

# Mediation in Child Protection Cases Round Table Report

February 2021



# What was the goal of the Mediation in Child Protection Cases Round Table?

The Supreme Court of Texas Children's Commission hosted the Round Table on Mediation in Child Protection Cases on February 22, 2019 in Austin, Texas. Round Table participants included mediators, attorneys, judicial leaders, subject matter experts, and policymakers from across the state. Attendees participated in a moderated discussion of the issues affecting mediation in child protection cases in Texas with the goal of advancing ideas that would increase the effectiveness of mediation as a tool to improve outcomes for children and families.















#### What is mediation in child protection cases?

Mediation is a collaborative problem-solving process used in child protection cases with the goal of reaching consensus and resolution of cases involving child abuse or neglect. Communication amongst parents, attorneys, the Department of Family and Protective Services (DFPS), and other participants is a central component of mediation in child protection cases.

# What are the laws in Texas governing mediation in child protection cases?

The law governing mediation is laid out in the Texas Civil Practices and Remedies Code to encourage the peaceful resolution of disputes involving the parent-child relationship through mediation and other voluntary settlement procedures. Mediation is defined as a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them. Courts may appoint impartial third parties as mediators and those serving as impartial third parties must have a minimum of forty hours of classroom training in order to be qualified. An additional twenty-four 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, is required to mediate a suit involving the parent-child relationship (SAPCR).

<sup>1</sup> Tex. Civ. Prac. & Rem. Code § 154.002.

<sup>2</sup> Tex. Civ. Prac. & Rem. Code § 154.023.

<sup>3</sup> Tex. Civ. Prac. & Rem. Code §§ 154.051, 154.052.

<sup>4</sup> Tex. Civ. Prac. & Rem. Code § 154.052.

The duties of a mediator include encouraging settlement without being coercive and maintaining confidentiality.<sup>5</sup> Once a mediation agreement is reached, written, and executed, it is enforceable in the same manner as any other written contract.<sup>6</sup>

Texas Family Code Section 153.0071 sets out the procedures for mediation in SAPCR cases. Parties can refer a case to mediation by agreement or the court can refer the parties to mediation. A mediated settlement in a SAPCR is binding and not subject to revocation if it is signed by each party and their attorney, and if it contains prominent notice that it is a binding agreement. A party is entitled to a judgment based on a binding mediated settlement agreement if it is properly executed.<sup>7</sup>

A court can decline to enter a judgement based on a mediated settlement agreement in two circumstances:

- 1. If the court finds that a party to the agreement was a victim of family violence and that circumstance affected their ability to make decisions during mediation; or
- 2. If the court finds that the mediation agreement allows a registered sex offender or other person with a history or pattern of physical or sexual abuse to reside in the same household as the child or to have unsupervised access to the child.

In both circumstances, the court must also find the mediated settlement agreement is not in the best interest of the child.8

A party may file a written objection to mediation on the basis that family violence was committed by another party against the objecting party or against a child who is the subject of the suit. Such an objection prevents the case from being referred to mediation unless a party requests a hearing, and the court finds that a preponderance of evidence does not support the objection. The court must order appropriate measures to ensure the physical and emotional safety of the party who filed the objection if mediation is ordered. However, this provision does not apply to suits filed under Texas Family Code Chapter 262, meaning that a CPS case involving family violence can be referred to mediation despite a party's objection and no hearing on the objection is required for mediation to occur. As mentioned above, mediators in child protection cases are required to complete at least four hours of family violence dynamics training developed by a statewide family violence advocacy organization, so that they may be prepared for this type of situation.

<sup>5</sup> Tex. Civ. Prac. & Rem. Code § 154.053.

<sup>6</sup> Tex. Civ. Prac. & Rem. Code § 154.071.

<sup>7</sup> Tex. Fam. Code § 153.0071(c)-(e).

<sup>8</sup> Tex. Fam. Code § 153.0071(e-1).

<sup>9</sup> Tex. Fam. Code § 153.0071(f)

<sup>10</sup> Tex. Fam. Code § 153.0071(f).

<sup>11</sup> Tex. Civ. Prac. & Rem. Code § 154.052(b).

#### What are the benefits of mediation in child protection cases?

The Round Table began with a discussion about the benefits of mediation in child protection cases. One of the first benefits discussed was the cost savings that utilizing mediation brings to the legal system. Judges from different counties reported that mediation saved their counties significant funds annually by reducing the number of trials conducted by the courts.

Participants also reported that mediation can produce better outcomes than trial because the process encourages parties to think creatively and tailor solutions to the unique aspects of individual cases. Parties can explore legal options or agreements in mediation that may not be available if the case proceeds to a contested trial. The adversarial nature of trial itself may also exacerbate antagonistic relationships between parents, relatives, foster parents, and caseworkers. Additionally, the long days in the courtroom, the stress of testifying and being cross-examined, and the anxiety of awaiting a verdict can take a significant emotional toll on all parties involved. Mediation allows parties to avoid the potential pitfalls and unpredictability of going to trial while taking advantage of the opportunity to craft a workable, customized solution to their case.

Participants also expressed that mediation allows parents the opportunity to express their feelings, to be heard, and to have a say in the final outcome of their case in a way that may not be available to them in the court process. Mediation can also facilitate communication and improve mutual understanding between the parties and between each party and their own attorney. The process may be more empowering and feel more equitable when parents are able to express themselves while receiving both legal counsel and support from their attorneys during mediation. Likewise, mediation provides an opportunity for the parties to assess the strengths and weaknesses of their case and the risks involved in going to trial.

# What are the benefits of early mediation in child protection cases?

Though participants reported that mediation often only occurs prior to trial, some jurisdictions reported using a standard practice of mediating cases prior to the Adversary Hearing. Additionally, some participants reported that their jurisdictions utilized Family Group Conferences or Family Team Meetings before the Adversary Hearing in lieu of mediation to attempt resolution of the case. However, participants noted that the agreements reached by those methods lacked the finality and enforceability of those reached through mediation.

Mediations that occur prior to the Adversary Hearing may prevent the need for DFPS to remove a child. If all parties have high-quality legal representation, early mediation can be an opportunity for the parties to share information in good faith with the goal of establishing safety for the child(ren) involved in a case.

<sup>12</sup> Tex. Fam. Code §262.201.

Early mediation allows the parties to come up with creative solutions to avoid the necessity of a removal, such as agreeing to proceed as a Motion to Participate/Court Ordered Services case under Texas Family Code Chapter 264 or agreeing to joint custody between the parents and relative caregivers. This practice can help reduce case backlog on dockets and reserve court time for cases that require contested Adversary Hearings.



Even if an Adversary Hearing is required, participants noted that early mediation still has several other benefits. Through early mediation, DFPS and the parents can gain a better understanding of one another at the beginning of the case and craft a more individualized and realistic service plan. Also, mediation at the outset of a CPS case can help increase parent engagement as mediation allows parents to have their voices heard directly when negotiating the family's plan of service. Additionally, early mediation may encourage parents to engage in services if they are more aware of what the services are meant to accomplish. Finally, early mediation can increase parents' confidence that their achievements will be recognized by DFPS.

Early mediation also requires parents and their attorneys to spend substantial time together at the beginning of the case and gives parents the opportunity to see their attorney zealously advocating on their behalf. A parent with this experience may be more inclined to feel that the child protection system values and legitimates their rights. As a result, trust is built between the parent and their attorney and parents may be more receptive to their attorney's advice throughout the case.

Round Table participants also noted that early mediation can benefit children as it can provide an opportunity to identify family members, expedite home studies, or place the children with a relative or fictive kin. These opportunities may not occur if the case proceeds directly to a contested hearing without mediation due to time constraints and potential lack of communication between parties leading up to an Adversary Hearing. Participants also noted that children often benefit when the adults in their lives can "get on the same page" as early as possible in the case.



# What conditions are necessary to achieve the benefits of mediation in child protection cases?

Parents can feel overwhelmed and anxious at mediation given what is at stake for their family. A mediator must have the conflict resolution skills necessary to navigate a legally complex and emotionally charged negotiation. The mediator must ensure that he or she speaks in clear language that is understood by everyone rather than legalese or child protection jargon; model polite, respectful and equitable treatment of all persons present; actively listen to what is being said; and acknowledge and legitimize the powerful emotions that can arise as the mediation process unfolds.

Many participants cited the importance of having a mediator who is a lawyer with experience in child protection cases as a necessary component of successful mediation. Mediators with this background already possess the legal knowledge to understand the complexities in this area of law. This knowledge helps keep the mediation on track as participating attorneys do not have to educate the mediator on the legal basics and the mediator does not spend time on options that are legally unenforceable. Mediators with child protection experience also have an appreciation of what a parent in a CPS case may need to feel comfortable during mediation.

Regardless of who the mediator is, participants articulated that a successful mediation requires a safe, physically comfortable environment. Adequate space and privacy can be particularly important in helping a parent feel less intimidated by the number of participants and perceive the experience as fair and equitable. Private office space with multiple breakout rooms was generally considered the ideal space for mediation. Participants noted that utilizing non-adjacent rooms or noise machines can help participants feel confident that the separate conversations that occur with their attorney and with the mediator are private.

Parties and attorneys must not only be physically present, but also mentally present and engaged. CPS mediation often involves the mediator caucusing (separate, confidential meetings between one party and the mediator) while the other parties wait for the mediator to return to speak with them. This time can be used for attorney-client strategizing about possible outcomes of the mediation and the trajectory of the case. Having food and drinks available is also an important aspect of mediation for participants to feel comfortable making decisions and staying focused and engaged throughout what is often a long day.

In addition to providing a confidential and comfortable physical environment, the mediator must establish a tone of mutual respect and good faith amongst the participants. The location of the mediation needs to be accessible to all the parties, some of whom may not have means of transportation. Special security considerations need to be made if the case involves an incarcerated parent or allegations of domestic violence.

All the parties necessary to reach an agreement must be present at mediation, along with their attorneys if they are represented. Necessary parties include the parents, the attorneys for the parents, the DFPS caseworker assigned to the case, the DFPS supervisor or other DFPS representative authorized to enter into agreement, and the attorney for the child and the guardian ad litem for the child. Necessary parties may also include the caregiver for the child, if the settlement will require their written consent to a final order. Additional representatives from DFPS with the authority to make exceptions to DFPS policy may also be necessary if those considerations are relevant to the agreement.

Several participants noted that, for mediation to be successful, the parties must have competent legal representation. To be effective during mediation, attorneys need relevant experience in CPS cases, an understanding of the mediation process, an established and trusting relationship with their clients, and the legal skills necessary to provide competent representation at trial or at a contested hearing if an agreement cannot be reached. A well-prepared attorney can also inform the mediator of the logistical considerations (security needs, non-party attendance, domestic violence history, etc.) that need to be accounted for so that the mediator can prepare in advance and not lose time addressing such issues extemporaneously.

Participants also discussed the need for attorneys to know their clients and cases prior to the mediation. Mediators are not in a position to understand the detailed factual history of the case in the same way as a prepared attorney, and mediators must rely on the attorneys to provide the factual context for negotiation to take place. In order for mediation to be most effective, participating attorneys should submit a summary of the issues and their position prior to the start of the mediation process. These summaries inform the mediator about the critical issues at stake, such as the client's goals for the mediation, a history of domestic violence by parties, if a party will need language, literacy, or other accommodation, security concerns, and which parties or non-parties should be present. Summaries allow mediators to prepare for the mediation as efficiently and effectively as possible. Mediators present at the Round Table reported providing summary questionnaires to the parties as standard practice.

#### What are the challenges to making mediation effective?

Though mediation in child protection cases has many benefits, participants also acknowledged that the process has some disadvantages as well. Several participants cited that mediation can amplify the power imbalances between the parents and DFPS. Parents may feel as though their voices are not heard equally if there are a large number of attendees present on behalf of DFPS. Additionally, participants noted that the resources available to DFPS at trial, the inconsistent quality of parent's attorneys, and the familiarity amongst the professionals can result in mediation feeling more like an ultimatum rather than a negotiation from a parent's perspective. If mediation feels coercive to a parent, it may be perceived as a means to deny them their day in court and their right to a jury trial, eroding their trust in the legal system.

Participants cited a lack of adequate space and privacy as elements that often hamper the effectiveness of mediation. Not all mediators can find or afford sufficient office space to provide the breakrooms necessary for caucusing. CPS mediations often occur in public spaces such as courthouses. Conducting mediation in public spaces has the additional challenge of both participants and non-participants moving in and out of the physical mediation space, causing distraction and delaying progress. There was general agreement among participants that mediation should not take place at DFPS offices, even if space is available, because it can be an intimidating environment for parents.

Many participants also noted the challenge in recruiting mediators with adequate experience and training to effectively mediate CPS cases. As stated above, attorney-mediators with experience in CPS litigation were generally believed to be best suited to provide quality mediation services. However, it can be a challenge if the attorney-mediator also takes CPS cases in the same jurisdiction and has an adversarial relationship with counsel on other cases. Attorney-mediators whose law practice includes both mediation and representation of parties in CPS cases must deal both with formal conflicts of interest and the informal complications that arise from juggling the roles of impartial third party and zealous advocate within the same pool of professionals. Conversely, mediators who have a practice exclusive to mediation must be mindful of avoiding the appearance of being too collegial with certain professionals who they interact with regularly as that can cause other parties to question the mediator's neutrality.

Both practicing mediators and judges reported challenges in securing sufficient compensation for attorney-mediators with experience in child protection law, which resulted in an inadequate number of mediators to meet the jurisdiction's needs. Several participants reported that their jurisdictions had to rely on Dispute Resolution Centers or on other non-attorney mediators who lacked the required knowledge of the legal dynamics of a child protection case to be effective. Many participants also cited the lack of available training on mediating a child protection case that would provide non-attorney mediators or attorney-mediators without CPS experience more opportunities to increase their knowledge and skills.

Lack of adequately trained attorneys representing children and parents in CPS cases was also cited as a concern. It was noted that some court-appointed attorneys fail to thoroughly understand the relevant law when termination of parental rights is at stake. Other attorneys are simply not prepared for mediation or familiar with the mediation process. Completion of pre-mediation questionnaires is standard practice in non-child protection mediation, but mediators in child protection cases reported rarely receiving responses to their request for a pre-mediation summary of issues from participating attorneys.



Exacerbating this issue is the lack of litigation skills and experience of attorneys representing children and parents and a possible corresponding reluctance to take a case to trial. This affects the attorney's ability to effectively negotiate on behalf of their client. One of the critical tools of reaching consensus at mediation is developing an understanding of the repercussions to each participant of failing to reach an agreement. An attorney without an adequate understanding of the relevant law and rights at stake or without adequate trial skills is likely unable to accurately and credibly advise their client about the repercussions of failing to reach an agreement, making an agreement more difficult to achieve. Conversely, an attorney who is adverse to going to trial due to inexperience may focus on reaching agreement as a means of avoiding trial, without prioritizing whether the agreement is fair or in the client's best interest.

Engagement with unrepresented parties can also present a challenge for mediators in child protection cases. In other types of mediations, typically either all parties are represented by counsel, or all parties are without counsel. In contrast, while all the parties in a child protection case are entitled to counsel, often relative caregivers participate in mediation without legal representation but agree to a legally enforceable document. A mediator faces the difficult challenge of explaining the negotiations so that the caregiver understands and can consent to the agreement, without providing legal advice or counsel to the unrepresented relative caregiver.



Enabling meaningful participation by the subject children was cited as a challenge by several Round Table participants. Children are not a formal party in CPS cases and there is not a requirement that a child who is the subject of the case attend mediation. However, participants agreed that older children, in particular, should have the option to attend mediation in their case. Careful consideration must be given to how the child's presence at mediation will be managed, including when it is appropriate for the child to participate in joint sessions.

If a child participates, the attorney for the child must prepare their client both for the process of mediation and its limitations. Children can be devastated if they develop unrealistic expectations either of the outcome of mediation or their ability to influence it. Also, a child's presence at mediation may risk other parties placing too much responsibility on the child's shoulders. While mediation can be an empowering tool for participants, it can also be very emotionally charged, and the mediator must be careful not to exceed their expertise and venture into a potentially traumatic experience for the child.

First and foremost, participants cited expanding funding available to support mediation services.

#### What can be done to make mediation in CPS cases more effective?

There was consensus that compensation for mediators needs to be sufficient to incentivize quality mediators to take child protection cases, yet many jurisdictions struggle to fund mediation. Jurisdictions with established programs shared their experiences in acquiring the necessary revenue. Some jurisdictions reported using court fees and special services fees<sup>13</sup> to pay for both non-attorney and attorney mediators at either an hourly rate or a flat fee.

Increasing access to proper training and experience for mediators was cited by participants as essential to improving mediation. One issue identified by participants was the need for child protection-specific mediation training throughout Texas and for such training to be accessible across the state, including the use of online modules that could increase access to mediation training for small and rural communities. Several participants mentioned the importance of mentorship between experienced and beginner mediators as well as adequate payment to keep experienced mediators in the field.

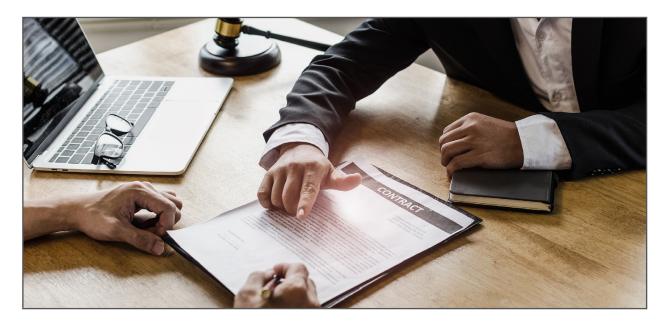
Participants also agreed that better-prepared parties and more skilled representation by court-appointed attorneys would make mediation more effective. Routine completion of the pre-mediation questionnaire to summarize the case and the party's position is also necessary to improve mediation practice. Some participants suggested there would be benefits to creating a standardized pre-mediation form for parties to complete. Others suggested that compliance with completing pre-mediation forms would be increased if participating attorneys were court-ordered to do so.

Participants also discussed providing guidance or procedures for determining attendance in advance of mediation. Having the proper people present in mediation is often crucial to reaching an agreement but identifying and reaching an agreement on who is necessary to attend the mediation can be complicated and contentious. Attempting to resolve disagreement over attendance on the day of mediation with disputed attendees already present can derail the process from the beginning and cause the mediation to be cancelled or rescheduled. If such an agreement cannot be reached in advance, a judge may have to make that determination in advance of mediation. Attorneys who anticipate that this may be an issue should seek an order authorizing the participation of any non-parties that will be essential to reaching a potential resolution at mediation.

Providing more advanced notice of mediation and automatically setting cases for mediation were also cited as tools that could make mediation more effective. Some jurisdictions reported providing parents with a scheduling packet which accompanies the petition that included appointment of counsel for parents prior to the Adversary Hearing and a list of dates for the statutorily mandated hearings as well as the date for mediation. There was discussion amongst the participants of the benefits of this method providing a roadmap of the case for parents as opposed to the drawback of creating a sense of fatalism for parents about the process.

<sup>13</sup> Tex. Civ. Prac. & Rem. Code § 152.004.

Increasing access to adequate and appropriate physical space that is easily accessible by all the parties was also cited as a way to make mediation more effective. Standardized scheduling and designating more dedicated spaces for mediation at public locations such as the courthouse may be an efficient way of increasing access to appropriate space while reducing the challenges of inadequate privacy and focus. Dispute Resolution Centers can provide physical space, but not every jurisdiction has this resource.



#### Conclusion

Mediation in Texas child protection cases can improve outcomes for families involved with DFPS, reduce the costs to the legal system, and relieve pressure on crowded court dockets, particularly if mediation occurs early in the case. However, not all Texas jurisdictions are able to utilize the benefits of mediation. Access to quality training for mediators, incentivizing quality mediators to expand their CPS practice, and thinking creatively about expanding funding and utilizing existing resources are necessary for improved outcomes via mediation.

The Children's Commission will continue to work with our collaborative partners to identify solutions to these challenges so that mediation in child protection cases is an efficient, fair, and effective process for all Texas families involved with the child welfare system.

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