MEDIATION IN CHILD PROTECTION CASES ROUNDTABLE

February 22, 2019
George I. Sanchez Building
University of Texas at Austin
10:00 a.m. – 2:00 p.m.
Mediation in Child Protection Cases

Table of Contents

Meeting Agenda

Attendee List ....................................................................................................................................................... 1

Travel Reimbursement Form and Guidelines ................................................................................................. 2

Relevant Law...................................................................................................................................................... 3

Guidelines for Child Protection Mediation .............................................................................................. 4

Self-Determination and Procedural Justice Meet Inequality in Court Connected Mediation ........................................................... 5
Agenda

10:00 a.m.   Welcome and Opening Remarks - Dylan Moench
10:15 a.m.   Introductions
10:30 a.m.   Review of Materials
10:45 a.m.   Discussion Topics

   1. What are the benefits of mediation in CPS cases?
   2. What conditions are necessary to achieve the benefits of mediation in CPS cases?
   3. When and where can the benefits of mediation be most effectively utilized in CPS cases?
   4. What resources are necessary to more effectively utilize mediation?
   5. What can be done to increase access to those resources?

12:00 p.m.   Break for Lunch
12:30 p.m.   Continue Discussion

   6. What are the deficiencies of mediation in CPS cases?
   7. What are the conditions that currently exist that result in those deficiencies?
   8. What can be done to address those conditions?

1:50 p.m.    Discussion of Action Items and Next Steps
2:00 p.m.    Adjourn
## Participant List

<table>
<thead>
<tr>
<th>Participant Name</th>
<th>Title, Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Twana Allen</td>
<td>Attorney, Law Office of Twana Allen, Plano</td>
</tr>
<tr>
<td>Gary Banks</td>
<td>Associate Judge, CPC Concho Valley, San Angelo</td>
</tr>
<tr>
<td>Chris Branson</td>
<td>Attorney at Law, Chris Branson Law Firm P.L.L.C., Houston</td>
</tr>
<tr>
<td>Erica Bañelos</td>
<td>CPS Regional Director, DFPS, San Antonio</td>
</tr>
<tr>
<td>Darlene Byrne</td>
<td>Judge, 126th District Court, Austin</td>
</tr>
<tr>
<td>Leslie Cocke</td>
<td>Collaborative Family Engagement Coach, Texas CASA, The Woodlands</td>
</tr>
<tr>
<td>Yolanda Cortes Mares</td>
<td>Attorney at Law, Belton</td>
</tr>
<tr>
<td>Sarah Crockett</td>
<td>Public Policy Coordinator, Texas CASA, Austin</td>
</tr>
<tr>
<td>Anne Darring</td>
<td>Judge, 306th District Court, Galveston</td>
</tr>
<tr>
<td>Teal de la Garza</td>
<td>Attorney, Bill De La Garza &amp; Associates, Houston</td>
</tr>
<tr>
<td>Krista Del Gallo</td>
<td>Policy Manager, Texas Council of Family Violence, Austin</td>
</tr>
<tr>
<td>John Delaney</td>
<td>Senior District Judge, CPC Brazos County, Bryan</td>
</tr>
<tr>
<td>Janet Denton</td>
<td>Director, Family Court Services of Tarrant County, Ft. Worth</td>
</tr>
<tr>
<td>Sarah Doke</td>
<td>Attorney, Private Practice, Winnsboro</td>
</tr>
<tr>
<td>Angela Dowdle</td>
<td>Attorney/Mediator, Angela M Dowdle PC, Burnet</td>
</tr>
<tr>
<td>Angela Ellis</td>
<td>Attorney/Mediator, Angela Ellis Law P.L.L.C., Houston</td>
</tr>
<tr>
<td>Annette Ezzell</td>
<td>Attorney/Mediator, Ane Law and Mediation Firm P.C., Wichita Falls</td>
</tr>
<tr>
<td>Susan Fisher</td>
<td>Attorney, Law Office of Susan A. Fisher, Dallas</td>
</tr>
<tr>
<td>Anna Ford</td>
<td>Director of Regional Litigation, DFPS, Austin</td>
</tr>
<tr>
<td>Kirk Fulk</td>
<td>Attorney, Retired Judge, Goldthwaite</td>
</tr>
<tr>
<td>Debra Fuller</td>
<td>Attorney, Private Practice, Kerrville</td>
</tr>
<tr>
<td>Ellen Griffith</td>
<td>Associate Judge, CPC Permian Basin, Midland</td>
</tr>
<tr>
<td>Julia Hatcher</td>
<td>Attorney, Law Office of Julia C. Hatcher, Galveston</td>
</tr>
<tr>
<td>Sean Healy</td>
<td>Attorney, Healy Law Offices, P.C, Tyler</td>
</tr>
<tr>
<td>Anissa Johnson</td>
<td>Specialty Courts Program Manager, OCA, Austin</td>
</tr>
<tr>
<td>Gil Jones</td>
<td>Retired District Judge, Marble Falls</td>
</tr>
<tr>
<td>Name</td>
<td>Position and Details</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Kathryn Lanan</td>
<td>Attorney/Mediator, Law Offices of Kathryn Bradfield Lanan, Dickinson</td>
</tr>
<tr>
<td>Michelle Latray</td>
<td>Attorney/Municipal Judge, Law Office of Michelle J. Latray, Groesbeck</td>
</tr>
<tr>
<td>Lynn LeCropane</td>
<td>Attorney, Travis Co. Office of Child Representation, Austin</td>
</tr>
<tr>
<td>Cheryll Mabray</td>
<td>Judge, CPC Hill Country, Llano</td>
</tr>
<tr>
<td>Beverly Malazzo</td>
<td>Attorney, Law Office of Beverly B Malazzo, Houston</td>
</tr>
<tr>
<td>Qiana Manns</td>
<td>Attorney/Manager, Manns Law Offices P.L.L.C., Houston</td>
</tr>
<tr>
<td>Emily Miller</td>
<td>Attorney, Woodley &amp; Dudley, Brownwood</td>
</tr>
<tr>
<td>Michele Morgan</td>
<td>Attorney/Mediator, Law Office of Michele Morgan, Austin</td>
</tr>
<tr>
<td>Marcela Ortiz-Taing</td>
<td>Attorney/Mediator, Ortiz-Taing Law Firm, League City</td>
</tr>
<tr>
<td>Donna Phillips</td>
<td>Executive Director/Attorney Mediator, McLennan Co. Dispute Resolution Center, Waco</td>
</tr>
<tr>
<td>Shellie Ryan</td>
<td>CPS Policy Manager, Texas Council on Family Violence, Austin</td>
</tr>
<tr>
<td>Renee Sanchez</td>
<td>Attorney at Law, Brownsville</td>
</tr>
<tr>
<td>Carol Self</td>
<td>Director of Permanency, DFPS, Austin</td>
</tr>
<tr>
<td>Michael Shane</td>
<td>Attorney, Gordon, Davis, Johnson &amp; Shane P.C., El Paso</td>
</tr>
<tr>
<td>Amy Strickling</td>
<td>Assistant County Attorney, Harris County Attorney's Office, Houston</td>
</tr>
<tr>
<td>Kimberly Toulet</td>
<td>Assistant County Attorney, Midland County, Midland</td>
</tr>
<tr>
<td>Brenna Troncoso</td>
<td>Attorney, Brenna M. Troncoso, Attorney at Law, P.L.L.C., Anson</td>
</tr>
<tr>
<td>Margaret Turner Carrigan</td>
<td>Attorney and Mediator, Carrigan Legal and Mediation Services, McKinney</td>
</tr>
<tr>
<td>Electra Watson</td>
<td>Attorney at Law, Watson Law Firm, Dallas</td>
</tr>
</tbody>
</table>
Insert Tab 2
Travel Reimbursement Guidelines

This program is federally funded and is thereby governed by the reimbursement policies of the Children’s Commission and the Supreme Court of Texas. All travel expenses will be paid in accordance with the following policies. *Reimbursements for personal expenses, alcoholic beverages and gratuities are not allowed.*

**Reimbursement Forms**
Please complete the Children’s Commission travel reimbursement form in full, sign and date. Forms may be submitted by mail or email with receipts attached.

**The Supreme Court of Texas Children’s Commission**
P.O. Box 12248
Austin, TX 78701
E-mail: patrick.passmore@txcourts.gov

**Match Form (if applicable)**
The Children’s Commission match form MUST also be completed to prevent delay in receiving your reimbursement.

**Transportation**
Original receipts are required for transportation expenses, including airfare, rental cars, taxis, and shuttles. You may be reimbursed for economy airfare or .54 cents per mile for travel by personal automobile. **Airfare receipts** must include the name of the traveler and airline, the ticket number, class of transportation, travel dates, and dollar amount. Itineraries/confirmations that show cost but not payment will not be reimbursed. **Rental car** reimbursements will be made only for the vehicle type/class with the lowest rate. If multiple attendees will be traveling together a larger vehicle may be requested through the **rental car request form**. This form must be submitted no later than five days prior to the meeting.

**Incidentals**
Original receipts are required for incidental expenses (ie. baggage fees, gasoline, internet access).

**Mileage Calculation**
You must include a printout from MapQuest ([www.mapquest.com](http://www.mapquest.com)) with your reimbursement form.

- Include your headquarters address and the destination. The map must have line by line driving directions.
- Make sure the map shows the total one-way mileage.
- Maps that show mileage increments without a total are not acceptable.
- In determining mileage you may choose the most cost-effective, reasonably safe, shortest route, the quickest drive time or the safest road conditions between destination points.
**Meals**

Meals are reimbursed according to the rates set by the General Services Administration. Refer to [www.gsa.gov](http://www.gsa.gov) for the daily maximum meals allowance.

- You may only claim meals that are not provided as part of the conference. For example, if breakfast is served at the conference, you may not claim a reimbursement for it.
- Provided meals are for participants only, guests must arrange for their own meals. You may claim meals for times you are traveling. The first and last calendar day of travel is calculated at 75 percent of the daily maximum meal allowance set by the GSA.

**Lodging**

Please refer to [www.gsa.gov](http://www.gsa.gov) for daily maximum lodging allowances. If you are traveling outside of your designated headquarters, the single occupancy rate plus applicable taxes for your hotel room will be reimbursed for arrival on the day before the conference or meeting through the night after the conference or meeting ends. Additional room nights, guests and incidental expenses are not reimbursable.

If you have any questions or need assistance completing the form, please contact us at (512) 463-4924 or Patrick.Passmore@txcourts.gov.

*All reimbursement claims must be submitted within 45 days of travel.*
Please Allow 30 days for processing.

PAYEE INFORMATION:

Name: ___________________________ Social Security Number: ____________
Title: _____________________________ Email: _____________________________
Business Address: __________________ Phone: ___________________________
City/State/Zip: _______________________ Fax: ____________________________

BUSINESS PURPOSE: Please provide brief description of conference or training attended.

Note: Refer to travel guidelines for maximum lodging and meals allowances. Receipts and supporting documentation must be attached, including mileage calculation between headquarters and conference location.

<table>
<thead>
<tr>
<th>Date</th>
<th>Mileage</th>
<th>Airfare</th>
<th>Rental Car</th>
<th>Taxi/ Shuttle</th>
<th>Parking/ Tolls</th>
<th>Meals</th>
<th>Lodging</th>
<th>Misc.</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0.58</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.58</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.58</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.58</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.58</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total

I CERTIFY THAT:

1. The amounts listed are actual expenses paid personally by me for the purpose stated.
2. I have not been nor will be reimbursed from any other source for any of the expenses listed.
3. This request is correct to the best of my knowledge.

Payee Signature: ___________________________ Date: ____________

This form may be e-signed and sent to patrick.passmore@txcourts.gov. All required supporting documentation should be scanned and attached in email with form. Or, send completed form and all required documentation (tape small receipts to standard-size paper), to:

PO Box 12248, Austin, TX 78701

For Commission Use Only

Commission Approval ___________________________ Date ____________ COMBJ
Insert Tab 3
Sec. 154.002. Policy.

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration
given to disputes involving the parent-child relationship, including the mediation of issues involving
conservatorship, possession, and support of children, and the early settlement of pending litigation through
voluntary settlement procedures.

Sec. 154.023. Mediation.

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between
parties to promote reconciliation, settlement, or understanding among them.

(b) A mediator may not impose his own judgment on the issues for that of the parties.

(c) Mediation includes victim-offender mediation by the Texas Department of Criminal Justice described in
Article 56.13, Code of Criminal Procedure.

Sec. 154.051. Appointment of Impartial Third Parties.

(a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under
Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for
appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

Sec. 154.052. Qualifications of Impartial Third Party.

(a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party
under this subchapter a person must have completed a minimum of 40 classroom hours of training in
dispute resolution techniques in a course conducted by an alternative dispute resolution system or other
dispute resolution organization approved by the court making the appointment.
(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to
the parent-child relationship, a person must complete the training required by Subsection (a) and an
additional 24 hours of training in the fields of family dynamics, child development, and family law, including
a minimum of four hours of family violence dynamics training developed in consultation with a statewide
family violence advocacy organization.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party
who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other
professional training or experience in particular dispute resolution processes.


**Sec. 154.053. Standards and Duties of Impartial Third Parties.**

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall
encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the
parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either
party information given in confidence by the other and shall at all times maintain confidentiality with respect
to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and
their counsel during the settlement process, are confidential and may never be disclosed to anyone,
including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is
subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48,
Human Resources Code.


**Sec. 154.054. Compensation of Impartial Third Parties.**

(a) The court may set a reasonable fee for the services of an impartial third party appointed under this
subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an
impartial third party as other costs of suit.

Sec. 154.055. Qualified Immunity of Impartial Third Parties.

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and wilful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.


Sec. 154.071. Effect of Written Settlement Agreement.

(a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.

(b) The court in its discretion may incorporate the terms of the agreement in the court’s final decree disposing of the case.

(c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

**Tex. Fam. Code § 153.0071**

Sec. 153.0071. Alternate Dispute Resolution Procedures.

(a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator’s award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator’s award.

(c) On the written agreement of the parties or on the court’s own motion, the court may refer a suit affecting the parent-child relationship to mediation.
(d) A mediated settlement agreement is binding on the parties if the agreement:

1. provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
2. is signed by each party to the agreement; and
3. is signed by the party’s attorney, if any, who is present at the time the agreement is signed.

(e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds:

1. that:
   A. a party to the agreement was a victim of family violence, and that circumstance impaired the party’s ability to make decisions; or
   B. the agreement would permit a person who is subject to registration under Chapter 62, Code of Criminal Procedure, on the basis of an offense committed by the person when the person was 17 years of age or older or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to:
     i. reside in the same household as the child; or
     ii. otherwise have unsupervised access to the child; and
2. that the agreement is not in the child’s best interest.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

(g) The provisions for confidentiality of alternative dispute resolution procedures under Chapter 154, Civil Practice and Remedies Code, apply equally to the work of a parenting coordinator, as defined by Section 153.601, and to the parties and any other person who participates in the parenting coordination. This subsection does not affect the duty of a person to report abuse or neglect under Section 261.101.
Sec. 37.002. Exemption.

The appointment requirements of Section 37.004 do not apply to:

1. a mediation conducted by an alternative dispute resolution system established under Chapter 152, Civil Practice and Remedies Code;
2. a guardian ad litem or other person appointed under a program authorized by Section 107.031, Family Code;
3. an attorney ad litem, guardian ad litem, amicus attorney, or mediator appointed under a domestic relations office established under Chapter 203, Family Code; or
4. a person other than an attorney or a private professional guardian appointed to serve as a guardian as defined by Section 1002.012, Estates Code.

Sec. 37.003. Lists of Attorneys Ad Litem, Guardians Ad Litem, Mediators, and Guardians.

(a) In addition to a list required by other state law or rule, each court in this state shall establish and maintain the following lists:

1. a list of all attorneys who are qualified to serve as an attorney ad litem and are registered with the court;
2. a list of all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court;
3. a list of all persons who are registered with the court to serve as a mediator; and
4. a list of all attorneys and private professional guardians who are qualified to serve as a guardian as defined by Section 1002.012, Estates Code, and are registered with the court.

(b) A court may establish and maintain more than one of a list required under Subsection (a) that is categorized by the type of case and the person’s qualifications.

(c) A local administrative judge, at the request of one or more of the courts the judge serves, shall establish and maintain the lists required under Subsection (a) for those courts. The local administrative judge may establish and maintain one set of lists for all of the requesting courts and may maintain for the courts more than one of a list as provided in Subsection (b).
Sec. 37.004. Appointment of Attorneys Ad Litem, Guardians Ad Litem, Mediators, and Guardians; Maintenance of Lists.

(a) Except as provided by Subsections (c) and (d), in each case in which the appointment of an attorney ad litem, guardian ad litem, or guardian is necessary, a court using a rotation system shall appoint the person whose name appears first on the applicable list maintained by the court as required by Section 37.003.

(b) In each case in which the appointment of a mediator is necessary because the parties to the case are unable to agree on a mediator, a court using a rotation system shall appoint the person whose name appears first on the mediator list maintained by the court as required under Section 37.003.

(c) The court may appoint a person included on the applicable list whose name does not appear first on the list, or a person who meets statutory or other requirements to serve and who is not included on the list, if the appointment of that person as attorney ad litem, guardian ad litem, or guardian is agreed on by the parties and approved by the court.

(d) On finding good cause, the court may appoint a person included on the applicable list whose name does not appear first on the list, or a person who meets statutory or other requirements to serve on the case and who is not included on the list, if the appointment of that person as attorney ad litem, guardian ad litem, mediator, or guardian is required on a complex matter because the person:

1. possesses relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case;

2. has relevant prior involvement with the parties or case; or

3. is in a relevant geographic location.

(e) A person who is not appointed in the order in which the person's name appears on the applicable list shall remain next in order on the list.

(f) After a person has been appointed as an attorney ad litem, guardian ad litem, mediator, or guardian from the applicable list, the court shall place that person's name at the end of the list.

Sec. 36.004. Report on Appointments.

(a) In addition to a report required by other state law or rule, the clerk of each court in this state shall prepare a report on court appointments for an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case before the court in the preceding month. For a court that does not make
an appointment in the preceding month, the clerk of the court must file a report indicating that no appointment was made by the court in that month. The report on court appointments must include:

(1) the name of each person appointed by the court as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case in that month;

(2) the name of the judge and the date of the order approving compensation to be paid to a person appointed as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for a case in that month;

(3) the number and style of each case in which a person was appointed as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for that month;

(4) the number of cases each person was appointed by the court to serve as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator in that month;

(5) the total amount of compensation paid to each attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator appointed by the court in that month and the source of the compensation; and

(6) if the total amount of compensation paid to a person appointed to serve as an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator for one appointed case in that month exceeds $1,000, any information related to the case that is available to the court on the number of hours billed to the court for the work performed by the person or the person’s employees, including paralegals, and the billed expenses.

(b) Not later than the 15th day of each month, the clerk of a court shall:

(1) submit a copy of the report to the Office of Court Administration of the Texas Judicial System; and

(2) post the report at the courthouse of the county in which the court is located and on any Internet website of the court.

(c) The Office of Court Administration of the Texas Judicial System shall prescribe the format that courts and the clerks of the courts must use to report the information required by this section and shall post the information collected under Subsection (b) on the office’s Internet website.
Insert Tab 4
Guidelines for Child Protection Mediation

Index

Acknowledgements...........................................................................................................2

Child Protection Mediation Guidelines Workgroup..........................................................3

Section 1: Introduction......................................................................................................6
  What is Child Protection Mediation?
  Benefits of Child Protection Mediation
  History and Mission
  How the Guidelines were Developed?

Section 2: Philosophy.....................................................................................................8

Section 3: Guiding Principles..........................................................................................9
  An Inclusive Process
  A Collaborative Process
  A Timely Process
  A Safe Process
  A Confidential Process
  An Ethical Process
  A Supported Quality Process

Section 4: Program Development Design and Operation.................................................11
  Planning the Program
  Program Design and Operation
  Cases and Timing of Referrals
  Participants
  Roles of the Participants
  Time Allotted for Mediation
  Mediation Communication Privilege/Confidentiality
  Mediator Assignment and Selection and Co-Mediation
  Agreements and Reporting Outcomes of Child Protection Mediation
  Program Funding and Institutionalization
  Mediator Recruitment and Training

Section 5: Conducting Child Protection Mediation.......................................................21
  The Role of the Mediator
  Conducting Child Protection Mediation in a Culturally Appropriate Manner
  Use of Interpreters
  Mediation Safety and Capacity
  Power Imbalances
  Maintaining Impartiality and Neutrality and Avoiding Conflicts of Interest
  Participant Preparation
  Roles and Responsibilities of the Mediator: Conducting the Session
  Ending the Session

Section 6: Monitoring and Evaluation.............................................................................26
  Program Monitoring
  Program Evaluation

Section 7: Other Collaborative Decision Making Methods...........................................26

Section 8: Conclusion....................................................................................................27

Section 9: Glossary of Terms........................................................................................28

Section 10: Selected Readings.......................................................................................32
Guidelines for Child Protection Mediation

Acknowledgements

We want to thank a number of people and organizations who helped to make the Child Protection Mediation Guidelines a reality:

Peter Salem, Executive Director of the Association of Family and Conciliation Courts and the staff at AFCC who have provided enormous amounts of encouragement, guidance and support throughout the two years that the Guidelines have been under development. And additional thanks to AFCC as an organization for embracing this project and allowing Child Protection Mediation to finally find a home.

Lisa Merkel-Holguin and the American Humane Association for both hosting our first organizational meeting and contributing the time and efforts to help us get started and keep us on track.

The National Council of Juvenile and Family Court Judges (NCJFCJ); Judge Leonard Edwards, Past President of NCJFCJ; and Crystal Duarte, Model Court Liaison, NCJFCJ, for consistent support, invaluable feedback and comments throughout the drafting process.

The other collaborating organizations, including the National Center for State Courts, the National Association of Counsel for Children, the Werner Institute at Creighton University, and the University of South Florida Conflict Resolution Collaborative. The expert advice, input, and help from individuals within these organizations, has been invaluable.

Judge Janice Rosa and the many individuals and organizations too numerous to mention with whom we have consulted along the way, especially when specific expertise was needed. We received thoughtful and insightful comments from numerous organizations and individuals. We are particularly grateful to the National Center for State Courts and the Conference of State Court Administrators for their thorough review of the draft document and comprehensive comments. The comments received by responding organizations and individuals have enhanced the richness, accuracy and thoroughness of this final document.

Words cannot describe the gratitude we feel for those members of the Child Protection Mediation Guidelines Workgroup who worked so diligently drafting, redrafting and editing these Guidelines over the past two years.

Marilou T. Giovannucci
Chair

Karen Largent
Co-chair

Child Protection Mediation Guidelines Workgroup
Guidelines for Child Protection Mediation

Child Protection Mediation Guidelines Workgroup

Kelly Browe Olson, Associate Professor/Director of Clinical Programs
University of Arkansas at Little Rock, Bowen School of Law
Little Rock, AR

Cynthia Bryant, Clinical Professor
University of Texas, School of Law
Austin, TX

Susan Butterwick, Consulting Director
Family Programs
Wayne Mediation Center
Dearborn, MI

Andrea Clarke, Senior Policy Analyst/Program Manager
Child Protection Mediation Program
Family Justice Services, Justice Services Branch
B.C. Ministry of Justice, Province of British Columbia

Liz Dunn, Court Program Manager (ret.)
Families & Children’s Bureau
Oakland, CA

Judge Leonard Edwards (ret.)
Judge – in – Residence
California Administrative Office of the Courts

Gregory Firestone, Ph.D., Director
University of South Florida Conflict Resolution Collaborative
Tampa, FL

Catherine Friedman, Esq.
New York City Family Court Alternative Dispute Resolution Coordinator
New York, NY

Marilou Giovannucci, M.S., Manager
Connecticut Judicial Branch
Wethersfield, CT

Karen Largent, Mediation and Facilitation Services Manager
Alaska Court System
Court Administration
Anchorage, AK

Bernie Mayer, Ph.D.
Professor, The Werner Institute
Creighton University School of Law
Omaha, NE

Lisa Merkel-Holguin, MSW, Director
System and Practice Advancements in Child Welfare
American Humane Association
Englewood, CO
Guidelines for Child Protection Mediation

Cynthia Schuler, Esq.
Chief Executive Officer
Kids Central, Inc.
Ocala, FL

Susan Storcel, Esq. Director
Circuit Court of Cook County
Child Protection Mediation and Facilitation Program
Chicago, IL

Nancy Thoennes, Ph.D.
Center for Policy Research
Denver, CO

Disclaimer: The statements made in this document are those of the authors and do not necessarily reflect the official positions of the contributing organizations.
Guidelines for Child Protection Mediation

Section 1: Introduction

1.1 What is Child Protection Mediation?

Child protection mediation (CPM) is a collaborative problem solving process involving an impartial and neutral person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals, and possibly others, in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned. The child’s voice in the decision making process is essential and is typically presented either directly by the child or by other means, such as by an advocate for the child.

CPM encourages constructive communication and information sharing and fosters an environment where genuine engagement and agreement is possible. As a consensual decision making process, no agreement can be reached unless all the involved parties agree. In addition to reaching important decisions regarding children and families, CPM can lead to a greater sense of teamwork and a greater understanding and ownership of resulting agreements by all involved.

1.2 Benefits of Child Protection Mediation

Today, the use of CPM is widely recognized as an invaluable service by child welfare stakeholders throughout North America and in many other parts of the world. Numerous research and evaluation efforts have confirmed that CPM programs, once instituted, produce noteworthy benefits. A recent review of the research in the field\(^1\) indicates that CPM:

- Is highly rated by participants, with both families and professionals perceiving the process to be fair and believing they had an opportunity to have their concerns heard by others;
- Produces a high level of settlements, with 60 to 80 percent of mediated cases reaching full agreements and another 10 to 20 percent reaching partial agreements;
- Can expedite permanency by resolving or reducing the contested issues;
- Is effective at all stages of case processing from the filing of the petition through an adoption;
- Helps to engage parents, with 70 to 80 percent of the professionals who work with families in the child protection system reporting that parents were more involved in case planning when mediation was used;
- Helps to engage extended families, with studies showing that programs typically invite extended family and friends to participate whenever the parties believe their participation would be useful;
- Effectively addresses problems that are rarely dealt with in a court hearing including communication issues among the mediation parties;
- Reduces case processing time, with a number of studies suggesting that mediation helps families achieve permanency in less time;
- Encourages greater parental compliance, as shown by reduced number of contested review hearings, and generally better performance on the treatment plan;
- Saves courts and agencies money and staff time, with evidence that mediation can help the system to reduce the length of time a child spends in foster care and to meet legislated time frames for case processing;

\(^1\) Portions of this section were adapted from “What We Know Now: Findings from Dependency Mediation Research” by Nancy Thoennes, Family Court Review, (2009).vol. 47. 21-37.
Guidelines for Child Protection Mediation

- Often results in mediated treatment plans that contain more services for children than do non-mediated plans;
- Results in greater use of kinship care than in non-mediated cases in some studies.

In addition to the above reported research, judges frequently have noted the benefits of CPM. For example, Judge Leonard Edwards, Past President of the National Council of Juvenile and Family Court Judges, wrote “CPM should be an integral part of every juvenile dependency court in the nation. From a judicial perspective it accomplishes a number of goals. Mediation saves court time; it produces better, more detailed, nuanced, and longer-lasting results than litigated cases; it creates a problem-solving atmosphere in the court environment (an atmosphere that better serves all parties); it engages the parents in the decision making process, thus making it more likely that they will follow any plan that they have helped draft; it reduces the time children remain in temporary care; and, finally, it shortens the time to permanency.”

1.3 History and Mission

CPM programs have developed gradually on a community by community basis as an alternative to traditional litigation. Early proponents of CPM were frustrated with the slow pace and adversarial nature of litigation and were looking for a better, more timely and collaborative decision making process.

In 1995, the National Council of Juvenile and Family Court Judges (NCJFCJ) published Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases which included a discussion of the benefits of CPM and recommendations for implementation of court connected CPM programs in the United States. The American Bar Association subsequently endorsed and decided to “encourage support for...and implementation of the Resource Guidelines.”

In Canada, the use of CPM and other collaborative decision making processes was encouraged by the enactment of statutory provisions in child protection legislation in many jurisdictions. In British Columbia, the current provincial legislation, which greatly influenced the use of CPM, was proclaimed in 1996. It includes principles and provisions for mediation and other dispute resolution processes. This led to building a strong infrastructure, which brought together legal and child welfare professionals. Since then, similar statutory provisions have been enacted in many other provinces across Canada.

In 1997, the United States Congress passed the Adoption and Safe Families Act (ASFA). The Act, ensuing federal regulations, and other federal legislation, such as the Fostering Connections to Success and Increasing Adoptions Act of 2008, made child safety and permanency the primary focus of the law. New requirements emphasized more timely permanency decision making, relative care, increased judicial oversight and expanded foster parents’ rights. When implementing ASFA, many jurisdictions developed CPM programs to aid the child welfare agencies and courts in meeting the new requirements and improving outcomes for families. These Guidelines reflect the collective wisdom and experience of successful CPM practitioners and programs throughout North America and important CPM research, and builds upon the federal laws and recommendations included in NCJFCJ’s 1995 Resource Guidelines. The goals of these CPM Guidelines are to:

- Articulate the principles and philosophy that guide effective CPM;
- Provide program developers and managers with a template for creating and evaluating successful programs;
- Offer a standard that can be taken to funders, court systems, child welfare agencies, legislators, and others to promote high quality services;

---

Guidelines for Child Protection Mediation

- Help judges, social workers, lawyers, mediators and other professionals evaluate their approach to CPM and improve their skills and programs.

While CPM programs operate in a variety of diverse settings which may require slightly different operational approaches, these Guidelines are intended to apply across the numerous and distinctive legal, cultural and institutional frameworks in North America.

CPM programs can be organized and conducted in many different ways and still be effective provided they adhere to the highest standards of practice and ensure that children and victims of domestic violence are protected, families are empowered and effectively engaged, and professionals collaboratively and meaningfully engage with one another and the children and families they seek to protect.

1.4 How the Guidelines Were Developed

These Guidelines were developed by the Child Welfare Collaborative Decision Making Network. The Network operates with the support and guidance of a number of organizations including the Association of Family and Conciliation Courts (AFCC), the American Humane Association (AHA), and the Werner Institute of Creighton University.

The Network grew out of a number of Think Tanks on Collaborative Decision Making in Child Welfare, which have met annually since 2007 in conjunction with the AFCC annual meeting. It became clear during these discussions that the establishment of a more formal process that reflected the three decades of experience and the research on CPM would be the best foundation for these Guidelines. A Guidelines Work Group, consisting of mediation program managers, mediators, researchers, mediation trainers, policy experts, child protection experts, and professional organization representatives from the United States and Canada drafted an initial set of proposed Guidelines and invited broad input from child protection, judicial, mediation and other experts. These Guidelines were then revised to reflect many of the constructive ideas and feedback received during the public comment period.

Section 2: Philosophy

Core values inherent in child welfare practice are reflected in the philosophical underpinnings of child protection mediation:

- The safety, permanency, and the well-being of children are paramount;
- Genuine and sustained engagement of families in their child protection cases is promoted by involving families as full participants in the discussions and decisions that affect their futures;
- Families are of critical importance to children and should be involved in making decisions about them;
- Whenever it is possible and safe, the best place for children to be is with their families;
- The child’s “voice” is essential in child protection decision making;
- Cooperative relationships and collaborative decision making best suit the resolution of most child protection concerns and should be promoted and sustained throughout the child protection system in ways that transcend formal mediation and other decision making forums;
- The inherent disparity in power among parties in child protection can be managed, and fair, voluntary and informed decision making promoted, when discussions are facilitated by impartial, competent mediators who are independent of the case. It is essential to prepare participants to understand and be effective in mediation;
- Timely resolution of disputes benefits all involved.
Guidelines for Child Protection Mediation

Section 3: Guiding Principles

Collaborative decision making should be promoted throughout the entire child protection process. CPM provides invaluable assistance to the collaborative process by providing a constructive forum for the timely resolution of issues in a manner that best protects children while also promoting increased cooperation among the stakeholders. CPM has the potential to assure that families participate in the decision making process with child protection professionals in a manner that enables all voices including the child’s voice to be heard and promotes the safety and the well-being of the child. In order to promote best practices, CPM should adhere to the following seven principles:

3.1 An Inclusive Process:

CPM should actively engage family members and child protection professionals to meaningfully participate in collaborative problem solving. Parents should safely participate in every aspect of CPM. When it is safe and appropriate, the child should also be given the opportunity to meaningfully participate in CPM, and in all cases there should be others present who can discuss and present the child’s interests, desires and perspectives so that the child’s “voice” will be heard in every mediation.

The participation of extended family, friends, and others may also play an important role in decision making and their participation may be essential if they will be impacted by decisions being made in mediation or are needed to implement any agreements reached in mediation.

CPM should be conducted with appropriate and reasonable accommodations for individuals with disabilities. Mediators and other mediation participants should seek to enhance each individual’s capacity to effectively participate in mediation.

Respect, appreciation, and understanding of cultural, racial, religious, socioeconomic and other issues of diversity should be promoted in all aspects of the CPM process.

3.2 A Collaborative Process:

CPM should be conducted in a manner that promotes constructive and open communication among the mediation participants and encourages participants to effectively address the needs of children and families in a collaborative manner. Through respectful dialogue and problem solving, mediation participants can find mutually acceptable solutions while at the same time improving the capacity of the family and professionals to constructively work together.

3.3 A Timely Process:

CPM needs to occur in a timely manner to encourage early engagement and collaborative problem solving, promote timely problem resolution, and ensure that CPM does not delay the progression of a case through the child protection legal system.

3.4 A Safe Process:

CPM must not compromise the safety of participants or non-participants who may be affected by the mediation process or outcome before, during or after the mediation session.
Guidelines for Child Protection Mediation

3.5  A Confidential Process:

Confidentiality is essential to the integrity and effectiveness of the CPM process so that parties feel free to speak openly with others. Participants need to understand the limits of confidentiality and privilege that may exist so they can make informed decisions regarding the extent to which they will communicate openly in mediation.

3.6  An Ethical Process:

CPM should be conducted in accordance with widely accepted standards of professional conduct for mediators that address all ethical issues including, but not limited to the following:

- Empowerment and Self-Determination of All Mediation Participants;
- Voluntary Nature of Mediation;
- Impartiality and Neutrality of the Mediator;
- Confidentiality of Mediation Communications;
- Mediator Avoidance of Conflicts of Interests;
- Mediator Competence.

3.7  A Supported Quality Process:

Leaders at the highest levels of court systems and child welfare stakeholder groups should be engaged in the development, implementation, evaluation and promotion of CPM and actively support quality CPM practice. Programs should ensure that competent and adequately trained mediators conduct CPM sessions. CPM programs should work to enhance child protection stakeholder understanding, capacity and utilization of collaborative problem solving methods and should maintain meaningful process and outcome evaluation procedures in order to improve program effectiveness and increase participant satisfaction.
Guidelines for Child Protection Mediation

Section 4: Program Development, Design and Operation

Planning, designing and operating a successful CPM program is a challenging task that involves bringing together the various child protection stakeholders, obtaining judicial support, funding, and, in some cases, fostering a paradigm shift that creates greater collaboration between the stakeholders and parents and a commitment by all to better include families in the decision making process.

4.1 Planning the Program

CPM program planning should be a collaborative process that addresses the needs of program stakeholders and values their input. Designers should begin by identifying the various stakeholders essential to setting up an effective program. The make-up of stakeholder groups often includes:

- Child protection agency administrators;
- Case workers (representing the child welfare authority) and their legal counsel;
- Domestic violence experts;
- Attorneys representing children, parents and other parties to the litigation;
- Guardians ad litem (GALs) or others representing the children;
- Court Appointed Special Advocates (CASAs);
- Native American, Aboriginal or other tribal representatives;
- Mediators and mediation experts; and
- The judiciary.

Those who might assist a stakeholder group include parents, foster parents and youth from the community being served, as well as individuals and organizations representing bar associations, universities, national child protection or professional development organizations and groups representing mental health, substance abuse issues and/or developmental disabilities.

Convening the Planning Group

Typically, the court, the child protection agency, or a private agency takes on the role of convening the planning group. Using a neutral facilitator from outside the group to conduct meetings can be helpful to promote collaboration and, to some extent, model the mediation process for the stakeholders. Once assembled, the stakeholder group should review and consider evidence based research and evaluation, literature and reports that document lessons learned from other programs. It is also helpful to hear from professionals having experience with established CPM programs in other localities.

4.2 Program Design and Operation

Every planning group and/or program manager will likely need to address certain design and basic operations issues, which are identified in this section.

4.2.1 Program Start-Up

CPM may be fully instituted or started as a pilot project. A pilot provides an opportunity to test the effectiveness and viability of CPM in a jurisdiction before a significant amount of time and money are expended or when there is the initial resistance and opposition to a full program. Another advantage to a pilot program is that program design, protocol, and forms can be tested and modified as needed before the full program is launched.

Ideally, CPM programs should not be launched before the involved judges, attorneys and case workers participate in an orientation meeting lead by a professional mediation trainer. In addition to explaining the details of the pilot and the protocol, the training agenda should include: an introduction to mediation; an introduction to CPM; strategies to optimize the CPM experience for everyone involved; and a discussion of practical and ethical issues. To help the trainees envision themselves in mediation, a video or live
demonstration of a CPM session should also be presented. In addition, involving judges, child protection workers and attorneys from a jurisdiction with a successful CPM program can help to address any concerns that individual stakeholders may have concerning CPM or their role in CPM.

4.2.2 Program Location

Where a program is housed will depend on many variables. The location of the program is not nearly as important as whether the participants perceive the location as an accessible, neutral and safe place and perceive CPM as a beneficial alternative to the options available through traditional litigation. CPM programs are currently housed in a variety of locations, including community dispute resolution centers, state or provincial court administration offices, child welfare agencies, child welfare legal offices, private mediator offices, courts, universities, and attorney general or justice services offices. Each option has unique advantages but also may carry specific disadvantages.

4.2.3 Program Administration

CPM programs require a clear organizational structure and a program manager who will oversee the day-to-day operation, quality control, ongoing program development and public relations. Ideally, the manager should be a trained mediator who mediates as needed, but is allotted sufficient time to perform program management duties. This individual should also be the program’s liaison to the judiciary and other stakeholders, and should maintain ongoing contact with the key stakeholders.

4.2.4 Cases and Timing of Referrals

The vast majority of child protection cases are appropriate for mediation at every stage of the case. Family violence/abuse, mental illness, substance abuse and other considerations may impact how the session will be structured, whether or not safety precautions should be put in place, what will be discussed, and who will be at the table, but they do not necessarily preclude mediation. Examples of cases which may be inappropriate for mediation include those involving family violence where the safety of the participants or others will be significantly endangered; where there may be an overwhelming imbalance of power between the perpetrator and the victim or those cases where the capacity of a party to meaningfully participate in mediation may be severely limited due to mental illness or substance abuse. With careful and ongoing safety screening and assessment and proper accommodation in mediation, most cases can be suitable for mediation. Participation in mediation will not remove a case from the docket or the court’s jurisdiction. The goal of mediation of child protection cases is to expedite the process to enable a child to reach permanency sooner and to increase meaningful understanding and engagement between the parties. The interplay between mediation and the court process is more a “both/and” relationship rather than an “either/or” relationship. There is a strong role for the court in reviewing mediation settlement agreements and ensuring the judge is comfortable with all the components of the agreement regardless of the stage of the case in which mediation is used.

CPM is very effective in the early stages of the case and should be considered even when the legal issues seem simple for counsel to resolve. Stakeholders report that cases go more smoothly when everyone has had an opportunity to hear the same information and come together early in the process, especially related to services. However, court statistics show that CPM can be beneficial at any stage of a case. Child protection issues generally vary according to the stage of a child protection case. At each stage, the actual issues for discussion will be identified by the mediation participants, by the court or both. The names of the stages provided below are intended as generic references with the understanding that exact names and practices may vary considerably from jurisdiction to jurisdiction.

Pre-Petition

Mediation may be used prior to filing a court petition to address how a child can remain in the care of the family with specific services and safety plans. Such a referral at the preventive stages could be part of an effort to avoid a court petition altogether by resolving the problems early on. Early use of CPM is an opportunity for professionals and the family to meet with an impartial person in a confidential and neutral environment, where, within the framework of the allegations and issues, the family’s strengths can be identified in the spirit of designing change and making better decisions for the children in the future. Mediation conducted early encourages family engagement, collaborative decision making, and a team
Guidelines for Child Protection Mediation

approach to handling child protection cases. The referral source in pre-petition cases is often the child protection agency rather than the court or attorneys and the agreement is shared with the referral source, but not the court, since there is not an open court case at this stage.

Emergency Removal

Sometimes circumstances brought to the attention of the child protection system result in the immediate need to remove children from their parents to ensure their safety.

As with pre-petition cases, use of CPM at the removal stage is an opportunity to gain understanding, utilize the family’s strengths to make important changes, and identify and access needed services early on. CPM at this time also provides an opportunity to consider extended family members, friends, community members, and neighbors who could provide potential placement options for the child and possibly serve as resources for assisting the family or supervising visitation. When children are not or cannot be placed with family or friends, early CPM allows the parents and temporary caregivers to meet in a safe and balanced setting where they can begin to foster a strong working relationship built upon respect, understanding, cooperation, and mutual concern for the child.

Preliminary Hearing

In this stage, the parents are provided an opportunity to respond to the allegations of abuse, neglect or abandonment. If the parents do not consent to the allegations of abuse, neglect or abandonment, the case then proceeds to an adjudicatory hearing where the court will determine whether child abuse or neglect has occurred and whether the court therefore has jurisdiction in the case to intervene on behalf of the child. As the issues at this stage are similar to the subsequent Adjudicatory and Dispositional Stages below, a more detailed discussion of the issues appropriate for CPM is provided immediately below.

Adjudication and Disposition

The Adjudicatory and Dispositional phases of a case focus on whether there will be a judicial determination of child abuse or neglect and, if the adjudication confirms that child abuse and neglect has occurred, a court adopted case plan. CPM at these stages provides an alternative to contested litigation and offers a collaborative process to reach agreement about whether the child may have been or is at significant risk of becoming abused, neglected or abandoned. In addition, dispositional issues such as placement decisions and evaluations, treatment, and services for the child or parents can be addressed. Parties may also discuss whether or not the child can return home soon, and if not, how the issues that brought the family to court can be ameliorated in a timely manner. CPM can help to engage the family and to assist in crafting customized service plans that are more family and case specific. Case plans can be drafted during the session or at a later date.

Permanency Planning

CPM at the permanency stage is an opportunity for a comprehensive discussion about the permanency goals available, how to support the goals, time frames for achieving the goals and their impact on the family’s future. Additional topics may include, but are not limited to, transition planning for youth aging out of care, maintaining important relationships, and identifying community services available after the case is closed.

Termination of Parental Rights/Relinquishment

CPM at this stage of the case is a forum in which this difficult subject can be explored in depth in a frank and deliberate manner. The topics addressed can include what a trial might look like, what the probable outcome might be, the impact a contested and adversarial trial could have on important family relationships and whether voluntary relinquishment would minimize that impact, whether the parent(s) are likely to make a meaningful effort to remedy their problems at this late stage, and what other options are available.

Some jurisdictions allow open adoption whereby potential adoptive and birth families may enter into contracts for post-adoption contact. In jurisdictions without open adoption, informal agreements between the families related to continued contact following termination or relinquishment are still possible, though
Guidelines for Child Protection Mediation

not legally enforceable. Consequently, in those instances, it is important that parents fully understand the difference between a promise and a binding legal contract.

Status Review Hearings

Status review hearings, as well as an array of other conferences and meetings, occur throughout the pendency of the case and can often be facilitated by the mediation process. For example, mediation provides an opportunity to gain understanding at review stages while the family is still receiving reunification services. Often disputes/differences arise between the child protection professionals and the family members regarding numerous issues, such as whether programs that have been completed will suffice for some similar case plan components, whether the case plan needs to be modified, visitation issues, placement concerns, whether reasonable efforts have been made or whether there has been sufficient compliance/progress to now return the child to a parent with services in place. Post-termination cases can also benefit from mediation when adoption is pending but the case is not progressing due to misunderstandings between the adoptive parents and the adoption agency, or the case is “stuck” due to an administrative barrier.

Adoption

Discussions in CPM can include pre-and post-adoption challenges, contested adoptions between two or more competing potential adoptive families, the need for post adoption services, a potential adoption disruption, and whether some degree of open adoption is possible. Adoption laws vary by jurisdiction. Therefore, any program planning to mediate adoption cases should become familiar with their jurisdiction’s statutes and practices.

4.2.5 Participants

As CPM is an inclusive process, programs should consider protocols and practices that support participation not only by parties to the litigation, but also by others involved with the family. These collateral participants often bring important resources and information to the discussion that may assist with finding solutions and options. The court may determine who is invited or ordered to participate in a CPM session. While parties may be ordered to appear at mediation by the court they are not required to reach an agreement. Other people who are important to the family may also participate with the consent of the mediation participants. CPM is most beneficial when everyone necessary to resolve the issues meaningfully and safely participates and contributes constructively. All parties must receive information about the mediation process and be free to make an informed decision about their own participation.

CPM programs differ as to whether participation in mediation is voluntary, according to who is mandated to attend and who can be invited. Typically, parents, their attorneys, the child’s representative and the child protection agency representative(s) and their attorneys participate in CPM. Although some programs discourage attorney participation, participants should have the opportunity to have an attorney present during mediation, and when parties have attorneys; their counsel should be provided notice of the CPM regardless of their intention to attend. Others who frequently attend CPM include, but are not limited to extended family members, foster parents, therapists, direct services providers, domestic violence advocates, cultural liaisons, spiritual advisors, friends, and significant others. Increasingly programs are recognizing the value of including affected children in CPM discussions.

In some jurisdictions, tribal and Aboriginal representatives are considered parties to the litigation. Regardless of party status, tribal and Aboriginal representatives can help support cultural traditions in the mediation process. They can also help with planning and bring cultural and community resources into play as well as provide support to the child and family.
Guidelines for Child Protection Mediation

4.2.6 Roles of the Participants

Roles of Parents

The full and active engagement of parents is an essential element of the mediation process. In mediation, parents are given the opportunity to collaborate in the decision making process concerning their children and their families. Through their active participation in mediation, they can learn about and discuss the issues that brought the family to the attention of the CPS system. Most importantly, they can express their own needs and those of their child as well as their desired outcomes for themselves and their children.

Some of the benefits of actively involving and empowering parents in CPM include the following:
- Increase the exchange of information among the CPM participants;
- Improve the quality of the agreement due to greater input from all CPM participants;
- Reinforce the parents’ role by providing them with the opportunity to contribute to the efforts to find a solution;
- Increase the parent’s sense of ownership and understanding of the agreement;
- Increase the parental compliance with the agreement;
- Reduce conflict between the parents, care providers and foster parents and professionals and increase the group’s ability to work effectively as a team; and
- Increase the parent’s confidence in the child protection process.

Role of Parent’s Attorney

Attorneys for the parents are responsible for preparing their clients prior to the mediation session, counseling and advising them before, during and after mediation, and, at times, advocating on behalf of their clients. Their role also includes helping parents understand their situation and their legal rights, consider all their options and understand the legal consequences of any agreement reached in mediation. Attorneys for victims of domestic violence should alert mediators prior to the session so appropriate accommodations can be provided to allow the victim to participate in a safe and productive manner. When the parents have or are likely to have competing interests, parents should have separate attorneys.

Role of the Child Protective Services Representative

Typically the representative from the child protection agency is responsible for identifying and presenting the agency’s understanding of the family’s problems and concerns about the child and family. The representative should be prepared to briefly summarize efforts made to prevent a child’s placement and to propose possible interventions and services that may address the concerns that made placement necessary. Additionally, the representative should be able to clearly articulate the agency’s overall plan for how to achieve safety, stability and permanency for the child. For CPM to be most effective, the representative should have full authority to negotiate and settle any issues that arise within the mediation.

Role of the Agency’s Attorney or Attorney for State/Province

The agency representative and the attorney for the agency or state/province both typically participate in CPM. The attorney optimally meets with the case worker prior to the mediation to discuss the case and the agency’s concerns. The attorney presents the legal issues in the case and represents the legal interest of the agency or the state/province during mediation. The attorney helps the case worker understand legal consequences of any decisions made at mediation, including any agreement they may enter into as a result of the mediation.

Role of Guardian Ad Litem or Court Appointed Special Advocate

Jurisdictions differ as to who represents the child’s interest in a child protection case and when this individual is appointed. In any case, an individual advocating for the child’s best interest should participate in CPM. Some jurisdictions rely on a guardian ad litem (GAL) who gathers information regarding the child’s life prior to mediation and participates in the decision regarding the child’s
Guidelines for Child Protection Mediation

participation in mediation. During mediation, the GAL presents information that is pertinent to the child’s case, including information about removal and placement, and often makes recommendations believed to address the child’s best interests. In some jurisdictions, Court Appointed Special Advocate (CASA) volunteers are appointed by the judge to watch over and advocate for the child. If appointed, CASA volunteers should participate in CPM to provide information about the family, the child and the child’s situation, that informs the discussion and helps with decision making.

Role of Attorney for Child

In some jurisdictions the child may be represented by an attorney who advocates for the child’s wishes. This attorney should assist in determining if the child should participate in CPM. If the child participates, the attorney should meet with and prepare the child prior to, and counsel and advise the child during the session. The attorney can support the child’s participation and assist the child to articulate his/her wants and needs, including but not limited to any services, visitation or placement options. If the child does not participate in CPM, the attorney should be the child’s “voice” and articulate his/her wants and needs. Whether the child participates or not, during CPM the attorney presents and frames the legal issues on behalf of the child and safeguards the child’s legal interests. The attorney is also responsible for helping the child to understand and consider what their options and legal rights are before, during and after CPM. This includes counseling the child as to the consequences of any decisions made during the session, including any agreement reached.

Role of the Child

CPM programs should specify who will decide whether and how a child may participate in the process. Factors to be weighed in such a determination include the child’s wishes, the child’s age and developmental capacity, and child protective factors, including the nature of the allegations in the case. There should be a meaningful inquiry to determine if the child understands mediation and if the child wants to participate. This discussion should occur between the child and the child’s attorney, GAL or CASA, or other appropriate support person prior to mediation. Whoever meets with the child before mediation should elicit the child’s preferences in a developmentally appropriate manner. A child should not attend a mediation session with an alleged perpetrator in cases where the confrontation is determined to be harmful to the child.

If a child expresses an interest in participation, the mediator should work with the child’s legal representative to determine the child’s capacity to actively and safely participate in the mediation. If a child does not wish to participate or it is determined that the child should not participate in person, alternative methods for ensuring the child’s “voice” is present may be utilized. For example the child could be allowed to appear by video or teleconference, to write a letter to be read at the mediation and/or to express their concerns to their attorney, GAL, or CASA, who can then relay their concerns directly in mediation.

Role of Other Participants

Other CPM participants may include foster parents, extended family, adoptive parents, support persons, tribal representatives, therapists, etc. Some of these participants may also elect to bring attorneys to assist them in mediation. Their role in mediation will be determined by the nature of the case and reason for their participation in mediation. If CPM communications are confidential by law or rule, the participation of non-party participants will likely require the permission of the mediation parties as non-party participants would be able to hear otherwise confidential communications. Non-party participants would be bound by the same confidentiality laws and rules that apply to other mediation participants, and would be required to sign the agreement to mediate if one is utilized. Unless non-party participants are agreeing to be bound in some way by the agreement, consent by non-party participants likely will not be needed in order for the parties to reach a mediation settlement agreement.
Guidelines for Child Protection Mediation

4.2.7 Time Allotted for Mediation

A key element of mediation, distinguishing it from both formal court hearings and mandated court conferences, is that discussions can proceed slowly, giving people an opportunity to ask questions, absorb information, and then process and react to the unfolding conversation. A clear protocol should be established to determine who will set the time for mediations and how they will be scheduled. Some programs may set a basic time frame for sessions such as two or three hours and then adjust it depending on the specifics of the case, the number of people involved, or whether or not attorneys will be present. Other program designs may allow for greater flexibility in order to be responsive to local practices or needs. Time constraints, cost considerations, and other pressures exist in all systems. However, courts, child protection agencies, attorneys and others need to allow sufficient time for the mediation to succeed.

The program and individual mediators may need to resist or defuse pressure to conduct mediations quickly or shorten the sessions. It diminishes the effectiveness of the mediation when these vital interactions are compressed or truncated. To the extent possible, parties should decide for themselves when their conversation is concluded, reflecting the underlying principle of mediation which supports self-determination and requires that the mediation process be responsive to the needs of the participants.

4.2.8 Mediation Communication Privilege/Confidentiality

Confidentiality is essential to the integrity and effectiveness of the mediation process. In CPM, confidentiality helps to create a forum in which parents may safely and openly discuss and consider alternatives for their children and themselves, as well as any pending legal issues. Lawyers, agency representatives, and other professionals are also able to more freely share and discuss their concerns including possibly the allegations of child maltreatment, concerns for the children or parents, etc.

Mediators should conduct CPM consistent with ethical standards governing the confidentiality of mediation communications in their jurisdiction. Prior to or at the beginning of the mediation, mediators should inform participants of the extent to which mediation communications are confidential and/or privileged in a manner clear to all participants. Mediators should be knowledgeable of the limits of mediation confidentiality protections and explain carefully that there are exceptions to mediation confidentiality.

An agreement to mediate may be utilized to address confidentiality and privilege. The agreement should be written in plain language and mediators should discuss these provisions with participants prior to or at the beginning of mediation and obtain each participant’s informed written consent. The confidentiality requirements of CPM should not limit the ability of the mediator and mediation participants to report new allegations of child abuse or neglect that may be disclosed in mediation.

If mediators conduct private sessions with a mediation participant or with fewer than all participants, the confidentiality of the private sessions must be maintained by the mediator unless the disclosing participant agrees otherwise. While this additional confidentiality protection requires the mediator to not disclose mediation communications to another mediation participant not attending the private session, it should not prevent the mediator from reporting new allegations of abuse or neglect which are revealed to the mediator in a private session. Mediators should make sure that mediation participants understand the limits of the confidentiality of the private session as well as the joint sessions.

Mediators should inform their program manager promptly if they are subpoenaed to testify in court or to disclose documents related to mediation. Mediators should consult legal counsel in responding to subpoenas that may require disclosure of information that relates to or arises out of the mediation process. Unless ordered otherwise by the court, mediators should honor all commitments made to the mediation participants concerning confidentiality.
Guidelines for Child Protection Mediation

4.2.9 Mediator Assignment and Selection and Co-Mediation

Ideally, the pool of potential mediators should reflect the diversity of the population they serve. In addition, a program should have the capacity to provide mediators with specific characteristics or skills when appropriate for a particular case. For example, a mediator who has experience working with children and adolescents may be able to engage them more easily and be better able to help them participate effectively in the mediation process. Other cases where mental health issues are prominent can benefit from having mediators who are knowledgeable and comfortable working with this population.

Some CPM programs utilize one mediator while others utilize a co-mediation model. The decision to use a single mediator or a team may ultimately be made because of economic or resources considerations. Using a single mediator is obviously more cost effective and allows coverage of more cases. A co-mediator model allows greater diversity in terms of age, gender or ethnicity, expertise and competencies and permits each mediator to assume complementary roles in mediation.

4.2.10 Agreements and Reporting Outcomes of Child Protection Mediation

Programs and their stakeholders must decide if, when and how to report outcomes of CPM sessions, and what information should be disclosed. Because the court may be required to take further action in the case, a judge may order or expect that the outcomes of CPM will be reported to the court regardless of whether an agreement is reached. Generally, CPM programs may advise the court regarding who attended mediation and whether a full or partial agreement has been reached or if the mediation has been adjourned and rescheduled for another session. Mediators should not provide any comments or make recommendations to the court as that practice will discourage frank and open communication in mediation. Moreover, the practice likely may violate mediator standards of practice as well as jurisdictional mediation confidentiality protections. It is also important that the mediator adhere to the ethical practice of mediation and neither offer nor be perceived as offering legal advice regarding discussions in mediation or potential agreements.

Writing and Enforcing Agreements

Programs need to consider many operational issues in designing their agreement process. Who will write the agreement, who will submit the agreement, and what the format of the agreement will be, all need to be decided. Many programs have the mediator write up the agreement during or after the session. Other programs designate one of the attorneys to draft the agreement. CPM programs should be careful that the designation of one individual to draft agreements does not compromise the impartiality or neutrality of the CPM program in substance or in appearance.

In some instances mediated agreements will be subject to the approval of the court. When deciding who will be responsible for presenting an agreement to the court, the mediation program or one of the parties, much will depend on whether cases will go before the judge immediately after the conclusion of the mediation session. If the program or the court requires the parties in CPM to physically sign the agreement before it is submitted, then parties must either be willing to wait for it to be completed after a session or return to the program for signing.

Programs and their stakeholders should decide whether agreements may be written in the parties’ own language or must use particular legal terminology required by the Court. To the extent possible, agreements should be written in plain understandable language. All participants’ obligations should be included in clear terms, and when possible, specific timeframes for compliance to the extent determined by the parties.

When participants reach an agreement in mediation, mediators should encourage them to consider signing a written agreement that reflects their oral agreement. Mediators should encourage parties to consider whether an oral agreement will be enforceable at all or to the same extent as a written agreement given the confidential nature of mediation.
Guidelines for Child Protection Mediation

Under some circumstances such as in the case of open adoptions in some jurisdictions, mediation participants may reach a voluntary agreement that may not be enforceable in whole or in part. Mediators should support the self-determination of mediation participants who choose to agree to such settlements and encourage discussions concerning the extent to which the agreement may or may not be enforceable.

4.2.11 Program Funding and Institutionalization

The source of funding for CPM programs is critical to the long term stability and success of the programs. Some sources include revenue from court fees or other common fees or line items in the court or child protection agency budget, at the state, provincial, county or local level. Because these cases often involve indigent parties, CPM programs should not be expected to be self sustaining through the collection of fees for service.

Court rules and legislation mandating the use of CPM are helpful, but they are not a definitive means to sustainability. The survival of CPM depends upon it being institutionalized into the basic framework of the child protection and/or court systems. It is the responsibility of program staff to help the judiciary, lawyers, case workers and other stakeholders understand that CPM offers the family and child protection stakeholders a positive, empowering, constructive and confidential experience that is unavailable in most other forums. Committed, invested stakeholders are strong and effective allies and their continuing support is essential to program success.

4.2.12 Mediator Recruitment and Training

Mediators who conduct CPM must be developed through targeted, deliberate recruitment, training and supervision. Individual mediators must possess or be capable of acquiring and maintaining the skills, knowledge, ethics and qualities that are necessary to serve as a mediator for highly complex, legal, and emotionally laden disputes involving children, their families and child protection professionals.

Recruitment

It is important that mediators possess strong communication skills, education or experience in the helping professions and/or legal systems, be culturally responsive and meaningfully represent the diversity of the population who they will serve. CPM mediators frequently have prior experience as mediators in other areas or have backgrounds in other dispute resolution processes or methods. They may be attorneys, mental health professionals, or other qualified professionals.

Standards of Practice

CPM mediators should be governed by ethical principles and standards of professional conduct endorsed by most national mediation organizations (such as the Model Standards of Practice for Family and Divorce Mediation endorsed by the Association of Family and Conciliation Courts, The Family Law Section of the American Bar Association and other national organizations or the Model Standards of Conduct for Mediators endorsed by the Association for Conflict Resolution, American Bar Association and American Arbitration Association) or court approved mediation principles and standards. In some cases there may be jurisdiction specific mediation standards or other professional association standards such as the National Association of Social Workers (NASW) Standards of Practice for Social Work Mediators. Mediators should strive to comply with all applicable standards.

Training Requirements

Child protection mediators should be required to complete at least 40 hours of CPM training. CPM Training should be conducted by highly experienced mediator trainers. Training should include both didactic and experiential learning in multi-party mediation. Final selection of mediators should be contingent on successful completion of training and mediation observation.
Guidelines for Child Protection Mediation

CPM training for mediators should include the following:

- Conflict Resolution Concepts in CPM;
- Court Process in CPM;
- Mediation Process and Techniques in CPM;
- Communication Skills in CPM;
- Standards of Conduct/Ethics for Mediators in CPM;
- Treatment Options and Community Resources in CPM;
- Diversity Issues in CPM;
- Family Dynamics, Child Development and Psychological Issues in CPM;
- Domestic Violence Issues in CPM;
- Working with Multiple Parties in CPM;
- Issues Concerning the Needs of Children in the Context of Child Protection Proceedings;
- Child Protection Laws;
- Role of Parties and Participants in CPM.

There should be minimum requirements for continuing education and professional development for child protection mediators. CPM mediators should receive periodic updates on changes to laws, court rules and child welfare agency policies and practices. Additionally, CPM mediators should be encouraged to take advanced training in mediation ethics and mediation skills.

Mentoring and Supervision

New mediators should have the opportunity to observe or co-mediate with more experienced practitioners. Programs should create a skill building system of coaching and critiquing new CPM mediators as well as an established standardized practice for assessing mediator skills on an ongoing basis.
Guidelines for Child Protection Mediation

Section 5: Conducting Child Protection Mediation

There are a number of issues that the mediator and program manager must consider before and during mediation sessions.

5.1 The Role of the CPM Mediator

The mediator’s role is to create an atmosphere that empowers the mediation participants to meaningfully engage in a safe communication and problem-solving process and make informed and voluntary decisions. The mediator typically begins by explaining the mediation process to the participants and ensuring that they understand the process and the extent to which mediation communications may be confidential or privileged. The mediator encourages the parties to identify what issues they wish to discuss, exchange information, identify the options and alternatives available to resolve the issue, and then negotiate and decide which solution is acceptable to all the mediation parties. The mediator strives to be impartial to all participants and neutral to the outcome and does not decide any aspect of the issues for the parties. The mediator may help to structure the mediation process by suggesting an agenda, meeting at times privately with different mediation participants during the session, asking questions, etc. in order to promote an effective mediation process. If the mediator believes the case may not be suitable for mediation, the mediator may adjourn or terminate the mediation session.

5.2 Conducting CPM in a Culturally Appropriate Manner

CPM brings together people from a rich diversity of backgrounds and cultures. Respect for heritage, ethnicity, race, religion, spiritual beliefs, traditions, customs, socioeconomic status, education, gender, gender identity, sexual orientation, age, and many other social characteristics should be at the heart of every CPM program. Furthermore, it is well documented that many cultural groups are overrepresented in the child welfare system, and it is essential that CPM programs are culturally responsive. Cultural responsiveness should be reflected throughout the program in its principles, goals, operations, standards, hiring, professional development, service delivery and practice.

It is essential for mediators and others in the program to show a genuine appreciation and respect for the culture of the CPM participants. Mediators should be sensitive to the norms regarding power structure, gender, role, child rearing and decision making that may impact the mediation and outcome while at the same time ensuring that all parties can meaningfully participate in mediation. Mediators should strive to become aware of, and remediate to the extent possible, their own implicit biases that may adversely affect their ability to mediate cases.

5.3 Use of Language Interpreters

When there are language differences, mediators should consider the need for both oral interpretation of communications during the session and for written translation of documents. Neutral and impartial interpreters should be brought in to assist with the mediation process, even if the mediator is bilingual. It is recommended that interpreters not be otherwise involved in the case, and where possible, should be assigned to the case by the court or other managing entity so programs, as well as the individual requiring interpretation, can verify their competence. The interpreters should fully understand the extent to which mediation communications are confidential.

Mediators should promote a process where only one individual is talking at a time to enable adequate interpretation. Consideration should also be given as to where to the interpreter will be seated in the mediation to most effectively assist the process. Mediators should prepare the interpreter for CPM and convey to the interpreter that it is a confidential process intended to assist everyone to better understand

Guidelines for Child Protection Mediation

It is very important that the participants understand the interpreter and that all communications must be interpreted. An inquiry should be made as to whether the interpreter may require a brief break to ensure the interpreter’s ongoing effectiveness and accuracy. In some cases, consideration should be given as to whether more than one interpreter would aid the process. Subsequent to the session, mediators should work with the parties and the interpreter to determine the process for writing the agreement; whether the agreement will be in English only or both English and the parties’ native language; and who will translate the agreement.

5.4 Mediation: Safety and Capacity

CPM sessions are structured and conducted so as to address safety and capacity concerns, provide appropriate accommodation, and promote engagement of individuals with diminished capacity and/or disabilities. This notwithstanding, if an individual is unable to exercise self-determination, or if another impediment to mediation exists that cannot be remedied, a case may need to be excluded from mediation. Mediators should continue the safety and capacity assessment process throughout the course of mediation.

5.4.1 Safety Considerations

CPM programs should develop clear protocols that are designed to protect everyone’s safety. When screening for safety concerns, programs should seek to identify what, if any, accommodations can be offered to enable an individual to participate or whether mediation should take place. Consideration should be given to where CPM sessions can be safely conducted. When mediation is conducted in less secure facilities, assessment protocols may need to be more comprehensive.

5.4.2 Family Violence

Despite a high correlation between child maltreatment and domestic violence, the existence of family violence in child protection cases does not necessarily preclude CPM. However, mediation is not appropriate when a mediation party is unable to safely advocate for his or her needs and interests or anyone’s safety may endangered as a result of mediation. Victim empowerment is a key principle in effective handling of family violence cases. Therefore, considerations should be given as to whether participation in mediation will put the victim or others at risk before, during or after the conclusion of the session(s). Prior to CPM, program staff may contact the professionals on the case, or review court records, case worker records, etc. to determine if safety concerns exists. Programs should also utilize individual pre-mediation questionnaires and/or private in-person or telephone intake interviews specifically intended to assess safety concerns. Determining whether CPM can be safely conducted when family violence exists is reliant upon a careful, case by case appraisal.

When evaluating the impact of family violence, it is important to look at more than physical abuse. Coercive and controlling behavior inhibits the opportunity for self-determination by all participants. When a mediator deems a case with family violence appropriate for mediation, the session(s) should be configured to maximize safety. The victim and perpetrator may use different entrances and be kept in separate rooms, or have separate sessions scheduled on different days. Or, one or more mediation parties may be included in the session via phone or teleconference. Other modifications may also be considered to enhance safety protections and to ensure that the parties can safely participate in every aspect of the mediation. Still, there may be circumstances where a victim feels unsafe or unable to exercise self-determination notwithstanding accommodations or modifications. In such an instance, the victim should have an opportunity to opt-out of mediation at any stage of the process.

CPM mediators should be competent in best practices and the latest research related to family violence. Moreover, they need to be skilled at knowing when and how to encourage a family violence victim to

---

Guidelines for Child Protection Mediation

speak up in mediation without endangering the safety of the victim or anyone else. Some techniques to achieve this goal include the following:

- Careful screening of cases;
- Meeting in a “safe” facility;
- Keeping the victim and perpetrator in separate meeting rooms;
- Utilizing a co-mediation model;
- Allowing the victim to bring a support person.

In addressing family violence concerns, the mediator should always adhere to recognized standards of professional conduct for mediators. In the event that family violence concerns increase and the mediator can no longer comply with these standards, the mediator should terminate mediation and take appropriate action to protect the safety of all involved.

5.4.3 Capacity

The mediator should assess whether a person is able to meaningfully participate and exercise self-determination and informed decision making on his or her own behalf as well as the mediator’s ability to accommodate the participation and engagement of all participants. A determination of incapacity need not preclude a person from participating in mediation, as it may be possible to include a court appointed guardian, surrogate or other advocate to provide support for the incapacitated person. In addition, some forms of incapacity may be resolved if mediation is adjourned and rescheduled for a later session. Some factors to consider when determining a party’s ability to exercise self-determination and meaningfully participate in mediation include whether he or she is able to understand the dispute, the facts relevant to the dispute, assess consequences to alternatives, freely make decisions, understand the mediation process, and be motivated to seek a positive outcome.

5.5 Power Imbalances

5.5.1 Nature of the Imbalances

In addition to the power imbalance that exists between a perpetrator and a family violence victim, there are often real or perceived imbalances of power between the state or province and the family. The mediator should promote a process that enables everyone to meaningfully participate in mediation and exercise self-determination in a balanced manner.

5.5.2 Strategies to Address the Power Imbalance between the Parents and the Child Welfare Agency

Power imbalances are best addressed by providing the parents with an equal opportunity to actively and meaningfully participate in mediation. As such, mediators should strive to:

- Educate parents and all mediation participants prior to mediation concerning CPM;
- Include the parents from the beginning;
- Begin the mediation in a way that empowers the parents and builds trust in the process;
- Make the language of the mediation understandable to all participants;
- Treat all parties impartially and not favor any mediation participants;
- Respect the parent’s right to disagree with the professionals and to seek court intervention instead of resolving the issues in mediation.
Guidelines for Child Protection Mediation

5.6 Maintaining Impartiality and Neutrality and Avoiding Conflicts of Interest

Mediators are ethically bound to be impartial to the mediation participants and neutral to the agreements reached in mediation. Mediators should maintain impartiality and neutrality throughout the mediation process and are obligated to assist all involved mediation participants. Due to these considerations, some professionals, such as child protection agency employees, should not be mediators in these cases.

Mediators should disclose potential conflicts of interest as soon as a mediator becomes aware of a conflict. If the mediation parties agree to continue the process after a mediator discloses a conflict, the mediator may continue to mediate if the conflict of interest does not compromise the impartiality and neutrality of the mediator. When there is a clear or undisclosed conflict of interest, a mediator should decline to mediate or withdraw if mediation has begun. Mediators should not create a conflict of interest during the mediation. A mediator should not provide any services to a party that is not directly related to the mediation process before, during or after the mediation.

5.7 Participant Preparation

CPM programs should strive to educate mediation participants about CPM prior to the mediation session. Whenever possible, program-specific print and/or audiovisual CPM information should be developed and distributed to all mediation participants. Programs could also host pre-mediation meetings to help prepare participants for mediation. In addition, CPM programs should regularly conduct ongoing mediation training for child protection system stakeholders.

Preparing families is particularly important and challenging. While mediation is a forum familiar to the professionals, it is likely foreign to families and foster parents who may feel intimidated and incapable of participating in a meaningful manner. Having someone thoroughly familiar with the mediation process prepare them to participate can be very helpful. It’s critical that the family participants have an opportunity to receive information and have their questions answered so that they understand the process (roles, extent and limitations of confidentiality, extent to which participation may be voluntary, etc.) and feel capable of participating. Whether the mediator does this or the program has someone else specifically assigned to this role, it is essential to the process.

In addition, at the beginning of mediation mediators should explain the following to mediation participants:

- The CPM process;
- The role of the mediator;
- The anticipated length of time of the mediation;
- The extent and limits of confidentiality;
- The extent to which the process is voluntary;
- The consensual nature of mediation;
- What will happen if agreements are reached; and
- What will happen if agreements are not reached.

5.8 Roles and Responsibilities of the Mediator: Conducting the Session

The mediator must maintain a neutral and impartial posture toward the participants and the issues in the mediation and model effective interpersonal communication and collaborative conflict resolution. As such, the mediator helps all CPM participants to establish their own working agenda, and becomes a role model for respecting differing perspectives and collaborative problem solving.

The mediator also must recognize when partial agreements are reached and check to be sure that the necessary mediation parties are in agreement. When agreements occur, the mediator should keep clear notes and be ready to accurately and fairly summarize them for the parties during the mediation.
5.9 Concluding Mediation

The mediator plays an important role at the end of the mediation by helping the parties to clarify and memorialize any final agreements. While the mediator need not write the agreement, the mediator should do so if requested by the parties. While mediators generally may serve as a scribe and record the agreement reached by the parties, mediators should be mindful of jurisdictional rules governing the unauthorized or unethical practice of law and the extent to which it may or may not impact the role of the mediator in recording agreements reached in mediation. The decision to assign the role of writing the agreement to someone other than the mediator should be made by the mediation participants so the mediator does not appear biased.

When a mediation session does not result in a whole or partial agreement, the mediator should acknowledge any constructive efforts the parties have made and encourage them to continue to strive to find common ground in the future. The mediator may also ask the parties if they wish to discuss how they will proceed to resolve the dispute after mediation and, if permitted, may offer to assist the parties in the future should there be interest and willingness to return to mediation later.
Guidelines for Child Protection Mediation

Section 6: Monitoring and Evaluation

6.1 Program Monitoring

It is extremely helpful to have a data collection mechanism in place before the program is launched. During the design phase, it is useful to think through the type of information that will be gathered for routine program monitoring, and, if relevant, the information needed for a full evaluation. It is also helpful to periodically review the collected data to determine what, if any, changes are necessary for improving the program.

Program monitoring should provide basic information that will allow program managers to assess how well the CPM program is meeting the needs of families and stakeholders. If possible, consideration should be given to creating a simple automated management information system to record basic information about cases and outcomes. Programs will have to consider what type of information they will be asked to routinely produce (e.g., for annual reports) before deciding what information to collect. It is likely that the system should note the participants’ names and contact information, the mediator, the dates of mediation, how long the session lasted, who appeared for mediation and the outcome of the session. In addition, CPM programs should consider collecting confidential satisfactions surveys from mediation participants and maintain summaries of satisfaction surveys separate and apart from specific case information to insure the confidentiality of mediation sessions.

6.2 Program Evaluation

A detailed evaluation can be used to address more complex questions about the process and its strengths and weaknesses. Such an evaluation might include collecting data to answer questions related to compliance with agreements, how agreements reached through the program differ from non-mediated agreements, or if there were certain types of cases where there were a lower percentage of agreements were reached. These questions will generally require the development of a comparison group, because at least some of the questions will need to examine the results of mediated cases and non-mediated cases. If the evaluation is longitudinal, the data will not be available immediately and this may mean reviewing court or agency documents or conducting interviews months or years after the mediation.

Section 7: Other Collaborative Decision Making Methods

Many child welfare and court systems employ a range of decision making processes from traditional approaches to those that are increasingly collaborative and involve children, their caregivers, extended family systems and others. In addition to CPM, other collaborative decision making processes include, but are not limited to: family group decision making, family group conferences, family case planning conferences, team decision making, integrated case management, and family team conferences.

A variety of approaches can help better meet the diverse needs of a wider range of families at all stages of their involvement in the child protection system. Multiple models may allow the family and professionals or the court to select the resolution method that best addresses the circumstances of the case.

While many communities are implementing multiple collaborative decision making processes, there is little research or literature on how to best coordinate these approaches. Having an array of decision making approaches presents both challenges and opportunities and identifying what strategies should be use to optimize their success can be quite challenging. Some steps include the following:

- Communities can conduct a survey of the various collaborative planning and decision making methods used in their area. At a minimum, multiple systems, including courts, child welfare, domestic violence, and mental health, should be surveyed.
Guidelines for Child Protection Mediation

- Stakeholders should exchange information concerning the strengths and weaknesses of various identified methods.

- Decision makers can map how these decision making processes can complement rather than compete with one another. Discussions around referral processes, policies, service agents, organization structures, and research/evaluation findings could help to create a framework for better coordinating these methods.

- Stakeholders should articulate through written literature and presentations how these processes fit together. For example, how each model works, how referral processes work, what models are used at specific points in the legal continuum and how referrals can be made between the different processes. These materials should identify through policies, training, and protocols, each model’s potential and clarify that they add value to and create a continuum of collaborative decision making methods.

- Stakeholders should conduct a continuous quality improvement process to periodically review the interface of the decision making processes, and make alterations as needed. Communities could bring together representatives from the agencies that play a significant role in these processes to review cases and discuss improvement mechanisms, model fidelity, and referral processes between the approaches, etc.

Section 8: Conclusion

Whenever possible, child protection agencies and courts should promote collaborative decision making opportunities including CPM before litigation or agency-based solutions are imposed on families. As reported in the Child Welfare Information Gateway published by the U.S. Department of Health and Human Services, “When families are part of the decision making process and have a say in developing plans that affect them and their children, they are more likely to be invested in the plans and more likely to commit to achieving objectives and complying with treatment that meets their individual needs.”  

CPM is a proven collaborative decision making process which holds the potential to better engage families; improve working relationships between families; foster parents and professionals; produce high levels of settlements at all stages; save judicial time; promote more timely resolution of cases; and improve parental compliance with case plan tasks in a cost efficient manner that is highly rated by both families and professionals. In some studies there is also evidence that CPM has resulted in increased placement in relative care and decreased placement in non-relative foster care when compared to litigation.

In addition to assisting in the resolution of child protection disputes, the NCJFCJ also points out that “The mediation process itself can also serve as a model for future nonviolent and constructive problem solving and conflict resolution.” As such there are other potential benefits to CPM including the potential to improve the overall quality of child protection services and promote more constructive conflict resolution by both families and child protection professionals.

6 www.childwelfare.gov/pubs/f_fam_engagement/

7 Resource Guidelines Improving Court Practice in Child Abuse and Neglect Cases, NCJFCJ 1995, Approved by the NCJFCJ Officers and Board of Trustees January 1995, p. 135.
Section 9: Glossary of Terms

A

Active efforts: An action that is required of the state in caring for an Indian child, mandated under ICWA. It refers to an effort more intense than the legal term “reasonable efforts”. Active efforts applies to providing remedial and rehabilitative services to the family prior to the removal of an Indian child from his or her parent or Indian custodian, and/or an intensive effort to reunify an Indian child with his or her parent or Indian custodian.

Adjudicatory Hearing: A hearing where the court determines whether the allegations in a petition have been proven; fact-finding hearing. Also known as a Jurisdictional Hearing.

Aging out: Refers to youth who will no longer be eligible to remain in foster care because of their age, generally 18-2.


Attorney for the Child: An attorney appointed to represent the wishes and interests of a child. (see Law Guardian and guardian ad litem).

CASA: Court Appointed Special Advocates: Trained community volunteers appointed by the court, who perform different functions in different jurisdictions including collecting information for the court or representing the best interests of a child.

Caseworker: An employee of a child welfare, social service agency, department, or ministry responsible for working with families in need of assistance. Caseworkers can but need not be social workers.

Confidentiality in CPM: Communications, be they oral, written or non-verbal, made during mediation are held in confidence and not disclosed to anyone outside the mediation unless all parties agree to such disclosure or the disclosure is permitted or mandated by the terms of the mediation confidentiality agreement, law, or order of the court.

Collaboration: A cooperative and non-competitive method of working together to resolve conflicts or problems in a manner that maximizes the extent to which concerns of all parties are best addressed.

Conflict of Interest: In CPM, a conflict of interest may include circumstances where the relationship between the mediator and the mediation participants or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality or neutrality.

Disposition: The outcome of a case; a hearing where the court decides whether a child remains in or returns home and what services the family needs.

E

Emergency Removal Hearing: (Shelter Care Hearing): Hearing to determine whether children can return home when child protection agency has done an emergency removal based on children being at imminent risk. Also known as Temporary Custody Hearing.

Empowerment: In the context of CPM, empowerment refers to the process whereby mediation participants are provided the opportunity and encouraged to actively participate in the communication and negotiations inherent in mediation.

Family Violence: A pattern of assaultive and coercive behaviors that operate at a variety of levels - physical, psychological, emotional, financial, or sexual - that one person uses against another person. The pattern of behaviors is neither impulsive nor "out of control", but is purposeful and instrumental in order
Guidelines for Child Protection Mediation

to gain compliance or control. As used in this document, the term “family violence” includes domestic and intimate partner violence.

Finding: A court’s determination of fact.

Foster care: A temporary placement of a child outside of their home with a family or in another setting, under the authority of an authorized agency or the child protection system.

G

Guardian ad litem (GAL): Generally, a person who speaks on behalf of someone who is not able to speak for him/herself. In some jurisdictions, a GAL is an advocate for the child and works to promote the child’s best interests. The GAL may or may not be an attorney. (See Law Guardian and Attorney for Child)

I

ICWA (US Law): The Indian Child Welfare Act. A US Law enacted in 1978 that sets out requirements for state courts handling of child protection cases where an Indian child is or is eligible to be a member of a federally recognized tribe. The intent of ICWA is to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families”. ICWA establishes requirements for US state courts with respect to tribal authorities, the requirements include notifying tribes of proceeding, the right of a tribe to intervene, minimum evidentiary requirements for placement of Native American children in foster care, use of expert testimony in making such determinations, the active efforts that must be made to avoid placement and toward reunification, and placement preferences. (See also Indian Custodian)

Indian custodian: As defined in the Indian Child Welfare Act (ICWA), an Indian custodian is “any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child [italics added]” (U.S.C. Title 25).

Impartiality: Includes freedom from favoritism or bias in word, action, or appearance.

K

Kinship (foster) care: Foster care placement with a non-parent family member.

L

Law Guardian: In some jurisdictions, an attorney who represents the child. (See Attorney for the child and Guardian ad Litem.)

M

Mandated Reporter: Certain professionals who are required to report child abuse or suspected maltreatment of children to a central authority.

Mediation: Mediation is a confidential and informal process whereby a neutral and impartial third person encourages communication and negotiation and facilitates the resolution of a dispute or problem without prescribing what it should be. It is a non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.

Mediator: An impartial and neutral third party who facilitates communication and negotiation among individuals or groups engaged in a dispute or involved in a relationship where problems, grievances and/or difficulties could arise in the future, by employing various techniques that help the individuals communicate and explore the potential for reaching a mutually acceptable agreement.

N

Neglect: Generally, when a child’s physical, mental or emotional condition has been impaired or placed in imminent risk of being impaired due to failure by a parent or other person legally responsible for a child to provide adequate care, food, shelter or supervision.

Neutrality: A disengagement from the outcome or decision made by the mediation participants.

Guidelines for Child Protection Mediation

O

**Open Adoption:** Adoptive families and birth parents enter into contracts for contact between birth parents and child following adoption. Types of agreement and enforceability varies by jurisdiction.

P

**Parties:** Named participants in the legal proceeding.

**Permanency Goals:** Under ASFA, the options for children in foster care 1) Return to parent 2) termination of parental rights and placement for adoption 3) referral for or transfer of legal guardianship 4) permanency placement with a fit and willing relative or 5) placement in another planned permanent living arrangement with a connection to an adult willing to be a permanent resource to the child.

**Permanency Hearing:** A hearing required under ASFA to review details and status of a child protection case and to determine appropriate permanency plan and goal.

**Placement:** When a child is placed by the court in the custody of the commissioner of the child protection agency or other child welfare official, to reside out of the home in foster care or in another institutional setting. Sometimes a child can be “placed directly” with a relative who will provide free care for the duration of the case.

**Privilege in CPM:** A right in certain jurisdictions and under certain circumstances for an individual to refuse to testify or otherwise disclose information obtained during mediation or to block other mediation participants from making such disclosures in court.

**Program Manager:** An individual who oversees quality control and the day to day operation of a CPM program. Also known as: director, administrator, coordinator, supervisor, etc.

R

**Reasonable Efforts:** Actions taken by a child welfare agency to prevent or eliminate the need to remove a child from home or to make it possible for a child to return home safely.

**Reinishment:** See Surrender.

**Removal:** Action taken by child protection agency to remove child from home or care of parents when there is risk of imminent harm to the child.

**Respondent:** Defendant; the parent against whom a child protection case is brought.

S

**Self Determination:** The state in which individuals feel free to express their thoughts, opinions and desires, and make personal choices and informed decisions without undue external pressure or influence.

**Service Plan:** Requirements established by the child protection agency and authorized by the court which parent must complete to address issues which brought the family’s case to court; required services to address needs of parent and children.

**Shelter Care Hearing:** See “Emergency Removal Hearing”.

**Surrender:** Legal proceeding in which parent voluntarily and permanently gives up rights to the care and custody of a child. Procedures vary by jurisdiction. Some jurisdictions permit surrenders to be conditioned on adoption by certain people.

T

**Temporary Custody Hearing:** See “Emergency Removal Hearing”.

**Termination of Parental Rights (TPR):** Legal proceeding to permanently end a parent’s right to care and custody, and even contact with a child. With certain exceptions, under ASFA, required to be filed if child has been in foster care for 15 out of 22 months.

**Transition Planning:** Educational, vocational, housing and life skills planning done by the agency and youth to prepare the young person for when they age out of the foster care system; also includes identifying people who will be permanent adult connections for youths.

**Tribe or ICWA Tribal Representative:** In cases involving an Indian child within ICWA jurisdiction the tribe may elect to intervene and participate as a party. The tribe may be represented by legal counsel or
Guidelines for Child Protection Mediation

other representative. The Indian child’s tribe has a discreet interest in any proceeding. In addition to the health, safety and welfare of the child, the tribe’s interests include the survival of Indian and tribal culture. Tribal representatives may represent interests in tribal integrity, the cultural and social standards of the tribal community and the concept of extended family as they relate to the Indian child.

V Voluntary Placement: Agreement between a parent and the child protection agency for a child to be placed temporarily out of the home in the care and custody of the agency; agreements are for limited period of time during which parent must plan to resume care of the child or face court proceedings that could include termination of their rights.
Guidelines for Child Protection Mediation

Section 10: Selected Readings


Guidelines for Child Protection Mediation


Guidelines for Child Protection Mediation


Guidelines for Child Protection Mediation


Guidelines for Child Protection Mediation


2017

Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation

Nancy Welsh
Texas A&M University School of Law, nwelsh@law.tamu.edu

Follow this and additional works at: https://scholar.smu.edu/smulr

Part of the Dispute Resolution and Arbitration Commons

Recommended Citation
Nancy Welsh, Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, 70 SMU L. Rev. 721 (2017)
https://scholar.smu.edu/smulr/vol70/iss3/7

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
DO YOU BELIEVE IN MAGIC?:
SELF-DETERMINATION AND PROCEDURAL
JUSTICE MEET INEQUALITY IN COURT-
CONNECTED MEDIATION

Nancy A. Welsh*

ABSTRACT

Proponents of the “contemporary mediation movement” promised that parties would be able to exercise self-determination as they participated in mediation. When courts began to mandate the use of mediation, commentators raised doubts about the vitality of self-determination. Though these commentators also suggested a wide variety of reforms, few of their proposals have gained widespread adoption in the courts.

Ensuring the procedural justice of mediation represents another means to ensure self-determination. If mediation provides parties with the opportunity to exercise voice, helps them demonstrate that they have considered what each other had to say, and treats them in an even-handed and dignified manner, it is more likely that the parties will share information that will lead to a result that actually represents the exercise of their self-determination.

Recent research, however, counsels that status affects procedural justice perceptions, voice is not always productive, and parties who are marginalized or lower status may neither expect nor desire to exercise voice. Further, research indicates that even those parties in mediation who value voice may not value participating in the back-and-forth or bargaining process that is required to arrive an agreement.

After reviewing this and other research, the Article proposes the following reforms to enhance the likelihood that mediation will provide all parties with voice, trustworthy consideration and real, substantive self-determination: increasing the inclusivity of the pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with pre-mediation information they need to engage in informed deci-

* Professor of Law, Texas A&M University School of Law. I thank Michael Green for inviting me to participate in this symposium, Richard Delgado for his inspiration for the symposium, and Roselle Wissler for her comments on an earlier draft of this Article. Any error or oversight is mine.
sion-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which mediators would be required to take affirmative steps to avoid unconscionable unfairness or coercion.

I. INTRODUCTION ........................................ 723
II. MEDIATION AND SELF-DETERMINATION ........ 725
III. MEDIATION AND PROCEDURAL JUSTICE: THE USUAL STORY ................................. 733
IV. PROCEDURAL JUSTICE MEETS INEQUALITY ...... 737
   A. The Potential for “Sham” Procedural Justice . 737
   B. Status and Its Effects on the Perceptions and Influence of Procedural Justice ............. 738
   C. Status and Its Effects on the Desire and Ability to Exercise Voice ........................ 742
      1. Voice That Affects Perceptions of Procedural Justice ........................................ 743
      2. Status and the Willingness to Exercise Voice .... 745
   D. Status and Its Effects on the Desire and Ability to Provide Trustworthy Consideration ................................. 747
V. POTENTIAL RESPONSES .............................. 750
   A. Increasing the Inclusivity of the Pool of Mediators and Training All Mediators to Acknowledge and Address Implicit Bias .... 750
   B. Pre-Mediation Caucusing with Parties to Increase the Likelihood and Productivity of Voice . 752
   C. Reflective Listening in Mediation to Increase the Likelihood and Productivity of Trustworthy Consideration ......................... 756
   D. Online Technology to Increase the Likelihood and Productivity of Voice, Trustworthy Consideration, and Real, Substantive Self-Determination . 757
   E. Empowering Mediators to Avoid Unconscionable Unfairness or Coercion ........ 760
VI. CONCLUSION ................................. 761
I. INTRODUCTION

Dreams and noble intentions, at least in part, inspired the “contemporary mediation movement.” Many mediation advocates urged—and continue to urge—that mediation should be embraced and institutionalized because it is an inclusive process and can enable people to find paths that allow them to exercise meaningful self-determination in resolving their disputes. This promise of self-determination has dimmed, however, as courts and agencies have focused on efficiency as a primary reason to institutionalize mediation, as lawyers and repeat players have come to dominate the issue framing and negotiations occurring within mediation, and as research has revealed that a significant percentage of parties do not possess the temperament or desire to fashion their own unique resolutions.

As self-determination has lost luster, some mediation advocates have emphasized mediation’s potential to provide an “experience of justice.” Drawing on the vast social–psychological literature regarding procedural justice, these mediation advocates have urged that the process offers important opportunities for “voice,” “trustworthy consideration,” and “even-handed and respectful treatment,” in marked contrast to the processes used to resolve the vast majority of litigated civil matters—i.e., default, lawyers’ bilateral negotiation, and dispositive motions. This Article, in part, represents a reminder regarding mediation’s potential to...
provide self-determination and procedural justice and then considers the fate of proposals that have arisen to reclaim this potential.

But this Article also examines more recent research raising questions regarding the appropriateness of expecting mediation to deliver self-determination or procedural justice. In particular, the Article examines research indicating that people’s societal identity and status can and does affect the likelihood that they will perceive procedural justice in mediation, their ability and willingness to exercise voice in mediation, and even their ability and willingness to demonstrate trustworthy consideration. Members of society who feel marginalized or isolated—or who know that they exercise no power due to their disadvantageous place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to express themselves in mediation. To do so represents an unacceptable risk. Meanwhile, members of society who are powerful—or who know that they exercise privilege due to their superior place within an extreme hierarchy—are less likely to be willing or able to embrace opportunities to hear and acknowledge what other parties have said in mediation. If mediation lacks participants’ voice and trustworthy consideration, it is difficult to understand how the process can provide either procedural justice or a meaningful version of self-determination. In other words, as self-determination and procedural justice meet inequality in mediation, these noble intentions are found wanting.

It is at this point that it becomes tempting to question the value of mediation—to label mediation as an innovation that looked promising but has ended in failure. It is also at this point that the question (and song title) Do You Believe in Magic? comes to mind. Of course, the answer to such a question must be “No!” Only a fool believes in magic. But as is so often true, the lyrics of the song are much more nuanced than the title would lead us to believe. The lyrics urge us to “believe in [the] magic in a young girl’s heart” and that music can “free your soul.” The lyrics also acknowledge that talking about this form of magic is “like trying to tell a stranger ‘bout-a rock and roll.”

In other words, it is the hope and creativity in music that are “magic,” and they must be experienced in order to be felt. There is no doubt that both of these assertions can be true. Music can overcome all sorts of barriers, inhabiting both the space outside and inside us, reaching beyond the rigorously rational and into the hopefully emotional. It can unlock individuals’ previously-unacknowledged abilities for expression and freedom, and when we make music together—or dance together—we can feel the power of coming together to create something good. Music defi-

---

9. THE LOVIN’ SPOONFUL, Do You Believe in Magic?, on DO YOU BELIEVE IN MAGIC (Kama Sutra 1965).
necessarily has a power, a language, a connecting force—a magic—that can help us overcome barriers and inhibitions that would otherwise divide us. So, the answer to the question “Do you believe in magic?” really has to be both “yes” and “no.” It depends.

And so it is with mediation. “It depends” must be the appropriate response to the question of whether we should continue to believe in the potential power of mediation to foster dialogue, procedural justice, and self-determination. Therefore, this Article will not end with the conclusion that mediation represents a failed experiment, unable to overcome the negative effects of inequality, bias, and prejudice. Instead, this Article will call for more realistic expectations of the process, the establishment of conditions that make achievement of its potential more likely, and reforms to increase the inclusivity and safety of the process—thus fostering all people’s ability to find and express their own voices, find and exercise their abilities to consider the voice of the other, and arrive at their own voluntary (self-determined) agreements. There is work to be done.

II. MEDIATION AND SELF-DETERMINATION

The field of “alternative” dispute resolution is grounded in the concept of self-determination. Oxford defines this concept as “[t]he process by

12. I am reminded of Professor Andrea Schneider’s recent remarks when accepting the ABA Section of Dispute Resolution’s award for scholarship:

   [W]hen I stepped back to think about what negotiation and ADR and international law and ethics all have in common, it is that they look for the best in people. It is the ideal of how people and countries, should behave toward one another with the recognition that ongoing interaction and communication inevitably includes conflict. It’s not that we can eliminate conflict—it’s that we can handle it better. I also think that these classes are optimistic. Why bother teaching them if you don’t believe that you can change the world for the better? And I think that is something that most of us have in common—we are optimists. We do this work because we believe. We believe that behavior can change, we believe that people can learn, we believe that most leaders want what is best for their country and not just themselves. This optimism has, of course, been labeled as naive over the years. This work also takes patience and persistence since we know people and situations do not change easily. So, . . . for better or worse, I tend to view the answer “no” as “not now.” And I will come back around to ask again. I also think that when we view learning as an invitation—let’s do this together—we are more likely to effectuate the change we want in our students, in our schools, and in our communities. I think that what has worked for me is to own this optimism and invite others along for the ride.

Andrea Kupfer Schneider, Speech for the ABA Section of Dispute Resolution Award for Outstanding Scholarly Work (Apr. 22, 2017) (transcript available at http://www.indisputably.org/?p=10644 [https://perma.cc/E8WE-ZN6A]). See also Welsh, The Transitional State, supra note 7, at 880 (observing that ADR proponents possess “a certain sort of faith, grounded in the principle of self-determination [and] . . . believe in providing people with the opportunity and tools to be their best, enabling them to take responsibility for making serious decisions in a deliberative, thoughtful manner”).

13. Although arbitration advocates and mediation advocates sometimes are portrayed as people with very different norms (see, e.g., S.I. Strong, Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking, 50 AKRON L. REV. 495
which a person controls their own life." Merriam-Webster defines it as “free choice of one’s own acts or states without external compulsion." The Free Dictionary defines it as “[d]etermination of one’s own fate or course of action without compulsion; free will." All of these definitions evince a faith in people’s desire and ability to control their own lives. For those of us who believe in the dignity and capacity of every human being, there is some degree of magic in this concept of self-determination.

Importantly, self-determination is not familiar to most lawyers and judges. Instead, it is a concept that finds its home in the worlds of diplomacy and nation building. Nonetheless, mediators in the United States have long embraced self-determination. For example, the Model Standards of Conduct for Mediators adopted by the American Bar Association (ABA) Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution) in 1994 placed self-determination first among the standards. The 1994 Model Standards described self-determination as “the fundamental principle of mediation." Standard 1 of the 2005 Model Standards, meanwhile, provides: “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” The vision of self-determination contained in this standard is not quite as inspirational as those referenced earlier, but the basic message remains the same: resolution of disputes in mediation shall occur only if the people involved in the dispute choose resolution on their own and without anyone forcing their hands.

(2016), they/we share this commitment to providing people with the real opportunity to resolve disputes in the manner that they choose. See Nancy A. Welsh, Introduction, 5 Y.B. On Arb. & Mediation v (2013).


17. See Welsh, The Transitional State, supra note 7, at 878.

18. See Welsh, The Thinning Vision, supra note 4, at 60.

19. See Daniel Thürer & Thomas Burri, Self-Determination, Max Planck Encyclopedia of Public International Law, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 [https://perma.cc/NX7F-4MZ9] (last updated Dec. 2006) (asserting that the origin of the modern concept of self-determination derives from the U.S. Declaration of Independence, particularly the provision that governments “derive[ ] their just powers from the consent of the governed” and that “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it”).


Largely due to concerns about declining access to justice—specifically, concerns that litigants were experiencing unacceptable delay and increased costs due to burgeoning civil and criminal court filings and litigation inefficiencies—federal and state courts institutionalized mediation for the resolution of all sorts of civil matters. Respect for parties’ self-determination was not a guiding principle. When insufficient numbers of litigants voluntarily elected to try mediation to resolve their cases, courts began making mediation mandatory. As lawyers became more involved in the process, their voices and framing of issues dominated the discussions occurring in mediation, thus marginalizing their clients’ participation. The lawyers also chose mediators who were experienced litigators or judges with relevant subject-matter expertise. They sought mediators who would provide reality testing.\(^{22}\) In some types of cases, lawyers counseled their clients not to attend the mediation.\(^{23}\) Increasingly today, lawyers urge mediators to avoid joint sessions that would allow the parties to talk directly with each other. Instead, many lawyers prefer private conversations with the mediator (caucuses) and shuttle diplomacy.\(^{24}\)

All of these adaptations have occurred while many courts continue to describe mediation in a manner that hearkens back to the early days of the contemporary mediation movement and as judges express a preference for mediation because they believe that it involves the parties more

---

22. See Bobbi McAdoo & Nancy A. Welsh, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 Nev. L.J. 399, 400, 420 (2005) [hereinafter McAdoo & Welsh, Look Before You Leap]; Riskin & Welsh, Is That All There Is?, supra note 5, at 420; Welsh, Making Deals, supra note 5, at 846; Welsh, The Thinning Vision, supra note 4, at 8–9. I have even raised concerns that lawyers are using mediation—specifically, the mediation privilege—to protect themselves from potential malpractice suits arising out of the settlement of cases. See Nancy A. Welsh, Musings on Mediation, Kleenex, and (Smudged) White Hats, 33 U. La Verne L. Rev. 5, 13 (2011) [hereinafter Welsh, Musings on Mediation].


24. See Lynne S. Bassis, Face-to-Face Sessions Fade Away: Why is Mediation’s Joint Session Disappearing?, Disp. Resol. Mag., Fall 2014, at 33; Jay Fölberg, The Shrinking Joint Session: Survey Results, Disp. Resol. Mag., Winter 2016, at 19; Eric Galton & Tracy Allen, Don’t Torch the Joint Session, Disp. Resol. Mag., Fall 2014, at 25–27; Thomas J. Stipanowich, Insights on Mediator Practices and Perceptions, Disp. Resol. Mag., Winter 2016, at 7. I pointed out the reduced use of joint session nearly twenty years ago. See Welsh, The Thinning Vision, supra note 4, at 20–21. Meanwhile, it is important to note that caucusing has been part of mediation for a very long time. Researchers found that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants’ statements occurred in caucus as compared to joint session; and

[i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties’ behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.

Gary L. Welton et al., The Role of Caucusing in Community Mediation, 32 J. Conflict Resol. 181, 199 (1988).
directly in the resolution of their disputes. The United States District Court for the Eastern District of New York, for example, defines mediation as

a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party’s legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

When parties seek to set aside agreements they have reached in mediation, however, courts generally do not try to determine whether there was “communication across party lines,” articulation and understanding of the parties’ interests, “exploration of a wide range of potential solutions,” options that “address interests . . . outside the scope of the stated controversy or which could not be addressed by judicial action,” and—ultimately—the exercise of self-determination. Rather, courts look for the other extreme, trying to determine whether any participant in the process engaged in behaviors or threats so overwhelming that they could be classified as “coercion.” Courts rarely find coercion in mediation.

---

25. See Bobbi McAdoo, All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation, 22 OHIO ST. J. ON DISP. RESOL. 377, 398–99 (2007) (reporting that one of the top reasons that judges order parties into mediation is because they believe it will get clients more directly involved in discussing their case and its resolution); McAdoo & Welsh, Look Before You Leap, supra note 22, at 410; see also Jennifer W. Reynolds, Judicial Reviews: What Judges Write When They Write About Mediation, 5 Y.B. ON ARB. & MEDIATION 111, 142–143 (2013) (observing that when judges write about mediation, their perspective and goals for the process depend upon whether they are focusing on their obligation to process cases or serve as mediators themselves and care about the “fit” between the social role of the courts and mediation).

26. S.D.N.Y. & E.D.N.Y. Local Civ. R. 83.8. (emphasis added). Interestingly, the definition of mediation on the court’s website varies slightly from the definition in its local rules. There, mediation is defined as

a confidential process in which parties and counsel meet with a neutral third party who is trained in settling disputes. The mediator assists in improving communication across party lines, identifies areas of agreement, and helps parties to generate a mutually agreeable resolution to the dispute. Mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action.


28. See Welsh, The Thinning Vision, supra note 4, at 47.

29. See Nancy A. Welsh, Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 420 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004);
This standard of self-determination as “not coercion” represents a very thin vision of self-determination indeed. But it is important to recall that (1) the courts exist in order to produce resolution of disputes; (2) they do not exist to foster citizens’ self-determination; (3) they have an interest in the disposition of cases; and (4) they are constantly facing legislative calls for increased efficiency, budget cuts, and competition from administrative courts, private dispute resolution, and even international tribunals. Nonetheless, over the years, there has been no shortage of proposals to reinvigorate self-determination in court-connected mediation.

Working under the assumption that courts will continue to mandate parties’ participation in mediation, Leonard Riskin and I have urged that courts should provide for a pre-mediation consultation with the parties to determine the issues that the parties hope to address and their preferred mediation model. Similarly assuming the continuation of mandatory mediation, Jaqueline Nolan-Haley has called long and consistently for parties to have access to information regarding their legal rights and remedies so that their consent to any agreements in mediation is sufficiently informed. Jennifer Reynolds has advocated for law schools to commit themselves to educating members of the public regarding their legal rights and the skills needed to participate in mediation. Stephen Landsman has proposed that state-appointed lawyers should accompany parties...
in mediation, while Kristen Blankley has urged that lawyers should use limited scope agreements to provide legal representation to clients in mediation. Omer Shapira has focused on mediators’ ethics, calling for revision of the Model Standards of Conduct for Mediators to require mediators to foster parties’ real, substantive self-determination rather than permitting formal, illusory self-determination to suffice. Alone and

34. See Stephan Landsman, Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings, 37 FORDHAM URB. L.J. 273, 277 (2010); see also Jean R. Sternlight, Lawyerless Dispute Resolution: Rethinking a Paradigm, 37 FORDHAM URB. L.J. 381, 416–17 (2010) (reporting on one legal services office that largely limits its lawyers’ time to representation of clients on the day of mediation, with strikingly good results).

35. See Kristen M. Blankley, Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services, 28 OHIO ST. J. ON DISP. RESOL. 659, 661–62 (2013). Interestingly, Dr. Roselle Wissler has observed that people participate less and express less satisfaction with their participation when represented by lawyers in mediation. She also provides several possible reasons for this. Roselle L. Wissler, Representation in Mediation: What We Know from Empirical Research, 37 FORDHAM URB. L.J. 419, 446–47 (2010).

36. See Omer Shapira, A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform, 100 MARQ. L. REV. 81, 125–27 (2016). Omer Shapira has recently examined the concept of self-determination in some detail:

[T]he exercise of self-determination requires the convergence of three accumulative elements: competency to make decisions, voluntariness and lack of coercion at the time of decision-making, and the availability and understanding of the information relevant to the decision-making. It will be helpful in the following discussion to distinguish between the factual observation that an autonomous decision has been made, and its value or quality. An autonomous decision must satisfy the first two conditions of self-determination: it must be made with competence, and be voluntary and uncoerced. An autonomous decision need not satisfy the third condition of self-determination, and could be based on inadequate information. However, such a decision would be of low quality. To put it differently, an uninformed decision is an exercise of formal self-determination, while a decision made with awareness of information relevant to the decision is an exercise of substantive self-determination.

The more the elements of self-determination are present and realized, the more likely it is that the decision is the product of substantive rather than formal self-determination. The exact point that separates substantive self-determination from formal self-determination might sometimes be blurred. However, it seems to me that the legitimate expectation of mediation parties is for “true,” i.e., substantive, self-determination, not formal self-determination. This expectation of a real, substantive exercise of rights is sometimes described as an expectation of fairness or justice.

. . . for a decision to be the product of “real,” substantive self-determination, as opposed to illusory, formal self-determination, each of the elements of self-determination must be of high quality: a high degree of competence in the sense of a high capacity to perceive and process information, as opposed to a low degree of competence following, for example, mental stress, confusion, or exhaustion; a high degree of voluntariness in the sense of a decision-making process free of coercive attempts, as opposed to a low degree of voluntariness following coercive acts and pressures that leave the decision-maker with feelings of helplessness and lack of choice; and decisions that are based on information relevant to the decision and understood by the decision-maker, as opposed to decisions that are based on inadequate information or on a misunderstanding of the information and its implications. When one or more of the elements of self-determination are of low quality, we will
with others, I have urged courts to establish mechanisms to monitor mediation or provide parties with post-mediation opportunities to submit feedback regarding their experience with the mediation process and the mediators.\footnote{See Welsh, The Place of Mediation, supra note 75, at 139-140; see also Bobbi McAdoo & Nancy Welsh, Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice, in ADR HANDBOOK FOR JUDGES (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter McAdoo & Welsh, Aiming for Institutionalization]; McAdoo & Welsh, Look Before You Leap, supra note 22, at 427, 430; Nancy A. Welsh, Magistrate Judges, Settlement, and Procedural Justice, 16 Nev. L.J. 983, 990 (2016) [hereinafter Welsh, Magistrate Judges] (description of survey and attachment); Nancy A. Welsh, Donna Stienstra & Bobbi McAdoo, The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013); Nancy A. Welsh & Bobbi McAdoo, Eyes on the Prize: The Struggle for Professionalism, Disp. Resol. Mag., Spring 2005, at 15 [hereinafter Welsh & McAdoo, Eyes on the Prize]. The ABA Dispute Resolution Section’s Certification Task Force addressed credentialing organizations’ responsibility in this area, concluding that they should “[p]rovide an accessible, transparent system to register complaints against credentialed mediators.” ALT. DISP. RESOL. SEC. OF THE AM. BAR ASSOC. TASK FORCE ON MEDIATOR CREDENTIALING, FINAL REPORT 4 (2012) [hereinafter Mediation Research Task Force Report]. The Task Force also noted that “[a] majority of the Task Force believes organizations should have a process to monitor the performance of credentialed mediators, such as periodic requests for feedback [while a] minority believes such monitoring is not feasible.” Id.} I have also advocated for a “cooling off” period to be applied to mediated settlement agreements, which would allow parties to rescind their agreements at will as long as such rescission occurred relatively promptly after the agreement was reached.\footnote{See Welsh, The Thinning Vision, supra note 4, at 87-89. This approach has been adopted by Minnesota for debtor-creditor matters, Florida in family matters, and California in insurance matters. See Minn. Statute 572.35(2) (providing for 72 hours to rescind mediated settlement agreement between debtor and creditor); Fla. Family L. R. P. 12.74(I)(1) (providing for ten-day cooling-off period for agreements reached in family mediation, if attorneys do not accompany parties); Cal. Ins. Code 10089.82(c) (providing a three-day cooling-off period for insured to rescind mediated agreement reached regarding earthquake insurance dispute, provided that insured was not accompanied by counsel at the mediation and the settlement agreement is not signed by her counsel). See also Reynolds, Luck, supra note 33, at 309 (expressing great skepticism regarding the likelihood that parties will exercise such opt-out rights).} I have urged that courts should be sure that court-connected mediation is supplemented with other alternatives so that parties are ordered to participate in the process that is most appropriate for their dispute—rather than expecting mediation to be all things to all people.\footnote{See Nancy A. Welsh, You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation, 17 Am. Bankr. Inst. L. Rev. 427, 455–56 (2009).}

Of course, other means to protect and foster parties’ self-determination would be to end courts’ mandatory imposition of mediation, make use of mediation only presumptive, or mandate something less than mediation. Jacqueline Nolan-Haley has urged very recently that courts should never consider the decision-making process as reflecting the exercise of formal self-determination, and tend to treat it as unfair or unjust.
be permitted to make mediation mandatory in the first place.40 Bobbi McAdoo and I have urged, separately and together, that if courts make mediation mandatory it should be for only a short time—perhaps two years so that lawyers have enough time to experience it—and then its use should be made voluntary.41 Bobbi McAdoo and I have also advocated for allowing parties to opt out of mandatory mediation at will, without any required showing whatsoever.42 Some courts specifically provide for such opt-outs.43 Often, however, such permission is conditioned upon a sufficient showing by at least one of the parties or a screening by the mediator.44 Andrea Schneider and I have endorsed proposals to mandate only the parties’ participation in pre-mediation meetings to educate the parties regarding the mediation process.45 Jacqueline Nolan-Haley has suggested that courts could create incentives to encourage parties’ participation in mediation—i.e., in cases involving fee-shifting provisions, courts could determine whether a party’s refusal to voluntarily participate in mediation should be punished by refusing to shift all or a portion of the fees that they would otherwise be entitled to receive.46

Most of these proposals have fallen on barren soil in American courts and thus have borne no or little fruit. The only real exception is the option of allowing parties to opt out, usually conditioned upon a sufficient showing. This exception exists primarily in court-connected family media-

---

41. See McAdoo & Welsh, Look Before You Leap, supra note 22, at 413; Welsh, The Place of Mediation, supra note 7, at 137–39; see also Frank E. A. Sander, Another View of Mandatory Mediation, DISP. RESOL. MAG., Winter 2007 at 16 (describing mandatory mediation as “a kind of temporary expedient, a la affirmative action”).
42. See McAdoo & Welsh, Look Before You Leap, supra note 22, at 427; Welsh, The Place of Mediation, supra note 7, at 130–32.
44. See McAdoo & Welsh, Aiming for Institutionalization, supra note 37; McAdoo & Welsh, Look Before You Leap, supra note 22, at 414; Welsh, The Place of Mediation, supra note 7, at 131–32; see also Robin H. Ballard et al., Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening, 17 PSYCHOL. PUB. POL’Y & L. 241, 242 (2011) [hereinafter Ballard]; Viktoria Pokman et al., Mediator’s Assessment of Safety Issues and Concerns (MASIC): Reliability and Validity of a New Intimate Partner Violence Screen, 21 ASSESSMENT 529 (2014) [hereinafter Pokman]; Kelly Browe Olson, Screening for Intimate Partner Violence in Mediation, DISP. RESOL. MAG., Fall 2013, at 25 (hereinafter Olson).
45. See Nancy A. Welsh & Andrea Kupfer Schneider, The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration, 18 HARV. NEGOT. L. REV. 71, 134–35 (2013). I (alone, with Andrea Schneider, and with Bobbi McAdoo) have also examined even less intrusive mandatory options—e.g., mandating that lawyers inform their clients about mediation or mandating that lawyers consult with their clients about ADR and then advise the court regarding their parties’ preferences). See Nancy A. Welsh & Andrea K. Schneider, Becoming “Investor-State Mediation”, 1 PENN ST. J.L. & INT’L AFF. 86, 92–93 (2012); Welsh, The Thinning Vision, supra note 4, at 81–82; McAdoo & Welsh, Aiming for Institutionalization, supra note 37, at 17; Nancy A. Welsh & Bobbi McAdoo, Alternative Dispute Resolution (ADR) in Minnesota—An Update on Rule 114, in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS 203, 206–207 (Edward Bergman and John Bickerman, eds., 1998).
tion and represents an acknowledgement of the unfortunately widespread reality and likely effects of intimate partner abuse. At this point, then, it is difficult to muster up faith in the reality of the magic of self-determination as applied to court-connected mediation, especially mandatory court-connected mediation. The courts, certainly, are not going to act as the optimizers or guarantors of self-determination.

As a result, this Article will now turn from the concept of self-determination to the social–psychological concept of procedural justice. This is because assuring procedural justice in mediation may serve as a reasonable link between achieving the courts’ mission of case disposition and providing a meaningful measure of self-determination in mediation.

III. MEDIATION AND PROCEDURAL JUSTICE: THE USUAL STORY

Many people use the social–psychological term “procedural justice,” but a smaller number actually ground their understanding in the vast social–psychological empirical literature regarding the subject. This literature reveals that people tend to perceive a process as fair or just if it includes the following elements: (1) “voice” or the opportunity for people to express what is important to them; (2) “trustworthy consideration” or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure; (3) a neutral forum.

47. See, e.g., Ballard, supra note 44, at 241–243, 253; Pokman, supra note 44, at 529–31; Olson, supra note 44. It is relatively easy to comprehend why an abused intimate partner would not feel the presence of self-determination in a mediation if he or she has been harmed by an abusing partner and fears being harmed again. Others have suggested—legitimately—that an individual who has suffered harassment, discrimination, retaliation, or has been the victim of abuse or a hate crime could feel quite similarly in mediation. However, the courts generally have not established opt outs for these types of cases.

48. Meanwhile, there is also a vast empirical literature regarding related concepts—organizational justice, interactional justice, informational justice, etc. See Lisa Blomgren Bingham, Designing Justice: Legal Institutions and Other Systems for Managing Conflict, 24 OHIO ST. J. ON DISP. RESOL. 1, 26-46 (2008) (cataloguing the many different categories of justice that have been identified); Lisa Blomgren Amsler et al., Dispute Systems Design: Preventing, Managing and Resolving Conflict (unpublished manuscript) (on file with author).

49. See E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 211–12 (1988) [hereinafter Lind & Tyler, Social Psychology]; E. Allan Lind, Procedural Justice, Disputing, and Reactions to Legal Authorities, in Everyday Practices and Trouble Cases 177, 187 (Austin Sarat et al. eds., 1998) [hereinafter Lind, Procedural Justice, Disputing, and Reactions]; Tom R. Tyler, Social Justice: Outcome and Procedure, 35 Int’l J. PSYCHOL. 117, 121 (2000) [hereinafter Tyler, Social Justice] (describing voice as the opportunity for people to present their “suggestions” or “arguments about what should be done to resolve a problem or conflict” or “sharing the discussion over the issues involved in their problem or conflict” and also noting that voice effects have been found even when people know they will have little or no influence on decision makers); Nouri Zimerman & Tom R. Tyler, Between Access to Counsel and Access to Justice: A Psychological Perspective, 37 FORDHAM URB. L.J. 473, 488–89 (2010) (reporting that voice “shapes evaluations about neutrality, trust, and respect” and has the “strongest influence, followed respectively by neutrality, trust, and respect”).

50. Theories regarding “social exchange,” heuristics, and “group value” explain the importance of this perception. In part, at least, people care about voice—and trustworthy consideration—because they wish to know that the decision-maker is fully informed re-
that applies the same objective standards to all and treats the parties in an even-handed manner;51 and (4) treatment that is dignified.52 If people believe that they were treated fairly in a decision-making or dispute resolution procedure (i.e., the process was “procedurally just” or “procedurally fair”), they are more likely to (1) perceive that the substantive outcome is fair—even when it is adverse to them;53 (2) comply with the outcome;54 and (3) perceive that the sponsoring institution is legitimate.55


51. See Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DePaul L. Rev. 661, 664 (2007) [hereinafter Tyler, American Public] (“Transparency and openness foster the belief that decisionmaking procedures are neutral.”); see also Steven L. Blader & Tom R. Tyler, A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process, 29 Personality & Soc. Psychol. Bull. 747, 749 (2003) (distinguishing between “formal” or “structural” aspects of groups that influence perceptions of process fairness, such as group rules, and the “informal” influences that result from individual authority’s actual implementation of the rules).


54. See Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 192; Tyler, American Public, supra note 51, at 673–74 (describing procedural justice findings generally and research that has identified procedural justice and trust as the key antecedents of the willingness to defer to legal authorities); Tyler, Psychological Models, supra note 50, at 857; Tyler, Social Justice, supra note 49, at 119.

55. See Lind & Tyler, Social Psychology, supra note 49 at 209; Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 188. This perception is obviously important to courts. See David B. Rottman, Admin. Office of the Courts, Trust and Confidence in the California Courts: A Survey of the Public and Attorneys 24 (2005); Tom R. Tyler, Why People Obey the Law 94–108 (1990); Tyler, American Public, supra note 51, at 665; Tom R. Tyler, Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform, 45 Am. J. Comp. L. 871, 885–86 (1997) (suggesting that the influence of procedural justice judgments supports the idea “that the
This is the usual story, the generally true story. It is not the whole story, but the Article will return to that a bit later.

For now, it is important to notice the potential relationship between a procedurally just process and one that provides some measure of self-determination. If a person truly has and takes advantage of the opportunity for voice—i.e., if she truly says what she wants and needs to say—she has engaged in an act of procedural self-determination. Her expression of voice also makes it more likely that she will have significant input into the outcome (even though she cannot entirely control that out-

---

56. I need to distinguish here between voice and participation. They are related but not the same. Dr. Roselle Wissler has conducted research indicating that people’s perceptions of procedural justice in mediation are strongly influenced by their perception that they had voice—i.e., the opportunity to tell their views of the dispute. See Wissler, Representation in Mediation, supra note 35, at 448 n.136, 450. Interestingly, the relationship between perceptions of procedural justice and voice is much stronger than the relationship between perceptions of procedural justice and the amount of time people spent talking during (i.e., participating directly in) the mediation. See id. at 452 (“Parties’ sense that they had a chance to tell their views was more strongly related to favorable assessments of mediation than was how much they participated. Thus, ensuring that parties feel they have a chance to fully express their views appears to be more important to their experience in mediation than how much they participate directly.”). Indeed, although there is a relationship between people’s perception of voice and the amount of time they talked in the mediation, many people felt they had voice even when they spoke very little or not at all. See id. at 448–49, 451 (“Thus, although talking a lot virtually guaranteed that parties felt they had voice, not talking at all, or having a lawyer who talked a great deal, did not prevent a substantial number of parties from feeling they had a chance to tell their views. These findings suggest that parties can feel they have voice through their lawyers. It is not clear, however, why some parties who did not talk in mediation felt they had voice while others did not; perhaps it made a difference whether parties preferred not to talk and wanted their lawyer to speak for them, or whether they were ‘shut down’ by their lawyers, the mediator, or the other side.”) Rather, people can feel they had voice even if they spent little time talking in mediation or if their lawyer dominated the conversation.). Consistent with some of the original procedural justice research conducted by Walker, Thibaut, and others, it appears that many people perceived they had voice as a result of their lawyers’ participation. See Welsh, Making Deals, supra note 5, at 841–43 (describing early studies by Walker, Thibaut, LaTour, and Lind).

It also appears that those who felt they had voice but did not talk a lot were less likely to feel pressured to settle. In contrast, those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. See Wissler, Representation in Mediation, supra note 35, at 449–50; see also Roselle L. Wissler, An Evaluation of the Common Pleas Court Civil Pilot Mediation Project viii (Feb. 2000) (unpublished manuscript) (on file with author). Meanwhile, “parties who said their lawyer talked more felt less pressured to settle than did parties who said their lawyer talked less.” Wissler, Representation in Mediation, supra note 35, at 451.

Wissler’s research suggests, to me at least, that the opportunity for voice is not the same thing as the opportunity to engage in the give-and-take of negotiation. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 654–58 (observing that while parents in special education mediation sessions valued the opportunity for voice, they did not particularly value the opportunity to negotiate or problem-solve with school officials). Further, Wissler’s findings appear consistent with other research suggesting that people value having their lawyers serve as “buffers” who reduce the need to engage directly in unpleasant interpersonal conflict. See Stephen LaTour et al., Procedure: Transnational Perspectives and Preferences, 86 YALE L.J. 258, 274 (1976).
and the opportunity to share this information may open up a new path toward both relational and instrumental resolution. It is important to notice as well the ways in which trustworthy consideration, a neutral forum, and even-handed and dignified treatment may create a greater likelihood that both parties will be able to hear and share information that may surprise or enlighten them, that such information may create new opportunities for resolution, that the parties may experience enhanced trust, and that this trust and the expanded exchange of information thus may produce both an integrative solution and a changed relationship.58

All of this potential is entirely consistent with the tantalizing promise of substantive self-determination. Long ago, Isabelle Gunning highlighted such potential and its particular promise for otherwise-disadvantaged people who need the opportunity to express “their authentic voices and experiences.”59 Mediation seemed to offer such people a forum in which “ideas about equality are [or at least could be] defined and redefined.”60 Thus, a procedurally just mediation process had the potential to bring different people together in a safe space,61 break through preexisting stereotypes and behaviors that continue to mar negotiations,62 and model


58. See Nancy A. Welsh, The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students, 28 NEGOT. J. 117, 133–34, 136 (2012) (observing the correlations that have been found among behaviors associated with procedural justice perceptions, enhanced perceptions of trustworthiness, enhanced information sharing, and enhanced likelihood of capturing available integrative potential) (citing Morton Deutsch, Conflict Resolution: Theory and Practice, 4 POL. PSYCHOL. 431, 438 (1983); Rebecca Hollander-Blumoff, Just Negotiation, 88 WASH. U. L. REV. 381 (2010)).


60. Id. at 67, 86.

61. This is consistent with one of the interventions recommended to combat implicit bias. See Andrew J. Wistrich & Jeffrey J. Rachlinski, Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It, in ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017) (describing exposure to stereotype-incongruent models as one means to combat implicit bias directly).

62. There are many examples of empirical research that demonstrate race discrimination in the selection of potential negotiation partners and the negotiation process itself. See, e.g., Ian Ayres & Peter Siegelman, Race and Gender Discrimination in Bargaining for a New Car, 85 AM. ECON. REV. 304 (1995) (experiment involving more than 400 visits to 200 car dealerships in Chicago); Ian Ayres et al., Race Effects on eBay, 46 RAND J. ECON. 891 (2015) (experiment involving sale of baseball cards in eBay auction held by light-skinned versus dark-skinned hand with payment of 20% less if card was held by a dark-skinned hand—even though that card was actually more valuable); Benjamin Edelman, Michael Luca & Dan Svirsky, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, 9 AM. ECON. J. 1 (2017) (rental of home to “guests”—8% more likely to accept queries from Caucasian-seeming names than African-American-seeming names; the exception was that African-American females did not discriminate against African-American females, but both Caucasians and African-Americans discriminated against African-Americans generally); Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AM. ECON. REV. 991 (2004) (resumes for those with white-sounding names 50% more likely to get callbacks than those with African-American-
the respect, responsibility, and dialogue that “fair and equal” people could and should extend to each other.63 However, as this Article has already indicated, there is a “rest” of the procedural justice story. The Article turns to this now.

IV. PROCEDURAL JUSTICE MEETS INEQUALITY

A. THE POTENTIAL FOR “SHAM” PROCEDURAL JUSTICE

First, and unfortunately, something called “sham” procedural justice exists. A process may include all of the elements listed above—with the implicit message that people’s voice has the potential to affect the outcome. However, the mediator or the parties may have absolutely no intention of allowing themselves to be affected by what they have heard or seen. This situation is most likely to occur when the mediator or the other party has a vested interest in the outcome.64 Under these circumstances, the mediator or the other party may be using the lessons of procedural justice research simply to seduce compliance.65 Not surprisingly, people’s trust can plummet if they learn that they were misled and unwittingly

63. See Jonathan R. Cohen, Let’s Put Ourselves Out of Business: On Respect, Responsibility, and Dialogue in Dispute Resolution, 108 PENN ST. L. REV. 227, 230 (2003); see also Nancy A. Welsh, I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution, 114 PENN ST. L. REV. 1149, 1153 (2010) [hereinafter Welsh, I Could Have Been a Contender] (arguing that people have to be motivated to have this kind of conversation; that fear of litigation, discovery, and trial may provide such motivation to otherwise-dominant players; and that trial procedures aspire to model a fair and equal dialogue that overcomes the preexisting power relations between the litigating parties).

64. See LIND & TYLER, SOCIAL PSYCHOLOGY, supra note 49, at 179–84.

65. See Eric Miller, Thanks for Inviting Me, PRAWFSLAWG (Sept. 8, 2017, 3:25 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/09/thanks-for-inviting-me.html [https://perma.cc/486V-4ZJZ] (describing the “sociological theory [of procedural justice as] . . . not a theory of justice, but of what makes for effective psychological coercion” and observing in the context of police-citizenry interactions that “[i]f we give the police credit for engaging in non-violent psychological coercion of the folks they encounter, are we giving them—and ourselves—too much credit for promoting ‘just’ policing[?]”); see also Ávram Bornstein et al., Tell It to the Judge: Procedural Justice and a Community Court in Brooklyn, 39 PoLAR 206 (2016) (citing to MacCoun and describing potential for procedural justice to produce “false consciousness”; also describing behavior of judge and problem-solving court in Red Hook court—demonstrating respect, compassion, interest in person, helpfulness, ability to access resources—and describing such behavior as fairer than what is provided by other courts); Keith G. Allred, Relationship Dynamics in Disputes: Replacing Contention with Cooperation, in THE HANDBOOK OF DISPUTE RESOLUTION 83, 92–93 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting the paucity of empirical data but observing that his “experience as a mediator suggests that manipulative uses of procedural justice are on the rise in both the public and private sectors” as well as overly simplistic application of procedural justice principles; specifically citing examples involving a Fortune 500 aerospace company and the Forest Service).
participated in a sham procedure.66 They may perceive the outcome of this sham procedure to be less fair than the identical outcome of an obviously unfair process.67

Importantly, however, this “frustration effect” has been found to occur quite rarely—e.g., when the apparent procedural justice of a process is relatively weak, the evidence of bias is strong, or a colleague points out the inequity of the outcome. E. Allan Lind and Tom Tyler have concluded that frustration effects “will occur only when there is overwhelming social or factual support for the supposition that the procedure is corrupt.”68 The marginalized and vulnerable are most likely to bear the brunt of a sham procedure—and recent decades have seen worrisome growth in the gap between “haves” and “have-nots” around the world.69 Unfortunately, the marginalized and vulnerable also may be least likely to detect that they were the victims of a sham procedure.70

B. STATUS AND ITS EFFECTS ON THE PERCEPTIONS AND INFLUENCE OF PROCEDURAL JUSTICE

There is also research indicating that even if a process is authentic and conducted in a procedurally just manner, individuals’ roles or social statuses affect the extent to which their judgments regarding procedural justice will influence their perceptions of substantive justice. Some of this research involves mediation directly. The Metrocourt Project, for example, reported that Hispanic-American litigants were more likely than Whites to be satisfied with the mediation process and its outcomes, even though Hispanic-Americans’ mediation outcomes were neither as favorable as Whites’ mediation outcomes nor as favorable as the

---

66. People are aware of their vulnerability to manipulation and if they perceive evidence of unfair treatment or perceive “false representations of fair treatment,” they respond with “extremely negative reactions.” Lind, Procedural Justice, Disputing, and Reactions, supra note 49, at 187; see Tom R. Tyler et al., Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 73–74 (1985) (explaining that, under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “frustration” effect”). Note that what seems to matter here is the falsity of the explicit or implicit representation that people’s voice will have the potential to influence the outcome. In somewhat surprising contrast, there is substantial research demonstrating that if people are told in advance that their voice will not or cannot influence the outcome, they are nonetheless more likely to judge a process as procedurally just if the process includes an opportunity for voice. See Welsh, Making Deals, supra note 5, at 821–22 (describing these studies).


68. Id. at 183–84. Recent research has found an interesting and very strong relationship between people’s perceptions of the existence of the rule of law and the absence of corruption. See Mila Versteeg & Tom Ginsburg, Measuring the Rule of Law: A Comparison of Indicators, 42 LAW & SOC. INQUIRY 100, 117-118 (2017) (discussing the overwhelming correlation between Transparency International’s Corruption Perceptions Index and the Rule of Law indicators of the Heritage Foundation, World Bank, World Justice Project and Freedom House).

69. See Ellen Waldman & Lola Akin Ojelabi, Mediators and Substantive Justice: A View from Rawls’ Original Position, 30 OHIO ST. J. ON DISP. RESOL. 391, 398–400 (2016); Reynolds, Luck, supra note 33.

70. See Reynolds, Luck, supra note 33.
comes Hispanic-Americans received in adjudication.71 Interestingly, women of color expressed the highest level of satisfaction with mediation, while white women were the least satisfied and least likely to perceive the mediation process as fair even though they experienced the most favorable outcomes.72

Recent research in the Netherlands regarding the mediation of labor disputes similarly indicates that people’s place in a hierarchy affects the influence of their procedural justice perceptions upon their perceptions of substantive outcomes. In this study, researchers found that supervisors were more likely than subordinates to judge mediation as effective even when the supervisors perceived low levels of procedural justice. Meanwhile, subordinates’ perceptions of mediation’s procedural justice determined their perceptions of the process’s effectiveness. Especially if subordinates perceived low levels of procedural justice, they perceived mediation to be ineffective.73 Supervisors also were more likely than subordinates to perceive mediation as procedurally just. Thus, in this research, those with higher status in the hierarchy of the workplace were more likely than those lower in the hierarchy to judge mediation as procedurally just and effective and less likely to find that low levels of procedural justice undermined the effectiveness of the mediation process.

Other research, not involving mediation, also suggests the relevance of status to procedural justice perceptions and their power.74 Substantial research has been conducted regarding the effect of procedural justice per-

---


72. See Hermann, New Mexico Research, supra note 71, at 92.


ceptions on people’s perceptions of substantive justice when they interact with police. In general, that research has shown that when police behave in a manner consistent with procedural justice, people are more likely to perceive substantive outcomes as fair even when they are adverse. In other words, the provision of procedural justice can reduce the impact of outcome favorability on perceptions of substantive fairness.\(^{75}\) Other research has shown, meanwhile, that in making judgments about procedural fairness, people of color “place[d] significantly greater weight on evidence about their social standing than did White group members.”\(^ {76}\) The researchers measured social standing by asking respondents “whether the authorities had been polite to them” and “had shown respect for their [respondents’] rights.”\(^ {77}\)

More recent research suggests that in interactions between lower status and higher status people in negotiations or the workplace, the lower status persons are more likely to desire future interactions with higher status persons if they perceive that the higher status persons behaved in a procedurally just manner—even when those interactions produced disappointing outcomes for the lower status persons. In contrast, the higher status persons (which would tend to include more powerful parties and dominant repeat players) were less likely to be influenced by procedural fairness. Indeed, when lower status persons treated them in a procedurally just manner, those with higher status were more likely to perceive outcomes as fair only if those outcomes were consistent with what they expected or knew themselves to be entitled to receive.\(^ {78}\)

These findings regarding the interaction between status and the composition and influence of procedural justice perceptions may be explained by the notion that procedural justice is more important and more influential for those who are lower status. Many studies have shown that people’s perceptions of outcome fairness are affected primarily by their expectations or comparison to others’ outcomes.\(^ {79}\) Lower status persons,

\(^ {75}\) See Ya-Ru Chen et al., When is It “a Pleasure to Do Business with You?”: The Effects of Relative Status, Outcome Favorability, and Procedural Fairness, 92 Org. Behav. & Hum. Decision Processes 1, 4 (2003).


\(^ {77}\) Id. at 833. These two measures were averaged to form a Standing scale. Id.

\(^ {78}\) See Chen et al., supra note 75, at 1; Jane W. Adler et al., Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program 76, 83 (1983) (“Unlike the unsophisticated individual litigants, . . . institutional litigants” who made extensive use of the arbitration program “appear[ed] to care little about qualitative aspects of the hearing process” and “judge arbitration primarily on the basis of the outcomes it delivers.”).

\(^ {79}\) See Chen et al., supra note 75; Roselle L. Wissler, Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics, 29 Law & Soc’y Rev. 323, 346–47 (1995) (reporting that disputants’ satisfaction with outcomes was influenced primarily by outcome measures and, to a lesser but significant degree, by process evaluations; noting that these results are “consistent with theories that maintain that outcome satisfaction is influenced more by one’s assessment of the outcome compared with expectations or with others’ outcomes than by the absolute outcome received”).
however, are less likely to be confident regarding what they are entitled to receive, more concerned about the potential for exploitation, and thus more likely to need to determine how much they can trust a higher status person. For lower status people, attending to procedural cues represents a coping mechanism to help them deal with uncertainty regarding outcome fairness. As a result, for these people, strong procedural justice reduces the influence of outcome favorability upon their perceptions of substantive justice.

There is even biological support for the value of using the assessment of procedural justice as a coping mechanism. Being treated in a manner that is dignified, feels safe, and reduces stress has been shown to have a positive physiological effect that enhances people’s cognitive ability and decision-making. Thus, it makes sense that procedural justice will be particularly important for those dealing with vulnerability or uncertainty. It also makes sense that the provision of procedural justice will exercise less influence upon the judgments of those who do not expect to experience vulnerability or uncertainty. In fact, there is research suggesting that when higher status persons perceive that they have received

---


81. See Jill S. Tanz & Martha K. McClintock, The Physiologic Stress Response During Mediation, 32 OHIO ST. J. ON DISP. RESOL. 29, 51–53 (2017) (discussing the “sweet spot” in cortisol production for problem solving and decision-making and how mediators can and should address disparities between mediating parties in the extent to which stressors may affect them); see also Keith G. Allred, Relationship Dynamics in Disputes: Replacing Contention with Cooperation, in THE HANDBOOK OF DISPUTE RESOLUTION 83, 92 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting that perceptions of fair process lead to more trust and loyalty).


83. See Kees van den Bos et al., When Do We Need Procedural Fairness? The Role of Trust in Authority, 75 J. PERSONALITY & SOC. PSYCHOL. 1449, 1452 (1998) (reporting research showing that procedural justice information was not as necessary when the authority had a trustworthy reputation while there was heavy reliance on procedural justice information when no reputational information was provided). Procedurally just treatment has also been found to be more important to, and more influential for, those who define and evaluate themselves based on their relationships with others or believe that social interactions should affirm basic moral values. See Joel Brockner et al., The Influence of Interdependent Self-Construal on Procedural Fairness Effects, 96 ORG. BEHAV. & HUM. DECISION PROCESSES 155, 155 (2005). There is also research that is beginning to demonstrate that people’s roles correlate to the heightened importance of certain elements of procedural justice. For example, one field study (in Germany) has found that observers of court procedures are much more likely to focus on dignified treatment than on voice, consideration, or even-handed treatment. See Susanne Beier et al., Influence of Judges’ Behaviors on Perceived Procedural Justice, 44 J. OF APPLIED SOC. PSYCHOLOGY 46 (2014).
high procedural justice from a lower status person, they are likely to focus even more strongly on outcome favorability in deciding whether to judge the outcome as fair. For them, procedural justice does not soften the blow of an adverse outcome. Rather, procedural justice may sharpen the blow because the occurrence of an adverse outcome as a result of a procedurally fair process calls into question the higher status person’s self-conception.

Finally, there is somewhat counter-intuitive research suggesting that people with low self-esteem and those who are highly committed to avoiding unfavorable outcomes but are certain they are going to lose actually do not prefer procedurally just processes. Indeed, they prefer procedurally unjust processes because they can then blame the processes for adverse outcomes. If the process were procedurally just, these individuals would have to blame themselves for not doing all they could to win—while they were sure they were going to lose.

C. Status and Its Effects on the Desire and Ability to Exercise Voice

There is also an increasing amount of research focusing on the element of voice, and some of this research is particularly problematic in considering how inequality, bias, and prejudice may undermine the potential of mediation to offer procedural justice and a forum in which people’s authentic voices and experiences can be expressed.

84. See Chen et al., supra note 75, at 1 (finding in experiments—one involving negotiation between higher status and lower status parties and a second involving the allocation of rewards between customer service representatives and supervisors—“high procedural fairness heightened the positive relationship between outcome favorability and desire for future interaction”). These researchers explain that higher status people “are more self-focused” than lower status people and use procedural fairness information (in conjunction with outcome favorability) more than lower status people do to determine how much they will be able to maintain existing conceptions of their status. On the one hand, social encounters that combine favorable outcomes and fair procedures on the other’s part enable higher status individuals to maintain their existing self-perceptions. Consequently, higher status people will strongly desire future interaction with other parties under such conditions. On the other hand, social encounters that combine unfavorable outcomes and fair procedures on the other’s part will be unwelcomed by higher status people insofar as these conditions threaten their existing self-perceptions. Id. at 6 (citing Dacher Keltner et al., Power, Approach, and Inhibition, 110 PSYCHOL. REV. 265 (2003)).

85. See id. at 6. On the other hand, prospect theory indicates that those who believe themselves entitled to a procedurally just process are quite likely to notice if they fail to receive such treatment. See Heather Pincock & Timothy Hedeen, Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory, 30 OHIO ST. J. ON DISP. RESOL. 431, 436 (2016) (discussing prospect theory). This research suggests that there is no particular advantage to providing a procedurally just process when dealing with higher status parties, but negative consequences may follow from the failure to provide a procedurally just process.

86. See Brockner, Wiesenfeld & Diekmann, supra note 80, at 188–90, 194–98 (describing research showing that people with lower self-esteem “felt significantly more self-verified [and their need for consistency was met] when told the event was handled with lower process fairness” while their level of commitment to an institution and its authorities was not affected by low process fairness).
Voice That Affects Perceptions of Procedural Justice

As noted earlier, the expression of voice is central to both procedural justice and self-determination. It is important, however, to identify the particular aspects of voice that are valuable in mediation. Roselle Wissler has conducted important research on this topic. First, she has found that people perceive that they have experienced the opportunity for voice and a procedurally just process in mediation if their lawyers speak on their behalf. Second, she has found that people’s perceptions of voice are even stronger if they have the opportunity to “tell their stories” themselves. Third, Wissler has found a distinction between voice and “participation.” In her research, while people’s perceptions of procedural justice are strongly related to their perception that they had a sufficient opportunity for voice, their perceptions of procedural justice are much less strongly related to the extent of their direct participation in the mediation. Indeed, Wissler found that those who spoke more in both domestic relations and civil mediation sessions were more likely to feel pressured to settle. This research suggests a disconnect between the voice that is important to procedural justice and the sort of participation that is often associated with self-determination—i.e., the opportunity to participate directly in the back-and-forth or bargaining of negotiation and mediation. I conducted qualitative research similarly suggesting that, in hierarchical systems, those with less power are quite likely to value the opportunity to express what is important to them while not valuing the opportunity to participate in the bargaining or negotiation process.

87. Voice also is central to procedural due process and, some would argue, rule of law. See Rebecca Hollander-Blumoff & Tom R. Tyler, Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution, 2011 J. Disp. Resol. 1, 10 (2011) (“Because the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law.”); Welsh, Hollow Promise, supra note 57, at 187 (observing that while voice and procedural due process certainly apply to adjudicative procedures, it is much more difficult to apply them to consensual procedures).

88. See Wissler, Representation in Mediation, supra note 35, at 447–52 (distinguishing between clients’ direct participation and indirect participation as their lawyers negotiated on their behalf); Roselle L. Wissler, Party Participation and Voice in Mediation, Disp. Resol. Mag., Fall 2011, at 20; see also Lind et al., In the Eye of the Beholder, supra note 52, at 969, 972 (finding that in a variety of dispute resolution processes other than mediation, tort litigants’ sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they “participated in the process of disposing” of their case was not).

89. See Wissler, Representation in Mediation, supra note 35, at 449–50; see also Wissler, Common Pleas, supra, note 56, at viii.

90. Importantly, the exercise of self-determination does not require participation in the back-and-forth of negotiation. People can also exercise meaningful (although perhaps thinner) self-determination in choosing among predetermined options or in choosing to veto a single proposed solution. See Welsh, The Thinning Vision, supra note 4, at 44–46 (describing this definition of self-determination).

91. Parents participating in special education mediation sessions generally expressed a desire for, and appreciation of, the opportunity to express themselves but were much less likely to anticipate or value the opportunity to listen and try to understand school officials or negotiate with them. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 581.
Meanwhile, voice is not always pretty or easy to hear. Voice can be angry, aggressive, and cause discomfort, both for the person expressing it and the person listening to such expression. 92 Such voice, with a strong emotional content, is often called “venting” in mediation. 93 Although mediation commentators acknowledge venting as valuable when new information is being shared (including revealing emotional impacts and needs), 94 they increasingly criticize the notion that venting is valuable for its own sake. There is physiological evidence, for example, that allowing a party to vent too much is not effective in helping with the release of difficult feelings and instead has the opposite effect. Continued venting, particularly in the presence of the other party, can result in heightened cortisol levels, which can then lead to greater entrenchment in negative feelings such as anger, as well as distorted perceptions that can inhibit problem-solving and decision-making. 95 Thus, unrestrained venting can

92. Being evaluated negatively and not having a sense of control are reported to be among the most serious psychological stressors that exist, leading to heightened levels of cortisol that then affect perceptions and attributions. See Tanz & McClintock, supra note 81, at 37 (citing Sally S. Dickerson & Margaret E. Kemeny, Acute Stressors and Cortisol Responses: A Theoretical Integration and Synthesis of Laboratory Research, 130 PSYCHOL. BULL. 355 (2004)). This research appears to be consistent with findings from other research regarding the fundamental attribution error. This research has established that situational influences strongly affect our judgments. See Lee Ross, The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 184–87 (Leonard Berkowitz ed., 1977); Michael W. Morris, Richard P. Larrick & Steven K. Su, Misperceiving Negotiation Counterparts: When Situationally Determined Bargaining Behaviors Are Attributed to Personality Traits, 77 J. PERSONALITY & SOC. PSYCHOL. 52, 53 (1999); Keith G. Allred, Anger and Retaliation in Conflict: The Role of Attribution, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 236, 240–41 (Morton Deutsch et al. eds., 2d ed. 2006) (noting that “research indicates that in observing a person at an airport yelling at an airline agent, one tends to over-attribute the behavior to bad temper and underattribute it to circumstances, such as having recently been the victim of recurring unfair treatment by the airline”). We are more likely to take into account situational factors to explain our own behavior. Edward E. Jones & Richard E. Nisbett, The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 79, 80 (Edward E. Jones et al. eds., 1972). Research further indicates that we are even more likely to attribute negative behaviors to a person’s character or disposition if that person is not a member of our own social group. Meanwhile, venting strong emotions in front of an adversary in a mediation session also can represent a stressor that raises cortisol levels. See Tanz & McClintock, supra note 81, at 37, 45.

93. See Tanz & McClintock, supra note 81, at 59–60.

94. Id. at 59.

95. Id. at 60, 66 (citing Brad J. Bushman et al., Chewing on It Can Chew You Up: Effects of Ruminating on Triggered Displaced Aggression, 88 J. PERSONALITY & SOC. PSYCHOL. 969, 974 (2005); Kenneth F. Dunham, I Hate You, but We Can Work It Out: Dealing with Anger Issues in Mediation, 12 APPALACHIAN J.L. 191 (2013); Tammy Lenski, Venting Anger: A Good Habit to Break, MEDIATE.COM (May 2011), http://www.mediate.com/articles/LenskiTbI20110516.cfm [https://perma.cc/Y3NT-6AMK]; Dominik Mischkowski et al., Flies on the Wall Are Less Aggressive: Self-Distancing “in the Heat of the Moment” Reduces Aggressive Thoughts, Angry Feelings and Aggressive Behavior, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1187, 1187–91 (2012)). Tanz and McClintock note that there may be a difference between men and women in their response to negative emotions, with women being more likely than men to inhibit such emotions and begin problem-solving. Id. at 49–51. Tanz and McClintock also report that women are more likely to respond to stress with a tend-and-befriend intervention, thus increasing social ties and resources. Id. at 68–69 (citing Shelley E. Taylor et al., Biobehavioral Responses to Stress in Females: Tend-
chill communications that are likely to be productive in terms of producing settlement in mediation.96

At the very least, this research regarding the physiological effects of venting suggests that there can be a “right” and a “wrong” sort of voice in mediation.97 At this point, it is not clear who is more likely to exercise the wrong sort of voice in mediation, but this research raises legitimate concerns that mediators who seek to place restrictions on venting ultimately could chill the expression of righteous anger and fear by those feeling the effects of inequality, bias, and prejudice.98

2. Status and the Willingness to Exercise Voice

Research also reveals that we cannot assume that those who perceive that they have been ignored, excluded, or disrespected will be willing or able to exercise their voice at all. Robert Rubinson has written quite passionately about the difficulties facing low-income participants who are required to participate in court-connected mediation. They may not be able to get child care. Their reliance on public transportation could make it difficult for them to travel to the courthouse. They may have to forego hourly wages and may fear the loss of their jobs if they fail to turn up for work in order to participate in mediation.99 These difficulties make it unlikely that people will be able to afford the luxury of voice.

and-Befriend, Not Fight-or-Flight, 107 PSYCHOL. REV. 411 (2000)). Stressed men are likely to become more cognitively rigid and entrenched and engage in tend-and-befriend only with those they already know and trust. Id. at 60, 69 (citing Bernadette von Dawans et al., The Social Dimension of Stress Reactivity: Acute Stress Increases Prosocial Behavior in Humans, 23 PSYCHOL. SCI. 651, 658 (2012)). See also Welton et al., The Role of Cau公共场所, supra note 24, at 183–85 (describing in some detail how presenting in front of the other disputant is problematic); Pincock & Hedeen, supra note 85, at 436 (asserting the need to revise theory positing that disputants have the emotional and mental capacity to “transition rather abruptly from . . . describing their conflict to solving their problem through generating ideas and forecasting their utility”) (citing Richard Birke, Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications, 25 O HIO ST. J. ON DISP. RESOL. 477, 510–12 (2010)).

96. In the context of online dispute resolution, eBay and Paypal structured their platform to avoid soliciting consumers’ open-ended text answers—instead requiring them to choose from a predetermined list—due to the likelihood that the consumers’ responses would be negative and thereby chill productive negotiation with merchants. See AMY SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 36–39 (2017).

97. See Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1, 44–51 (1990) (examining how White’s client’s voice during their counseling session was quite different from the voice she used when meeting with the caseworker; discussing restrictions on voice, its relationship to participation, power disparity, and safety).

98. In a related vein, Professor Carrie Menkel-Meadow has suggested that in focusing on individual negotiators’ behaviors or even the interactions between negotiators, we have perhaps “been naïve about the social structural conditions under which integrative negotiation can most optimally occur” and that we need to identify the “socioeconomic and political conditions [under which we can] actually get to yes by negotiating fairly, equitably, and wisely to achieve joint and mutual gain.” Carrie Menkel-Meadow, Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections, 22 NEGOT. J. 485, 499 (2006).

Recent research also has demonstrated that people’s willingness or ability to exercise their voice will depend, in large part, upon their identification with the relevant social group. In this research, the more people felt themselves to be part of a social group, the more they desired and expected voice in matters relevant to group membership. The less they identified with the social group, however, the less they desired and expected voice. Thus, despite the centrality of voice in the procedural justice literature, we cannot assume that everyone will always and uniformly have a high desire for voice.\textsuperscript{100} Those who do not feel part of the relevant social group—i.e., those who are marginalized or perceive that others are prejudiced against them—are likely to be less willing to exercise voice. Indeed, they are likely to be aware that their exercise of voice could subject them to heightened attention and negative consequences.\textsuperscript{101} People with higher status and greater identification in a social group, meanwhile, are more likely to exercise voice—and more likely to expect to exercise more voice.\textsuperscript{102} Interestingly, researchers noted that this may mean that people with higher status may actually be willing to trade their voice for something they want even more—i.e., a favorable outcome:

[L]ower-status individuals or groups might demand voice precisely for its instrumental properties. At the same time, higher-status individuals and groups—particularly legitimately higher-status individuals and groups—may feel sufficiently confident in their positions that they would be willing to forgo voice (i.e. express a relatively low desire for voice) in favour of alternative rules such as unbiased decision-making, precisely because the unbiased decision maker ought to recognize their legitimately higher status and afford them the material benefits normatively associated with it.\textsuperscript{103}

\textsuperscript{100.} See Michael J. Platow et al., Social Identification Predicts Desires and Expectations for Voice, 28 Soc. Just. Res. 526, 527 (2015). These researchers also observed, however, that people’s desire for voice generally is greater than their expectations regarding whether they will have voice. \textit{Id.} at 545.

\textsuperscript{101.} See, e.g., Doron Dorfman, Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process, 42 Law & Soc. Inquiry 195, 214–15 (2017) (describing how persons with disabilities who identify with the medical-individual model of disability do not necessarily want or need voice while those who identify with the social model of disability appreciate voice but also fear negative consequences of exercising voice in the disability determination process); Welsh, Stepping Back Through the Looking Glass, supra note 7, at 653–54 n.337 (suggesting this dynamic for parents of children with special needs); James A. Wall, Jr. & Suzanne Chan-Serafin, Do Mediators Walk Their Talk in Civil Cases?, 28 Conflict Resol. Quarterly 3, 16 (2010) (finding that mediators tended to use evaluative or pressing strategies even when they said they would employ a neutral style, and such strategies were used most often with plaintiffs engaging in behavior the mediators perceived as too demanding or competitive); see also Welsh, I Could Have Been a Contender, supra note 63, at 1168–71 (citing research demonstrating that women who make demands and negotiate assertively are more likely than men to be judged harshly, parties who have suffered discrimination are particularly unlikely to bring claims, employer-respondents tend to refuse the EEOC’s invitation to mediate discrimination matters, and status quo bias tends to favor dominant parties and disfavor marginalized parties).

\textsuperscript{102.} See Platow et al., supra note 100, at 526–49.

\textsuperscript{103.} \textit{Id.} at 545–46.
Related research indicates that people’s desire for, and expectation of, voice also is affected by the power distance culture of their national or organizational setting. In those nations with low power distance cultures104 (i.e., more egalitarian cultures), voice is expected and its legitimacy is high. When people in these nations experience lower levels of voice, they react negatively. In nations with high power distance cultures105 (i.e., more hierarchical cultures), people’s reactions to “low voice” are less negative. The researchers noted that “[a] central premise of the procedural justice literature—based on studies conducted mainly in the United States—is that people react unfavorably when they have little voice in a decision-making process.”106 These studies show that people’s desire for voice and their expectation that they will have voice are very likely to vary depending upon their culture, its power distance, and their placement in a relevant hierarchy.

Upon examination, it becomes clear that voice is neither a simple concept nor one that we can take for granted in the context of mediation. It is not magic. Rather, voice may be quite limited. Voice of the wrong sort can produce physiological effects that make it less effective in producing solutions. And people in a hierarchical setting who know they are marginalized may not expect voice or may choose not to exercise voice because they perceive, quite rationally, that it may cause them harm.107

D. Status and Its Effects on the Desire and Ability to Provide Trustworthy Consideration

As noted earlier, procedural justice research generally reveals that while people care about the opportunity for voice, they also care about whether their voice has been heard—i.e., whether their views were considered in a trustworthy manner. Most of the research focuses on whether an authority figure or decision-maker—e.g., a judge, police officer, or supervisor—has demonstrated trustworthy consideration. Notice that the people in these roles tend to be third parties, not engaged directly in the dispute. Indeed, researchers have long raised doubts about the ability of

---

104. The United States and Germany were the low power distance countries examined in this study.
105. China, Mexico, and Hong Kong were the high power distance countries examined in this study.
107. This research is reminiscent of the story told in White, supra note 97, in which the client chose to tell one story—the real story—to her lawyer and then told another story—the one that would fit a stereotype and yield the result she needed—when dealing with her welfare officer.
the disputing parties involved in a mediation to truly listen to each other.\textsuperscript{108} Relatively recently, however, researchers have discovered that the procedural justice perceptions of parties trying to resolve disputes in mediation depend very much on whether the other party—who shares decision-making authority in this consensual process—demonstrated trustworthy consideration.\textsuperscript{109}

Trustworthy consideration is a concept that bears similarities to several others: active or reflective listening,\textsuperscript{110} “looping,”\textsuperscript{111} perspective taking,\textsuperscript{112} open-minded listening,\textsuperscript{113} testing for understanding,\textsuperscript{114} and empathizing.\textsuperscript{115} There are three key questions here: “Did the authority (or other) listen to what I said?” “Did the authority (or other) understand what I said?” “Did the authority (or other) care to understand what I said?” Research indicates that people tend to judge accurate procedures—i.e., those in which the decision maker or authority takes all relevant information into account in coming to a decision—as fairer than inaccurate procedures.\textsuperscript{116}

As with voice, there is research indicating that inequality, bias, and prejudice can get in the way of listening to someone else’s perspective, accurately understanding what she has said, and caring to understand her perspective. Research regarding the fundamental attribution bias, for example, shows that when someone has hurt us and is not in our social

\begin{itemize}
\item \textsuperscript{108} See, e.g., Welton et al., \textit{The Role of Caucusing}, supra note 24, at 185 (“Joint sessions encourage disputants to simply repeat their official positions over and over rather than to explore these positions or listen to one another.”).
\item \textsuperscript{109} See Tina Nabatchi et al., \textit{Organizational Justice and Workplace Mediation: A Six-Factor Model}, 18 \textit{INT’L J. CONFLICT MGMT.} 148 (2007) (reporting, in the context of a transformative mediation program, the statistical significance of whether the other party heard and understood).
\item \textsuperscript{111} See Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, \textit{Beyond Winning: Negotiating to Create Value in Deals and Disputes} 64–65 (2000); Leo- nard J. Riskin et al., \textit{Dispute Resolution and Lawyers} 83–84 (5th ed. 2013).
\item \textsuperscript{116} See Jan-Willem Van Prooijen et al., \textit{Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects}, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1357 (2002) (describing manipulation of procedural accuracy in experiment and noting that it represented “an alternative way to study procedural fairness”); see also Chen et al., supra note 75, at 15 (describing a “high procedural fairness condition” as one in which the decision-maker wrote “I carefully scored the forms, and I saw that you did X percent of the work, so I thought it’d be fair to give you Y of the 10 tickets,” while in a “low procedural fairness condition,” the decision-maker wrote “I didn’t bother to score the forms, but X is my lucky number, so I’m giving you Y percent of the tickets”).
\end{itemize}
group, we are more likely to over-attribute her bad behavior to her essential character and under-attribute it to the situation in which she found herself. We are more forgiving of those in our in-group and even more forgiving of ourselves.117 This psychological phenomenon is likely to impede our ability or desire to listen and really understand the voice of someone who is not in our social group.

There is also research showing that status can impede trustworthy consideration. Those who have higher status and greater power have been shown to be less likely to be trustworthy118 and thus less likely to provide consideration that is trustworthy. Worryingly, there is even research suggesting that people naturally associate the failure to provide procedural justice with power and assume that someone who has behaved in a procedurally just manner is less powerful.119 The failure of those with higher status and greater power to extend trustworthy consideration has been attributed to their reduced need for others’ help. This phenomenon also may be self-protective. Bob Mnookin has suggested that one of the great challenges of a similar skill, empathizing, is that it seems to require sympathy, agreement, or even the assumption of responsibility and blame for another’s pain—i.e., “the fear that I’m being asked to characterize my own decision as immoral.”120

This research demonstrates that placing two people in the same room in the presence of a mediator does not guarantee that either will provide the other with trustworthy consideration. Trustworthy consideration, like self-determination and voice, is not magic.

But can something be done to achieve many of the benefits of procedural justice while also recognizing that certain people—e.g., those who are lower status in a hierarchical system, those who have been marginalized within a social group, and ultimately those who are likely to be among the marginalized—may need assistance in exercising their voice, while other people—e.g., those who are higher status—may need assistance with demonstrating trustworthy consideration?

117. Allred, supra note 92; Morris, Larrick & Su, supra note 92. See Ross, supra note 92.

118. See David DeSteno, The Truth About Trust: How It Determines Success in Life, Love, Learning, and More 129-144 (2014) (summarizing research that has shown that trustworthiness is affected by context—e.g., an experience of increased status (even if temporary) leads to a reduced sense of needing others’ help and an increased sense of self-reliance that then results in reduced trust, reduced trustworthiness, and increased lying; as social class goes up, trustworthiness also declines).

119. See Brockner, Wiesenfeld & Diekmann, supra note 80, at 157 n.2.

V. POTENTIAL RESPONSES

The following potential responses represent just a beginning in trying to address the potential for inequality, bias, and prejudice to undermine mediation’s potential to deliver procedural justice, substantive justice, and self-determination. The first response focuses on mediators, their commitment to procedural justice and self-determination, and the role that their social identities play in conveying a message of equal treatment, inclusivity, and the safety of a neutral forum. The second response focuses on the use of caucuses, primarily before the formal mediation session begins, in order to foster all parties’ voice, their sense of belonging, trustworthy consideration by the mediator, and trust in the mediation forum. The third response examines the potential to enhance the parties’ ability to provide each other with trustworthy consideration. The fourth response considers whether online technologies may be used to increase voice, trustworthy consideration, even-handed treatment, and respect—and also increase real, substantive self-determination and access to justice through access to important information. The fifth response asks whether mediators should have some responsibility to avoid patently unconscionable results.

A. INCREASING THE INCLUSIVITY OF THE POOL OF MEDIATORS AND TRAINING ALL MEDIATORS TO ACKNOWLEDGE AND ADDRESS IMPLICIT BIAS

There is no doubt that courts and public and private dispute resolution providers must increase the inclusivity of their pools of mediators,121 include underrepresented demographics (e.g., professional women and people of color) in the lists of potential mediators sent to parties,122 and mentor and promote professional women and people of color as mediators.123 The presence of such mediators will signal greater inclusiv-

122. See Gina Viola Brown & Andrea Kupfer Schneider, Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey, 47 Akron L. Rev. 975 (2015); Andrea Kupfer Schneider & Gina Viola Brown, Gender Differences in Dispute Resolution Practice, Disp. Resol. Mag., Spring 2014, at 36.
123. See Noah Hanft, Making Diversity Happen in ADR: No More Lip Service, 257 N.Y.L.J. (2017) (reporting that “CPR saw an 81 percent increase in the selection of women and diverse neutrals in FY16, with women and minorities accounting for 26 percent of
ity and safety for all. From the perspective of the procedural justice literature, increasing the diversity of the pool of mediators should enhance marginalized parties’ willingness to perceive that they will be, and were, heard and understood, therefore increasing marginalized parties’ willingness to exercise voice and increasing the likelihood of actual understanding and trustworthy consideration—which may then reduce the likelihood of unjustifiably disparate outcomes. There are hopeful signs that public and private dispute resolution providers and other organizations are moving in this direction.

Carol Izumi has written comprehensively about the presence and influence of implicit bias in mediation and is writing more for this symp-
sium. In this Article, I will suggest only that requiring mediators to practice “considering the opposite” has been shown to be effective in reducing bias.129

B. PRE-MEDIATION CAUCUSING WITH PARTIES TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF VOICE

Earlier, this Article expressed concerns regarding lawyers’ increasing tendency to avoid joint sessions in mediation and to request mediators whose mediation sessions occur entirely in caucus. Indeed, recent research has indicated that in certain contexts extensive caucusing does not necessarily increase the likelihood of settlement,130 while it can reduce parties’ belief in their ability to work together.131

From a procedural justice perspective, however, targeted and careful use of caucus may have the effect of enhancing the voice of those who are hesitant to exercise it (i.e., those who are of lower status or who do not identify with the “social group” being served by the mediation). Targeted and careful use of caucus also may increase the likelihood that people feel and believe that their views received trustworthy consideration and respect. Thus, used appropriately, caucusing has the potential to help parties gain the benefits of procedural justice.

Several years ago, I conducted a small qualitative empirical research project involving special education mediation.132 To my surprise, caucus emerged as very significant to the parents and school officials who participated in the mediation sessions. It was a potent tool. In some cases, the mediators chose to allow initial presentations in a joint session and then engaged in shuttle diplomacy. One participant expressed appreciation of this approach because he “—like many others—... valued the way in which caucus simultaneously permitted bargaining and buffered both the parents and him from the negative emotions often triggered by distribu-

---

129. See Frenkel & Stark, supra note 112, at 22–24; see also Phyllis E. Bernard, What Some Theories Say; What Some Mediators Know, DISP. RESOL. MAG., Spring 2009, at 6 (reporting on the effects of requiring mediators to reflect on the role of gender, race, and socioeconomic class and the inclusion of such opportunities for reflection in the Early Settlement Central Mediation Program in Oklahoma City).

130. See Mediation Research Task Force Report, supra note 37.


132. See Welsh, Stepping Back Through the Looking Glass, supra note 7, at 580.
tive negotiation tactics.” 133 Other school officials and parents similarly found that the use of caucus kept mediation from “get[ting] out of control,” “eliminated the arguments,” and allowed the parties to “take a deep breath, step back, take a look, and then come back to the table.” 134 Some participants in this study also described how the use of caucus significantly enhanced their perceptions of procedural justice. For example,

both parents and school officials reacted positively to caucuses when mediators used the technique to provide disputants with a full opportunity to tell their stories or spent time in caucus ensuring that they understood what disputants were saying. . . . Mediators’ use of caucus also garnered positive reviews when the technique assisted the disputants in engaging in a thorough and dignified deliberative process. For example, when the mediator in one case did not challenge the disputants’ selection of a normative frame in caucus, but instead assisted the disputants in a more careful examination and application of the legal norms they had invoked, both the parent and the school official accepted and valued the mediator’s evaluative interventions.135

In other instances, however, the mediator’s use of caucus significantly harmed the parties’ perceptions of procedural justice. “When [the participants] were uncertain that the mediator truly understood what they had said and could not hear the mediator’s translation for themselves, they raised concerns about the accuracy of what the mediator communicated on their behalf” and “feared the potential effect of caucus on the quality of the substantive outcomes achieved in mediation.” 136 “The privacy of caucus also may have encouraged some mediators to engage quickly in more aggressive evaluative actions and statements, which disputants then described as ‘adversarial,’ ‘impatient,’ and ‘going over the edge.’” 137 For instance, “when mediators used the privacy of caucus to try to persuade disputants to accept the validity of the other side’s normative frame, both parents and school officials questioned the mediators’ impartiality.” 138 Finally, when mediators did not permit parents to make an initial presentation in joint session, did not disclose prior contact with school officials, or “spen[t] so much time” with school officials, some parents became very suspicious about the relationship between the school officials and

133. Id. at 647.
134. Id. at 650–51.
135. Id. at 650.
136. Id. at 647–48.
137. Id. at 648 (footnotes omitted); see also Welsh, Magistrate Judges, supra note 37, at 989 (providing examples of aggressive evaluation by judges in ex parte meetings during settlement conferences).
138. Welsh, Stepping Back Through the Looking Glass, supra note 7, at 648. A Party’s reaction is likely to be quite different if the mediator expresses understanding and appreciation of the position being taken by that party. See, e.g., Welton et al., The Role of Caucus-
mediators. Rather than experiencing a procedurally just mediation process that fostered free, equal, and respectful dialogue, some of these parents felt that they and their children had once again become marginalized “odd men out” with officials talking behind their backs.

Based on these reactions from parents and school officials, I suggested that special education mediation could “borrow a page” from victim-offender mediation, which regularly provides for pre-mediation caucusing—generally conducted before the day of mediation, with the mediator visiting the victim and the offender separately to prepare both of them to participate in the mediation process. The goal is to help both participants identify their goals for the mediation session and prepare to achieve those goals. In a very similar vein, Gary Friedman and Jack Himmelstein recommend meeting with parties individually to help them come to their own decisions about whether, why, and how they might use mediation. Friedman and Himmelstein describe their mediation model as “understanding-based” and also specify that it is a “non-caucus approach”—but their pre-mediation meetings with the parties also represent a sort of caucus, one in which the focus is on welcoming the parties’ voice and providing respectful and trustworthy consideration.

In the last few years, other commentators have similarly urged the use of pre-mediation caucuses to enhance the quality of mediation sessions. Jill Tanz and Martha McClintock, who have raised concerns regarding the negative physiological effects of unrestrained venting in mediation, have encouraged the responsive use of early caucuses to build trust in the mediation process and the mediator, learn what each party hopes to achieve, gauge emotional levels, and plan. Such caucusing is designed to reduce stress and anger and instead enhance trust, focus, problem-solving, and decision-making. Other researchers have also recommended the use of pre-mediation caucuses in order to build trust and specifically not to develop settlement proposals. Still other commentators have recommended the use of pre-mediation caucuses to assist individuals claiming discrimination to prepare for the mediation process and place their expe-

139. Id. at 649.
140. Id.
141. Id. at 658.
143. See Tanz & McClintock, supra note 81, at 55, 60, 62. Tanz and McClintock observe that mediators trying to determine whether parties are experiencing stress may watch for microaggressions (often targeted at women and people of color), which can signal that the aggressor is experiencing stress and then engaging in displaced aggression. Id. at 65. Such microaggressions then often cause stress in those who have been targeted. Id. Other researchers are focusing on other physiological factors that influence decision-making. See, e.g., Roy F. Baumeister et al., The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior, 15 PEPP. DISP. RESOL. J. 377 (2015); JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 78–79 (2d ed. 1994) (excitation transfer effect).
144. See Roderick Swaab & Jeannie Brett, Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution, IACM Meetings Paper at 2, 9 (2007).
rience within a larger context. Finally, the researchers who examined the use of labor mediation in the Netherlands, described earlier, also have recommended pre-mediation caucusing, particularly with the subordinates who cared so much about procedural justice and outside the presence of the supervisor, in order to avoid triggering hierarchical relationships and dynamics.

In all of these cases, the commentators and researchers have focused on the use of pre-mediation and early caucusing to enhance parties’ trust in the mediator and the process, affirm that each party is a valued member of the group engaged in mediation, and help parties prepare for their participation. It is noteworthy that these efforts also would have the effect of encouraging the productive expression of voice and providing evidence of trustworthy and respectful consideration by the mediator.

Of course, these recommendations also tend to assume that only good things will happen in caucuses. As noted earlier, mediators and parties generally use caucuses to move toward settlement. When mediators focus too heavily or too quickly on settlement, however, they can undermine perceptions of procedural justice and self-determination. Some researchers observing the parties’ behavior, meanwhile, have raised other concerns. For example, when the parties are in caucus they are more likely to speak quite strongly about their own cases and more disparagingly about the other party. They also may use caucus to try to manipulate the mediator.

146. See Bollen, Ittner & Euwema, supra note 73, at 632.
147. See Welton et al., The Role of Caucusing in Mediation, supra note 24, at 182 (discussing the importance of caucus for the early development of rapport between mediator and party).
148. See id. at 196 (noting the many positive consequences of using caucus: less direct hostility between the parties, increased disclosure of information, more ideas for solutions (perhaps because emotion and defensiveness are reduced and offering an idea is less likely to be seen as a sign of weakness), increased requests from the mediator for information (in contrast to joint session where such requests declined rapidly), more useful challenges by the mediator, providing a route into problem-solving; also noting that caucuses are used for different purposes at different stages of the mediation—e.g., greater likelihood of requests for other disputant’s or mediator’s reactions to ideas in middle and late stage caucus than in joint sessions; greater likelihood of mediator-generated alternatives in middle stage caucus and then in final stage joint session).
149. See id. at 199 (reporting that caucus was used in about two-thirds of the community mediations studied; about 35% of disputants’ statements occurred in caucus as compared to joint session; and “[i]n cases that employed a caucus, disputants used more persuasive arguments, made fewer requests for reaction to an alternative, and generated fewer new alternatives. Mediators employed more negative evaluations of the parties’ behavior and less positive evaluations of their positions during these cases. These findings suggest that mediators tend to call caucuses when disputants are taking a contentious, as opposed to problem-solving, approach.”).
150. See Dwight Golann, Sharing A Mediator’s Power: Effective Advocacy in Settlement 6–8, 50–52, 68–69, 83–87 (2013) (examples of lawyers’ use of mediation and mediators to implement a distributive or competitive negotiation strategy); James R. Coben, A Candid Look at Advocacy Strategies in Caucused Mediations, 7 Disp. Resol. Mag. 27 (Fall 2000); Welton et al., The Role of Caucusing in Mediation, supra note 24, at 193–94 (reporting research regarding community mediation, finding that in caucus dispu-
The lesson? Pre-mediation caucusing also is not magic. If it is used, its purpose should be clear and constrained. Mediators should be trained in how to use it to develop trust, and courts encouraging or ordering parties’ use of mediation should institutionalize sufficient time for pre-mediation caucuses as well as systems that provide for feedback and quality assurance.151

C. REFLECTIVE LISTENING IN MEDIATION TO INCREASE THE LIKELIHOOD AND PRODUCTIVITY OF TRUSTWORTHY CONSIDERATION

As noted earlier, participants’ inability or unwillingness to extend trustworthy consideration to each other also can hinder mediation’s potential to foster procedural justice and self-determination. But people can learn the value of listening as a result of participating in mediation.152 People also can learn at least the rudimentary components of active or reflective listening—e.g., allowing the other party to speak and then trying to summarize, accurately, what they believe the other party has said.153 Interest-

151. See Welsh, Magistrate Judges, supra note 37, at 1035–1043, 1046–1060 (urging feedback for federal magistrate judges who facilitate settlements, providing examples of different means to provide feedback and opportunities for self-reflection, and providing a sample feedback form); Welsh & Schneider, Thoughtful Integration of Mediation, supra note 45, at 137–139 (describing courts’ systems for assuring the quality of mediation); Welsh, et al., The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions, supra note 37 (presenting and explaining a questionnaire soliciting feedback from lawyers and parties regarding the procedural fairness and helpfulness of judicial facilitation of settlement); McAdoo & Welsh, Aiming for Institutionalization, supra note 37, at 39–43 (recommendations for assuring effectiveness and quality of court-connected dispute resolution programs and for resolving complaints about dispute resolution processes); McAdoo & Welsh, Look Before You Leap, supra note 22, at 430; Welsh, The Place of Mediation supra note 7, at 139–140 (expressing concerns regarding many courts’ failure to monitor the quality of court-connected mediation programs).

152. For example, in the U.S. Postal Service’s REDRESS program, supervisors who had participated in mediation reported that they had learned that it was important to listen, rather than immediately propose a solution or other response. See Jonathan F. Anderson & Lisa Bingham, Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS, 48 LAB. L. J. 601, 607–08 (1997); Lisa B. Bingham, Employment Dispute Resolution: The Case for Mediation, 22 CONFLICT RESOL. Q. 145, 158 (2004).

153. It appears that these sorts of behaviors are likely to be perceived as collaborative and procedurally fair, are likely to increase trust, and are likely to result in the provision of
ingly, recent research also indicates that when a mediator models reflective listening (or trustworthy consideration), this can enhance parties’ ability to do the same.\textsuperscript{154} Other research, in the communications context, has found that when meetings are characterized by a substantial amount of checking for understanding of previous contributions, the incidence of attacking or defensive behaviors is low.\textsuperscript{155} Meanwhile, people participating in meetings characterized by substantial testing for understanding tend to judge these meetings as fair.\textsuperscript{156}

If the mediator has developed a trusting relationship with the parties and demonstrates that she cares very much about accurately understanding what each of the parties has to say, then it appears to be more likely that the parties will care about ensuring that they understand each other.\textsuperscript{157}

D. Online Technology to Increase the Likelihood and Productivity of Voice, Trustworthy Consideration, and Real, Substantive Self-Determination

Some have also suggested that those who are hesitant to exercise voice may be emboldened by the opportunity to participate in asynchronous online mediation.\textsuperscript{158} There certainly is plenty of research and personal experience demonstrating that people’s online voice can be different from their in-person voice. Research has indicated that lower-status individuals, for example, are more willing to participate in “lean media” like email and that social influence bias is reduced.\textsuperscript{159} People can also take their time in composing messages, discerning the meaning of the messages they receive, and making decisions about how to respond. Indeed, a person’s written facility with language under these circumstances may be quite different from her verbal facility with language in an in-person meeting.

more information—thus making it more likely that parties will capture the integrative potential of a situation. See Welsh, \textit{The Reputational Advantages}, supra note 58, at 119.

\textsuperscript{154} See Administrative Office of the Courts, \textit{supra} note 131, at v–vi.

\textsuperscript{155} See \textit{NEIL RACKHAM, MODELS FOR EXPLAINING BEHAVIOR: INTERACTIVE SKILLS PROGRAM 56} (1995) (unpublished manuscript) (on file with author) (defining “testing understanding” as behavior that “explores understanding of previous contribution,” “ties down and clarifies points which may be unclear or ambiguous,” and “check[s whether] people are seeing things [in] the same way”); Nick Anderson, \textit{Meetings Bloody Meetings, The CRISPAN ADVANTAGE} (Feb. 19, 2010), http://therispianadvantage.com/meetings-bloody-meetings/ [https://perma.cc/E5K4-7EHL].


\textsuperscript{157} See supra note 131. But see Wissler, \textit{Representation in Mediation}, \textit{supra} note 35 (reporting that mediation participants were less likely to indicate that they understood each other better when they were represented by lawyers; the reason is unclear).

\textsuperscript{158} See Bollen, Ittner & Euwema, \textit{supra} note 73, at 631.

\textsuperscript{159} See Noam Ebner, Anita D. Bhappu, Jennifer Gerarda Brown, Kimberlee K. Kovach & Andrea Kupfer Schneider, \textit{You’ve Got Agreement: Negotiating via Email, in RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE} 89, 96 (James R. Coben, Giuseppe DePalo & Christopher Honeyman eds., 2009).
Some dispute resolution organizations actually facilitate an online pre-mediation exchange of information between the parties by requesting that parties respond online to a series of questions and then allowing the parties to see each other’s answers. Thus, these online providers facilitate a form of voice and trustworthy consideration.

Less dramatically, asynchronous online communication may play a helpful role as a component part of in-person mediation. For example, researchers have examined the effects of including an online intake procedure before face-to-face mediation (i.e., e-supported mediation) in the context of the workplace, with presumed hierarchical differences between supervisors and subordinates. The particular intake procedure that was examined “encourage[d] both parties to reflect on the issue at hand, the accompanying feelings, the underlying interests as well as potential solutions.”160 According to the researchers, these online tools “provide[d] parties with an opportunity to tell their side of the story via asynchronous typewritten messages (e-mails); [and] it help[ed] parties to get some insight into the situation at hand, and their needs and interests as well as the needs and interests of the other.”161 The researchers found that in the face-to-face mediations preceded by the online intake procedure, subordinates did not differ from superiors in their satisfaction with the mediation outcome or the mediation process. This was in marked contrast to face-to-face mediation that was not preceded by a preparatory online intake procedure, in which subordinates felt less satisfied with the mediation outcome and the mediation process.162 This research suggests that an online intake procedure, with carefully-crafted questions, may be used to achieve some of the same goals as pre-mediation caucusing, described earlier.

In addition, online tools may help to ensure real, informed self-determination in mediation. There is research indicating that the widespread use of smartphones (in contrast to computers) is bridging the digital divide that has existed between men and women, between racial groups, and between rich and poor.163 If this is so, then widespread online access to information—such as that regarding legal rights and defenses, available procedures, available dispute resolution providers, and outcomes in

---


161. Id.

162. Id. at 312.

163. See SCHMITZ & RULE, THE NEW HANDSHAKE, supra note 96, at 19 (citing to data from the Pew Research Center showing “smartphone usage has created new means for accessing the internet, especially for minority groups and those with lower economic means. For example, 10% of Americans do not have home broadband internet access, but they do own a smartphone. Smartphones also virtually eliminate the digital divide among races and ethnicities, with 80% of “White, Non-Hispanic,” 79% of “Black, Non-Hispanic,” and 75% “Hispanic” having some internet access through home broadband or a smartphone. Still, smartphones widen the digital divide between 18–29 year olds and those who are over age 65 (increasing from a gap of 37 percentage points in home broadband access to 49 percentage points when taking smartphones into account).”).
comparable cases—may create the potential for both increased access to justice and more informed self-determination. Legal service providers in the United States already are experimenting with the provision of such information to their clients and self-represented litigants using artificial intelligence, online videos, online legal libraries, and many other tools.164

Online tools also may have an important post-mediation application. For example, online publication of information regarding numbers of mediated cases, settlement rates, procedural fairness perceptions and even aggregated substantive outcomes with status-based breakdowns, would provide some degree of transparency and contribute to trust in the procedural and substantive fairness of mediation and the avoidance of systemic but under-the-radar discrimination.165

More generally, many are now advocating for online dispute resolution (ODR) in order to increase access to justice by reducing costs and time to disposition.166 Thus, ODR may be in the process of becoming the “new” mediation,167 just as mediation has become the new arbitration168 and arbitration has become the new litigation.169 Like the processes that came before it, however, ODR is very likely to need to embrace procedural safeguards and transparency in order to assure people of both procedural and substantive justice.170

164. The Legal Service Corporation’s annual Technology Initiative Grants Conference provides an opportunity to explore all of these futuristic options. See also Ethan Katsh & Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes 157–158 (2017).

165. See Nancy A. Welsh, Class Action Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?, 13 U. St. Thomas L.J. 381, 430-431 (2017) (imagining an online dispute resolution process for business-to-consumer disputes that provided consumers with access to information about their rights and defenses, substantive and procedural safeguards, aggregated information regarding consumers’ perceptions of fairness and substantive results, and impressive compliance with results).


169. See Tom Stipanowich, supra note 23.

E. Empowering MEDIATORS TO AVOID UNCONSCIONABLE UNFAIRNESS OR COERCION

Ellen Waldman, Lola Akin Ojelabi, Jennifer Reynolds, and other scholars increasingly express concern that even if mediation sessions provide for voice, trustworthy consideration, even-handed treatment, and respect, they also have the potential to produce unconscionable outcomes. Waldman and Ojelabi do not urge that mediators should therefore impose their own solutions and definitions of fairness upon the disputants. However, they do advocate for mediators’ ethical responsibility to assist the “have-nots” and at least question outcomes that are so lopsided that they appear unconscionable or patently unfair.\(^{171}\) This is likely the most controversial suggestion contained in this Article, but there is precedent for imposing some ethical obligation upon mediators to avoid extreme substantive unfairness in specified contexts.\(^{172}\) It is also relatively easy to

---

\(^{171}\) See Ellen Waldman & Lola Akin Ojelabi, Mediators and Substantive Justice: A View from Rawls’ Original Position, 30 OHIO ST. J. ON DISP. RESOL. 391, 420–30 (2016) (using Rawls’ “veil of ignorance” as well as ethical codes that permit mediators to withdraw due to concerns regarding unconscionability).

\(^{172}\) In some settings, for example, mediators are obligated to avoid unconscionable settlements. See Wissler, Representation in Mediation, supra note 35, at 435 (citing Model Standards of Conduct for Mediators, §§ I.A, II, V.L.A. (Am. Arb. Ass’n et al. 2005); ABA Model Standards of Practice for Family and Divorce Mediation §§ I, IV (2001) [hereinafter ABA Model Divorce Mediation Standards]; Model Rule for the Lawyer as Third-Party Neutral r. 4.5.3, 4.5.6 & cmts. (CPR-Georgetown Comm’n on Ethics and Standards in ADR); Nat’l Standards for Court-Connected Mediation Programs §§ 8.1.f, 11.1 & cmts. (Ctr. for Dispute Settlement, Inst. for Judicial Admin); Jacqueline M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 NOTRE DAME L. REV. 775, 787 (1999); Leonard Riskin, Toward New Standards for the Neutral Lawyer in Mediation, 26 ARIZ. L. REV. 329, 349, 354 (1984); Welsh, The Thinning Vision, supra note 4, at 15, 78–84; see also ABA Model Divorce Mediation Standards, §§ XI, 25.4 (“A family mediator shall suspend or terminate the mediation process when . . . the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable.”); Robert A. Baruch Bush, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications 13–19 (1992); John Lande, How Will Lawyering and Mediation Transform Each Other?, 24 FLA. ST. U. L. REV. 839, 878 (1997); Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 MINN. L. REV. 1317, 1332–33, 1397–98, 1405–06 (1995); Nolan-Haley, supra, at 811, 836; Pincock & Hedeen, supra, note 85, at 444–47 (discussing
understand how such an obligation would make it more likely that marginalized parties would perceive the mediation process as offering at least minimal assurance that they and their claims will be treated in an even-handed and dignified manner.

VI. CONCLUSION

This Article began by recounting the dreams and noble intentions that inspired many of those who advocated for the institutionalization of mediation. Of course, powerful dissenting voices arose at the time. Richard Delgado was chief among them, and he continues to raise legitimate concerns that must be addressed. Indeed, this Article has examined the ways in which mediation has fallen short of achieving aspirational self-determination and how and why inequality can undermine the ability of mediation to assure a procedurally just process. Much of the research reviewed here is consistent with the social science research that Professor Delgado and his co-authors invoked as the basis for their concerns regarding mediation. Thus, mediation has fallen prey to the same social and economic problems that have afflicted (and continue to afflict) civil and criminal litigation, administrative adjudication, and arbitration.

This Article, though, is for those who have valued and continue to value mediation for its potential to offer self-determination and procedural justice—it’s potential for a certain sort of magic—even while admitting its shortcomings and acknowledging the need for reform. The research described here, particularly regarding procedural justice, reveals that we can and should take steps to increase the likelihood and productivity of all participants’ voice, trustworthy consideration and real, substantive self-determination by: increasing the inclusivity of our pool of mediators; training all mediators to acknowledge and address implicit bias; training mediators to engage in pre-mediation caucusing that focuses on developing trust; institutionalizing systems for feedback and quality assurance; training mediators to model reflective listening; adopting online technology that provides parties with the information they need to engage in informed decision-making and the opportunity for self-analysis and self-reflection; and perhaps even identifying additional areas of mediation practice in which marginalized parties’ safety requires mediators to take affirmative steps to avoid unconscionable unfairness or coercion.

theoretical developments regarding bullying, the related concepts of harassment and discrimination, and the potential responsiveness of restorative justice).


174. See Michael Mofitt, Three Things To Be Against (“Settlement” Not Included), 78 FORDHAM L. REV. 1203, 1245 (2009) (“We should celebrate the beauty in each process’s internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. . . . Both settlement and litigation fail on each of these measures with some reliability . . . .”).
It turns out that achieving the illusion of magic demands commitment from us, and quite a lot of work. But it is work that can and should be done.