooms.*** Courts should have children's waiting rooms adequate to accommodate children of litigants who are attending court hearings or mediation sessions, receiving self-help services, or using any other case-related services at the court.
7. ***Co-location of services.*** In existing and particularly new courthouse facilities, family law courtrooms and related services should be co-located. For example, co-location of the self-help center and the clerk's office allows litigants to easily file documents, providing them with convenience and minimizing confusion. Courts should also strive to co-locate DCSS and general family law courtrooms, which facilitates coordination of cases for families involved in multiple matters.
8. ***Safety.*** Compared to other departments, family courts have a relatively high incidence of violence, whether directed at litigants, attorneys, judicial officers, or court staff. Courthouse facilities must be appropriately equipped and staffed to ensure safety. Every family law courtroom should be staffed by a deputy sheriff or other law enforcement officer. Courts should consider establishing agreements with law enforcement to perform other needed duties such as checking in litigants, coordinating telephone appearances, receiving reports, and handing out orders. To the extent possible, family law courtrooms should not be located in close proximity to criminal courtrooms.

Courts should devote particular attention to establishing protocols for litigants in cases involving domestic violence. For example, Cal. Rules of Court, rule 5.215, which outlines domestic violence protocols for family court services, recommends separate and secure waiting areas, separate conference rooms for parent education and mediation, and secure parking. Other measures to ensure safety include requiring litigants to pass through a metal detector, providing

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<sup>12</sup> Admin. Off. of Cts., *supra* note 9.

an escort to accompany domestic violence victims when leaving the courtroom, and ensuring that courtrooms are large enough to allow for parties to be physically separated.

9. **Accessibility.** Courthouses as well as offsite court-connected services must be accessible to persons with disabilities. Courts must ensure appropriate and timely responses to requests for accommodations under the Americans With Disabilities Act.
10. **Hours of operation.** Courts should explore the feasibility of holding evening calendars and offering self-help services, workshops, orientation, and education programs during evening or weekend hours to increase accessibility to litigants who may have difficulty taking time off work to attend to court matters. Courts are encouraged to explore creative solutions such as alternate work schedules for staff providing services outside of regular business hours, or offering services at times that the court may already have extended hours, thereby taking advantage of court security that is already in place. Safety issues and added security and operational costs should be taken into account in considering extended or alternate hours.
11. **Equipment and technology.** Family law courtrooms should be equipped with appropriate technology and other accommodations to facilitate the presentation of evidence and production of other needed documents, similar to what is available in criminal and civil courtrooms. For example, courtrooms should have wireless Internet access and sufficient power outlets for attorneys and litigants to plug in laptops, printers, and projectors.

Computers in the courthouses, law libraries, and public libraries should be equipped to handle e-filing and fax filing. (See the Leadership, Accountability, and Resources section for recommendation to offer e-filing and fax filing.)

## 21. Leadership, Accountability, and Resources

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Although the trial courts have made improvements in delivering services in family and juvenile law matters, more work remains to be done to overcome the challenges of these historically underserved areas of court operations. The resources provided have not been proportionate to the volume of cases and proceedings related to family law. Many suggested changes can increase efficiency in the delivery of services in family law without adding resources; however, without significant additions of judicial officers and staff resources, courts will be unable to meet the crushing workload in family courts. Currently in family courts statewide, fewer than half the numbers of judicial officers are assigned to hear family law cases compared to the number of judges assigned to other areas based on workload.<sup>13</sup>

Another way to transform the family law court culture is to refocus the entire work of the court and ensure that family and juvenile judicial officers are involved in decisionmaking processes and encouraged to take a leadership role in promoting access to justice for families and children, including outreach to and collaboration with justice partners and the public.

In addition, a new approach by presiding judges in making assignments of judges and subordinate judicial officers to family law court will improve access to justice and service to the public. Presiding judges need flexibility and discretion to consider judges' expertise, professional background, temperament, interest in the assignment, and other factors to make the best possible assignments to the family law court.

Finally, numerous court-based services must be enhanced to better meet the needs of family law litigants.

The Elkins Family Law Task Force recommends:

1. ***Promoting the work of the family court by enhancing judicial leadership.*** Advance the ability of the family court to articulate its needs and advocate for appropriate resources by:
  - A. ***Standard 5.30.*** Elevating standard 5.30(c) (2) of the California Standards of Judicial Administration—which directs the supervising family law judge, in consultation with the presiding judge, to work to ensure that the family court has adequate resources—to rule of

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<sup>13</sup> There are an estimated 175 full-time equivalent judicial officer positions in California in family law. The AOC's 2007 judicial need study estimated the need for 2,332 judicial positions statewide; of those, 459, or 20 percent of the total, are needed to handle the family law workload. Admin. Off. of Cts., *California's Statewide Judicial Need: Assessing Judicial Workload in the Trial Courts From 2004 to 2007* (2007), [www.courtinfo.ca.gov/reference/resandstats.htm](http://www.courtinfo.ca.gov/reference/resandstats.htm).

court status. Specifically include it as a duty of the presiding judge of the court under rule 10.603(c)(1).

- B. ***Status of supervising judges.*** Enhancing the status of the family law supervising judge, possibly elevating it to presiding judge of family law in courts with 10 or more judicial officers. The job description should include administrative responsibilities for coordination of staff and judicial resources, including family court services, as well as coordination and development of access to community resources. In addition, the family law supervising judge should have a formal role in the management of the court's self-help center.
  - C. ***Leadership of family and juvenile court.*** Assessing the viability of consolidating both the juvenile and family court departments under the leadership of a single judge, thus having a presiding judge of the juvenile and family courts who can advocate for families and children and maximize existing services within the local justice system. In the alternative, in larger courts, it may be more effective to establish a rule of court to provide for greater coordination between the presiding judges of the family and juvenile courts.
2. ***Family and juvenile court role within trial court governance structure.*** In consultation and collaboration with the Trial Court Presiding Judges and Court Executives Advisory Committees, the Judicial Council should reassess and modify, as necessary, existing rules of court or standards of judicial administration to ensure that family and juvenile supervising or presiding judges are standing members of internal executive committees or other court leadership structures, as appropriate. The task force notes that the approach may be different in smaller courts, but must ensure that family and juvenile bench officers are regularly consulted on policy, resource allocation, and facility needs.
  3. ***Family court management and resource allocation.*** Promote more informed resource allocation, including the adoption of best practices, in family court administration.
    - A. ***Training for presiding judges and court executives.*** Insert a training module in annual presiding judge and court executive leadership classes on the true workload needs of the family court and standard 5.30 strategies in obtaining these goals. Hold a judicial branch and justice partner summit.
    - B. ***Guidelines for work processes.*** Publish guidelines for ideal family court work processes in all areas.
  4. ***Self-assessment to inform resource allocation.*** The AOC should develop and implement a program for self-assessment and diagnosis of the court's overall workload and resource allocation by:

- A. ***Evaluate available workload data.*** Evaluating available data against existing judicial and staff workload models to determine whether actual resource allocation is consistent with what the models predict; and, in anticipation of the AOC’s update of the trial court workload study, using improved workload models to better allocate resources.
  - B. ***Education and technical assistance to judicial stakeholders.*** Providing education and technical assistance to the targeted core group of judicial stakeholders at each court (presiding judge, family and juvenile presiding judges, and court administration).
  - C. ***“Best Practices” on self-assessment.*** Developing and promoting a toolkit of “best practices” from other courts that have engaged in a self-assessment process and gained system efficiencies through reallocation of existing resources.
  - D. ***Incentives for aligning resources.*** Creating an incentive for courts to align their existing resources to address the needs of families and children by creating a special judicial branch award, similar to the Ralph N. Kleps Award for Improvement in the Administration of the Courts, and/or providing financial awards.
5. ***Judicial appointments and assignments.*** Increase the experience and depth of family law knowledge on the bench by:
- A. ***Judicial appointment process.*** Suggesting further changes to the judicial appointment process and application to encourage family law attorneys to apply for appointment. The judicial application has been modified to attempt to draw attorneys with diverse practice experience to apply. However, many family law attorneys remain hesitant to apply for appointment because of the tendency of governors to seek lawyers with extensive trial experience. The application could be further modified to highlight the qualifications, characteristics, and experience that are important for family law judges.
  - B. ***Provide information to State Bar and JNE.*** Suggesting that members of the State Bar’s Commission on Judicial Nominees Evaluation (JNE), as well as the Governor’s judicial appointments secretary, receive information about the qualifications, characteristics, and experience that are important for family law judges.
  - C. ***Judicial experience prior to family law assignment.*** In courts with 10 or more judicial officers, requiring judges to have a minimum of two years of judicial experience prior to assuming a family law assignment. The presiding judge must have the discretion to consider all characteristics or qualities that make judges well suited for the unique nature of the family law assignment, including but not limited to subject-matter expertise, temperament, calendar management, ability to work with self-represented litigants, and familiarity with child development issues.

6. **Assignment of judicial officers to family law.** On an ongoing basis, consistent with available workload data, each superior court should determine the number of judicial officers to be assigned to family law based on the percentage of the court's workload that is family law. Meaningful access to justice requires adequate judicial resources. Statewide, at the current time, approximately 20 percent of the courts' workload is family law.<sup>14</sup> To the extent that an individual court's family law workload appears to vary from statewide standards (e.g., because of unique caseload characteristics, procedural differences, or provision of enhanced services), commensurate adjustments to the 20 percent benchmark should be made. This is a standard that can be measured and managed to, and it will provide the significant shift that is needed to ensure that families and children have meaningful access to justice in family court. Among the many benefits of increasing the judicial officer resources will be increased access to fair and timely justice in emergency situations, enhanced opportunities for settlement, and enhanced access to timely hearings and trials.
7. **Court resources.** Consistent with the increase in judicial officers assigned to family law, ancillary and supporting resources for self-help centers, courtroom staff, clerical staff, family court services staff, and research attorneys must also be increased. To improve the status of the family law assignment and ensure equal access to justice, the family court must receive resources equivalent to those given to the general civil assignment if we are to adequately address the unique requirements for supportive services in the family law assignment. Specific court resource changes would include:
- A. **Judicial support staff for ministerial functions.** Ensure sufficient judicial support staff to handle ministerial or nonjudicial functions in order to make the most effective use of a judicial officer's limited time.
- B. **Support staff to finalize orders.** Ensure sufficient support staff to finalize orders and judgments within a reasonable amount of time.
- C. **E-filing or fax filing.** Offer an e-filing and/or fax filing option.
- D. **Procedural document review.** Ensure that appropriate staff review files to ensure that all documents are in order and inform the court if information is missing or incomplete. This

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<sup>14</sup> The workload of the family courts represents 20 percent of the total statewide judicial workload (family court only, not including juvenile court workload). Admin. Off. of Cts., *supra* note 12. A study conducted by the AOC's Center for Families, Children & the Courts estimated 175 full-time equivalent judicial officer positions in family law. (Admin. Off. of Cts., 2006 Family Law Judicial Officer Survey: Judicial Officer Background, Judicial Resource Needs, and Challenges (2009), [www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm#family](http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm#family)). This represented only 9 percent of the 1,921 authorized judicial positions statewide at the time. Admin. Off. of Cts., *The Need for New Judgeships in the Superior Courts: Government Code § 69614(c)* (2008). [www.courtinfo.ca.gov/reference/documents/100808item1.pdf](http://www.courtinfo.ca.gov/reference/documents/100808item1.pdf). If 20 percent of statewide judicial officers were assigned to family law, consistent with statewide workload estimates, there would have been 384 judicial officers hearing family law.

procedural review would precede the judicial officer's substantive review of the file. Staff could provide notes to the judicial officer as well as public notes, which—similar to the process used in probate—may be made available on the court's Web site for access by the parties, attorneys, and self-help center staff.

- E. ***Supervised/monitored visitation.*** Seek creative partnerships with community organizations to address the significant unmet need for affordable, convenient supervised/monitored visitation and exchange services. Community-based options appear to be decreasing.
  - F. ***Volunteer coordinator position.*** Encourage courts to develop a volunteer coordinator position to work with both attorney and nonattorney volunteers.
8. ***Ensuring access to the record.*** All family law courtrooms should have court reporters, and there should be low-cost options for parties to acquire transcripts. The record in family law proceedings is an area of long-standing concern and is a serious access-to-justice issue. Many family law courts do not have court reporters, so there is no official record for purposes of appeals. There are also widespread issues with parties having difficulty in preparing orders after hearing.
  9. ***Ensuring access to a recording for preparation of orders.*** Legislation should be adopted to provide an opportunity for parties to review a recording of family law proceedings for a designated period of time, not for purposes of maintaining an official record but to ensure that the information is available for parties to prepare their orders. However, parties should receive written orders before leaving the courtroom whenever possible.
  10. ***Calendaring approaches.*** Courts should consider dedicated calendars such as a self-represented litigant calendar, default calendar, work search calendar, and contempt calendar to enhance services to the public. Specialty calendars can provide improved service to litigants by making additional services from the self-help center, community organizations, and other resources available in the courtroom. Courts should also consider calendar management approaches such as staggered times for hearings to improve efficiency in court time and service to the public.
  11. ***Inclusiveness and collaboration.*** Promote an inclusive and collaborative approach to addressing the needs of family court and the community as a whole by:
    - A. ***Local communities to improve family and juvenile justice.*** Developing a rule or standard, similar to standard 10.20 (Court's duty to prohibit bias) that would establish local committees to focus primarily on ways to improve family and juvenile justice. These committees would be standing committees appointed by the presiding judges (court, family, juvenile) and composed of a broad cross-section of community stakeholders and family/juvenile justice system partners.

B. ***Duties of presiding judge.*** Amending California Rules of Court, rule 10.603 (Authority and duties of presiding judge) to add this standing committee to (8), Liaison. Suggested committee name: Family and Juvenile Court Improvement Steering Committee.

12. ***Transparency and accountability.*** Improve and promote transparency and accountability in the family court by:

A. ***Complaint mechanism.*** Creating a meaningful, timely, and independent mechanism for litigants and the public to submit complaints related to court-based services. The complaint process should include issues of access and procedural fairness.

B. ***Public information.*** Creating a public information program to educate the public on the services available, court's limitations, and options for resolving their complaints.

C. ***Court ombudsman.*** Evaluating the creation of a court ombudsman position to receive and investigate complaints and make recommendations to court leadership for improvement. This position would not be limited to family law matters and would be fully empowered to research and investigate any filed complaint, pursuant to established local rules.

13. ***Consistency between local and statewide rules.*** The AOC should develop a self-assessment tool to ensure that local rules and procedures are in compliance with state law and rules.

14. ***Family and juvenile court assignments.*** The task force is aware of the Judicial Council's established policy to ensure that judges, rather than subordinate judicial officers (SJOs), hear family and juvenile cases. For the long-term improvement and enhancement of the family law assignment, the task force supports the policy of encouraging judges to hear these matters. In each of the last three fiscal years, the Legislature has authorized the conversion of 162 SJO positions to judgeships in 25 courts. The conversions are capped at 16 per year and occur only upon vacancy in the SJO position. Legislation was introduced in 2009 (Assem. Bill 942 [Assem. Com. on Judiciary]) to allow up to 10 additional annual conversions of SJO positions to judgeships in eligible courts if, as a result of the conversion, a judge will be assigned to hear family or juvenile cases that prior to the conversion had been assigned to a commissioner. The task force recognizes and appreciates the depth of experience and expertise that many SJOs assigned to family and juvenile law have provided to the courts and litigants over many years. Therefore, the task force encourages experienced subordinate judicial officers who hear family law to seek judicial appointment.

15. ***Enhanced use of IV-D commissioners in family law.*** The task force recognizes a significant opportunity to improve services to the public in the courts' handling of child support (IV-D) cases, which are heard by SJOs because federal funding is available to support this function only if SJOs hear these case types, and only when handling the child support-related issues. As a result, other issues in title IV-D cases, such as custody, visitation, or requests for restraining

orders, are often severed from the child support matters and heard by different judicial officers. The task force recognizes the unique expertise of commissioners who hear child support matters and urges a policy of allowing IV-D commissioners to hear all aspects of a family's case. There are clear benefits to litigants when their cases can be fairly and efficiently resolved by a single judicial officer. Rather than maintaining a fragmented system in which families must go to multiple hearings, locations, and judicial officers to have their cases resolved, courts should employ a policy that allows IV-D commissioners to "time-study" and hear all parts of the case. To accomplish this, courts will need to maintain a sufficient number of SJOs in family law to allow for the time-studying of IV-D cases. The task force believes that by giving SJOs the flexibility to hear custody and other issues, litigants will be better served, the family court will be more efficient, and the strong backgrounds of the IV-D commissioners will be used to full advantage.