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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 25, 2012

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Title	Agenda Item Type
Family Law: Retention of Working Files of Court-Employed Child Custody Mediators	Information Only
Submitted by	Date of Report
Family and Juvenile Law Advisory Committee	September 6, 2012
Hon. Kimberly J. Nystrom-Geist, Cochair	Contact
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### Executive Summary

At the request of the Judicial Council, the Family and Juvenile Law Advisory Committee has prepared this informational report on policy considerations related to the retention and destruction of the working files of court-employed child custody mediators, sometimes referred to as family court services files. The committee makes no recommendation for council action on this issue at this time.

### Previous Council Action

At its meeting on October 29, 2010, the Judicial Council accepted an audit report on the destruction of family court services working files in the Superior Court of Marin County.<sup>1</sup> Investigated and prepared by the Administrative Office of the Courts (AOC) through the Internal Audit Services unit of its Finance Division, the report concluded that no impropriety had occurred because the files destroyed were not court records. The council asked the Family and Juvenile Law Advisory Committee to review policy considerations statewide relating to the retention and destruction of court-employed mediators' working

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<sup>1</sup> Internal Audit Services, Finance Division, Judicial Council of Cal./Admin. Off. of Cts., *Superior Court of California, County of Marin—Investigation Report: Destruction of Family Court Mediator Working Files* (Aug. 2010) [www.courts.ca.gov/documents/20101029itemj.pdf](http://www.courts.ca.gov/documents/20101029itemj.pdf). (Note: The electronic version posted at this URL includes an introductory Judicial Council report, which the cited audit report follows as an attachment.)

files and return to the council with recommendations, if any, on this matter. The committee conducted a review as requested, and this report contains the findings.

## **Methodology and Process**

At the same time as the council made this request, the Bureau of State Audits (BSA) was concluding its own investigation of the Marin and Sacramento family courts, raising the possibility that information relevant to this review might be revealed in the resultant BSA audit report. When the BSA issued its final report in January 2011, it did not address the issue of retention policies for mediators' working files, so the committee formed a working group to review statutes, rules, and practices and to develop this report.

The committee recognizes the complexity and importance of the cases handled by child custody mediators across the state. These cases often involve allegations of domestic violence and other serious issues, requiring professional mediators with expertise in a wide range of disciplines. While the bulk of mediators are court-employed, some courts contract private professionals to conduct child custody mediation. Either way, family law judges and litigants rely on their assistance in handling child custody and visitation matters and, in some instances, providing information to the court. These vital functions and the professionals who perform them are often referred to collectively and interchangeably as "family court services."

## **Legal background**

In considering the creation and management of court-employed mediators' working files, the first question to arise is whether these files are court records. The AOC's audit report reviewed this question, noting that "the retention of court records is specific and detailed in various statutes and rules of court," including Government Code sections 68150–68153, then went on to describe the statutory guidelines for child custody mediation working files in greater detail:

Mediation working files, including handwritten or typed notes, are used to produce the mediator's report to the court and are not included in official case files or records of the court. Once the report is submitted to the court it is considered a court record as it contains any and all of the information considered necessary by the mediator for the court to reach a decision. Local court policies and procedures would control the retention periods of the documents contained in the mediator working files after the mediator report is submitted to the court by the mediator.<sup>2</sup>

The report concluded that "[m]ediator working files, including any 'handwritten notes,' are not considered 'court records' according to statute and CRC [California Rules of Court] and therefore are not subject to court record retention requirements."<sup>3</sup>

In 1981, when the law requiring mandatory child custody mediation went into effect in California, local courts gained the authority to designate agencies, court employees, or outside contractors as responsible

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<sup>2</sup> *Supra*, at p. 2.

<sup>3</sup> *Ibid*.

for family court services. State law allows courts to determine by local rule whether professional mediators assigned to or contracted for this service can make recommendations to the court when parties are unable to reach an agreement through mediation.<sup>4</sup>

As a result of recent amendments to Family Code section 3183(a), courts that allow family court services mediators to provide child custody and visitation recommendations to the court are required to refer to the process as “child custody recommending counseling” (CCRC) and the providers as “child custody recommending counselors,” although all rules and requirements for mediators still apply. Mandatory child custody mediation procedures and requirements for both mediators and CCR counselors appear in Family Code sections 3164–3186 and rules 5.210 and 5.215 of the California Rules of Court. These guidelines contain no requirements that child custody mediators create or maintain files, nor any guidance as to the retention or destruction of such files if they do. The sole reference to this subject in the Family Code applies only to those courts that operate a “family conciliation court under Family Code sections 1810 et seq.”<sup>5</sup> and is found in Family Code section 1819:

(a) Except as provided in subdivision (b), upon order of the judge of the family conciliation court, the supervising counselor of conciliation may destroy any record, paper, or document filed or kept in the office of the supervising counselor of conciliation which is more than two years old.

(b) Records described in subdivision (a) of child custody or visitation mediation may be destroyed when the minor or minors involved are 18 years of age.

(c) In the judge’s discretion, the judge of the family conciliation court may order the microfilming of any record, paper, or document described in subdivision (a) or (b).

Given the statutory silence in this area, the working group in December 2011 and early 2012 solicited input directly from family court services directors around the state about their respective courts’ practices for retaining the working files of court-employed mediators. Through a survey developed by the working group, these directors were asked a series of questions designed to all be answered easily in a short time. Of the 33 directors who responded, 14 said they worked in medium-sized courts, 10 in small courts, and 6 in large courts (3 declined to answer), affirming that the pool of respondents formed a representative sample of the population.

## **Summary of Findings**

The working group distributed questionnaires in person at a meeting of family court services (FCS) directors and provided the option of completing the same survey online for those unable to attend the meeting in person. The questionnaire text and a compilation of the directors’ responses follow this report in Attachment A. The purpose of the survey was to collect general information on statewide trends and issues—respondents were not asked what county or court they represented, only about the services their courts offered.

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<sup>4</sup> Fam. Code, § 3183(a).

<sup>5</sup> At this writing, the Superior Court of Los Angeles County is the only one known by the committee to have a conciliation court.

Several respondents checked more than one answer for the first question about which services led to creation of files, with responses split between 13 courts creating files for confidential mediation and 18 starting files for CCRC; 4 keep no separate files. (Twelve also said they create files when family court services conducts a custody evaluation or investigation, but the working group focused its review on the working files of mediators.) Several respondents expressed concerns about the resources required for long-term storage of records. The overall response indicates that most, but not all, courts

- create family court services files;
- retain family court services files for a period of time; and
- destroy working files some time after delivery of the final report to the parties and the court.

Although there is no legal requirement that courts develop written policies in this area, the directors were next asked if their courts had written policies or procedures on the retention or destruction of family court services files. Of the 29 who responded, 12 worked in courts with written policies for retention and/or destruction of files while 22 of the 29 worked in courts with no written policies. The survey asked those responding to check all that apply; as a result, the numbers indicate that some courts may have written policies for both confidential and CCR counseling file retention and destruction or written policies for some procedures and not for others.

Asked about their current practices for the retention, storage, and destruction of family court services files, FCS directors responded with a variety of approaches:

- Files are stored and retained at the courthouse until the youngest child in the case turns 18.
- Files are destroyed only by special order from the supervising family law judge after the last contact with family court services was over three years ago and youngest child is over 18.
- Family court services files are not created; FCS intake sheets are placed in a confidential folder in the court file, and notes used by the counselor or evaluator are retained for at least two years but destroyed at [the counselor's or evaluator's] discretion based on estimates of future need for return cases.
- Files are destroyed immediately following the submission of the report and recommendations.
- All FCS files are retained, with older files placed in storage when minors turn 18.
- FCS files are kept for specified periods of time (for example, three to seven years, unless case has had ongoing conflict issues) due to storage limitations.
- Mediation notes are maintained until the child turns 18, evaluation notes are destroyed once the evaluation report is done, and intake forms from parents are destroyed once a court order is issued.
- Some files stored on paper, with efforts under way to scan documents to store electronically.
- Contractors determine how to handle their own files.
- Inactive case files are shredded after two years because of storage constraints.
- Files are available to parties on request and, when a volunteer is available, scanned to be stored electronically.
- Only the files from the current and preceding years are maintained.

The next question asked FCS directors to identify who sets their court's policy for the retention and destruction of these working files. In addition to the directors of family court services themselves, others named as involved in setting such policy included

- director of operations for family law and probate division;
- court executive officer and supervising judge;
- court executive officer, supervising family law judge, and presiding judge;
- executive committee; and
- contractors handling their own files.

### **Concerns of Stakeholders**

The questionnaire next asked about any challenges associated with retention or storage of family court services files. While several directors responded that they had none because they kept no working files, two saw the absence of a set policy in their courts as posing a challenge. The majority expressed significant concerns about space, resources, and the decreasing capability of courts to financially manage creation and retention of these files. Specific concerns included

- difficulty accessing storage locations (for example, in the basement or offsite);
- strain on staff time and resources to transport and store older files kept offsite because of limited space in the court facility;
- cost of offsite storage and limited space for onsite storage; and
- lack of consistency in format and content of mediator notes.

The survey next asked if the FCS directors were contemplating any changes in how they address retention or storage and found that the vast majority were not. Those considering changes focused almost entirely on a switch to electronic storage or on broader approaches to destroying files, either when a child turns 18 or once the final report or recommendation has been entered. Some expressed an interest in creating formal policies in courts that currently have none.

The working group noted that parties and their attorneys are also stakeholders who may have an interest in or concerns about mediators' working files. For example, when a recommendation is made, a party or attorney might call the CCR counselor to testify about the basis for that recommendation—in which case information in the working files may be relevant to the mediator's testimony. Additionally, for parties returning to court within a short period of time, having relevant information readily available to a newly assigned mediator may be useful. Most courts appear to be retaining mediators' working files until the youngest child in a case reaches the age of 18. However, when parties have not been in court for some time, mediators often have them complete new intake forms and develop updated notes, reducing any need to retain files for lengthy periods. For this reason, a number of courts allow working files to be destroyed shortly after an agreement is reached or a written recommendation provided to the court and the parties.

## **Policy and Cost Implications**

The Legislature has neither required courts to create child custody mediator files nor indicated whether such files should be retained for any length of time. Absent statutory guidance on this subject, then, local approaches reflect the types of services a court provides, the needs of litigants and mediators, storage capacity, and resource constraints. Although there are always costs associated with retaining files, where resources permit, courts are increasingly considering the benefits of electronic storage and other approaches that could reduce the costs associated with storing paper files.

The enactment of Family Code section 3183(a) requires that mediators enter all child custody and visitation recommendations in writing and that these documents be added to the family law file in the confidential section required under Family Code section 3025.5. The result is that mediators' final recommendations now become part of the court file and must therefore be maintained according to the requirements for handling of other formal court records. Preliminary notes and other working documents generated during the mediation process, on the other hand, remain separate from the official record and may be stored or destroyed in accordance with preferred local policy.

Complications that must be resolved to impose uniform statewide requirements for creating, retaining, and destroying mediators' working files include

1. the complexities of drafting a set of specific, consistent requirements for the courts of 58 jurisdictions that each perform different services for widely divergent local populations;
2. increased financial and personnel costs on those courts required to retain and preserve files for longer periods than they currently do; and
3. procedural difficulties and staff retraining for those courts required to destroy files at faster intervals than their current timetables.

The current statutory flexibility, on the other hand, appears to afford courts the ability to make decisions and apply policies that evolve organically to reflect local levels of services and resources. The working group found no indication in any jurisdiction of decisions being made unilaterally, arbitrarily, or in disregard of established local policy for retention and destruction of family court services files. The local systems in current use reveal no problems significant enough to allocate limited branch resources toward pursuing their solution. The committee makes no recommendation for council action at this time.

## **Next Steps**

This information-only report is submitted to the Judicial Council on behalf of the Family and Juvenile Law Advisory Committee. The committee will provide this information to the Trial Court Presiding Judges and Court Executive Advisory Committee and continue to participate in education and training opportunities with judicial officers, family court services professionals, and court staff as requested and will address this topic wherever relevant and appropriate.

## **Attachments**

1. Attachment A: *Family Court Services: File Retention Questionnaire*, with results as of April 2012, at pp. 7–11.





Attachment A

Family Court Services: File Retention Questionnaire

(Results as of April 2012; percentage reflect number of responses not 58 counties)

**1. In your county or court, do family court services professionals create files for \_\_\_\_\_?**  
(Check all that apply):

33 answered, some choosing more than one response.

Confidential mediation	13 courts	39.4%
Child custody recommending counseling	18 courts	54.5%
FCS evaluations or investigations	12 courts	36.4%
No separate files	4 courts	12.1%

**2. Does your court have a written policy or procedure regarding \_\_\_\_\_?**  
(Check all that apply):

29 of 33 answered, some choosing more than one response; 4 abstained.

Retention of FCS confidential files	3 courts	10.3%
Retention of CCRC files	5 courts	17.2%
Destruction of mediation files	1 court	3.4%
Destruction of CCRC files	3 courts	10.3%
No written policy	22 courts	75.9%

**3. Please describe your current practices for retention, storage, and destruction of FCS files.**

All 33 answered.

1. FCS files are retained until the youngest child in the case reaches 18 years of age
2. Mediation files are kept until youngest child in family turns 18. We developed a notation system on outside of file to track “aged-out” cases.
3. n/a
4. FCS files are maintained until the youngest child turns 18. At that time, they are destroyed.
5. We have court connected CCRCs and they maintain their own confidential files offsite.
6. I keep them and they are available to the parties if requested. When they are old and we have a volunteer, they are scanned.
7. Only the current year and preceding year are maintained.
8. Files are reviewed every November, and when children reach 18 years of age, FCS files are destroyed. We plan to obtain student interns this year to review all files and input data as to when the file can be destroyed into the FCS database.
9. Files are stored in the basement of the courthouse where court files are also stored, but in an area sectioned off for FCS files. Currently, we are destroying files after the youngest minor turns 18 years of age.

10. FCS files are stored and retained at least until the youngest child in the case reaches the age of majority. Eligible files are destroyed as additional space for storage is needed when resource (staff time) allows.
11. File destruction (first get a special order from supervising family law judge); last contact at FCS was more than three years ago and the youngest child is over 18 years old.
12. We don't create formal files, as the staff works from the court file, and things like intake sheets are placed in a confidential folder in the court file. Notes used by the counselor or evaluator are retained for at least two years but destroyed at their discretion based on estimates of future need for return cases.
13. Stored until youngest child is 18 years.
14. All files are retained at this time. Files of clients are placed in storage when minors turn 18. We are considering destroying over 18 files.
15. (1) Retain file until youngest child is 18 years of age. (2) Destroy file when youngest child is 18 years of age.
16. Files kept approx. seven years (unless case has had ongoing conflict issues) due to storage issues
17. Currently retaining and storing on site.
18. Destroy when youngest child is 18.
19. Current practice is to retain for some undetermined period of time.
20. All FCS files with all notes maintained until youngest child turns 18. Then destruction order obtained and file destroyed.
21. No files kept.
22. No files kept.
23. We keep the files until the youngest child turns 18
24. The contracted CCRCs or evaluators store their own files and discard them on their own—no procedure exists at the present time that I am aware of.
25. Inactive case files are shredded after two years because of storage constraints.
26. FCS files purged every four years due to space.
27. Files are purged every three years. If a file has not been active in three years, it's destroyed only due to the need for room.
28. Due to limited shelf space and storage, the practice is to destroy files older than three years.
29. Mediation notes deleted when child turns 18. Evaluation notes destroyed upon completion of report. Other confidential elements (CLETS, police records) destroyed also. Intake forms from parents and evaluation log hours destroyed after order made.
30. Keep info until youngest child is 18; some files are paper storage, now scanning documents and storing electronically
31. Destroy all files at age 18 in 2011, began electronic storage retention of new mediation cases. Will begin electronic storage retention for child custody investigations in 2012.
32. Maintain file including notes and intake forms until youngest child is 18.
33. The few evaluations are done by contractors. There is no policy and I don't know what they do regarding retention.

**4. Who sets the policy (for example, court executive committee, presiding or supervising judge, FCS director)?**

All 33 answered.

1. FCS management
2. FCS director
3. n/a
4. Was set before I started in FCS. For changes, I would make the recommendation to the CEO and family law judges.
5. Thus far, we have not addressed how long the court connected contractors should maintain these confidential files.
6. FCS director
7. Decision was vetted through administration (CEO)
8. FCS director and presiding judge
9. The FCS director set the policy for file storage and destruction.
10. Director of operations for family law and probate division
11. Ultimately, court executive and supervising judge
12. FCS director
13. FCS director
14. FCS director in coordination with court admin
15. FCS = supervising mediator (we have no director)
16. FCS director
17. CEO/supervising FL judge/PJ
18. FCS manager
19. Has not been determined, but probably CEO in conjunction with FCS director and presiding judge.
20. Don't know—policy has been in existence long-term.
21. FCS manager, director, deputy CEO, and CEO
22. FCS director and supervising judge
23. FCS director
24. Executive committee
25. FCS director
26. No files.
27. No files kept.
28. No files kept.
29. FCS director in consultation with CEO and judges
30. Policy not in place as far as I know [because] contractors “own” their files.
31. Family court judge, presiding judge, FCS director
32. FCS along with court executive committee
33. CEO and FCS director

**5. What are your challenges with FCS file retention/storage?**

All 33 answered.

1. Space
2. Space
3. n/a
4. Limited storage within FCS, what should be kept in the file since it tends to duplicate information in the court file. In addition, consistency in format and content of mediator notes...
5. The court does not house these files on site so there is not a storage issue...
6. Space for storage.
7. Storage
8. NO ROOM!!!!!!!!!!!!!!!!!!!!!!.
9. The location is not easily accessible in the basement.
10. Staff time/resources needed to transport and store older FCS files that are stored offsite due to limited space available within FCS/Family Court facility.
11. Cost of offsite storage, limited onsite storage.
12. None since so little is retained.
13. Space availability.
14. Space, rental fees, employee time.
15. No answer.
16. Limited storage.
17. Adequate storage space.
18. Court paying for storage.
19. That there is no policy.
20. No space.
21. Lack of space, extremely limited space.
22. None
23. Space, cost.
24. Space
25. None to date. We purge annually..
26. No files.
27. No files.
28. No files kept.
29. Space for keeping, effort to create form a clerical workload perspective, level of notekeeping, different note taking approaches by mediators.
30. Need a policy established to share with contractors.
31. Not much space for files—need to purge inactive cases.
32. Too many files, too little room.
33. We are not overwhelmed with too many files due to this longstanding practice due to limited storage.

**6. Are there changes in FCS file retention/storage that you would like or are planning to make?**

28 of 33 answered; 5 abstained.

1. Future imaging.
2. No. Only that we can't fit anymore file cabinets in the space we have.

3. Yes. We are considering shortening the retention period to five years since we don't find the older files to be used or referenced.
4. No.
5. More time for scanning. Until children emancipate it seems old case keep, eventually, coming back.
6. None. The changes were made in the last year.
7. See #3.
8. None at this time.
9. Filing and storing documents electronically.
10. No.
11. No.
12. We would like to purge after retention of three to five years.
13. We are considering destroying files when all minors in family turn 18.
14. No.
15. No unless statewide suggestion/policy is presented.
16. Need to also remove electronic info from cases when child reaches 18.
17. Yes—determine a written policy.
18. No.
19. Ideally, it would be great to have paperless FCS files and with a retention/destruction schedule still in place.
20. No.
21. We would like to shred documents after our report is complete.
22. See #4.
23. No.
24. No files.
25. We are developing a written protocol that includes why we keep what we keep and for how long. Our goal is to clarify and then begin a more active management/retention program.
26. Would like to establish a set procedure for issue.
27. No.
28. No, altho I'm interested in becoming paperless, just not sure how to get started.

**7. Please indicate the size of the court for which you work.**

30 of 33 answered; 3 abstained.

Small	10 courts	33.3%
Medium	14 courts	46.7%
Large	6 courts	20.0%

