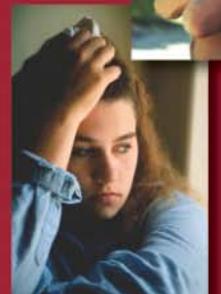


Finding a Third Option:

The Experience of the London Child Protection Mediation Project



Funded by
Legal Aid Ontario,
Department of Justice Canada,
and Ontario's Ministry of Children
and Youth Services

Alison Cunningham and Judy van Leeuwen

The opinions expressed herein are those of the authors and do not necessary reflect those of Legal Aid Ontario, Department of Justice Canada, the Ministry of Children & Youth Services or the Government of Ontario.

See also the companion document to this report:

Alison Cunningham & Judy van Leeuwen (2005).
Discussion Guide for Communities Implementing Child
Protection Mediation: The Community Checklist from the
London Child Protection Mediation Project. London ON:
Centre for Children & Families in the Justice System.



200-254 Pall Mall Street,
London, Ontario Canada N6A 5P6
info@lfcc.on.ca • www.lfcc.on.ca

Additional copies of this report and
the Discussion Guide can be download
from our web site.

© 2005 Centre for Children and Families
in the Justice System, London Family Court Clinic, Inc.

Table of Contents

Acknowledgments ix

1. Introduction and Overview 1

- Child Protection Mediation
 - London Child Protection Mediation Project
 - Andrea’s Case
 - Andrea’s Case After One Year
 - A Viable “Third Option”
- Overview of the Report
 - Why Child Protection Mediation?
 - London Child Protection Mediation Project
 - The Referral Process
 - The 40 Cases
 - The 20 Mediations
 - Comparison of the Outcomes
 - Stakeholder Feedback
 - Overall Reflections
- Answers to Research Questions
- Conclusions
 - Mediation is a Viable “Third Option”
 - Select Cases Purposefully
 - “How” we do Mediation is Important

2. Child Protection Mediation 19

- Why Child Protection Mediation?
- Strengths and Concerns
 - Perceived Strengths of Mediation
 - Perceived Concerns
- A Tale of Two Coasts
 - Nova Scotia
 - British Columbia
 - Lessons Learned

3. London Child Protection Mediation Project 29

- Project Funders
 - Legal Aid Ontario

- Department of Justice Canada
- Ministry of Children & Youth Services
- Project Partners
 - Office of the Children’s Lawyer
 - Ontario Association of Children’s Aid Societies
 - Ministry of the Attorney General
 - Children’s Aid Society of London & Middlesex
- Advisory Committee
 - Local Advisory Committee
- Goals of the Project
 - Process of Implementation Questions
 - Outcome Questions
- Outreach to the Community
 - Legal Community
 - CAS Staff
 - CAS Clients
 - Broader Stakeholder Groups
 - Community Update
- Rationale for Focus on Supervision Orders
- Generalizability of Findings
 - Generalizability of Results to Other Settings
 - Generalizability of Results About Supervision Orders to Other Cases

4. The Referral Process 43

- Eligibility Criteria
- Referral Sources
- Case Vetting
 - Disqualifying Cases
 - Disqualifying Parties
- Definition of a Party to the Mediation
- Securing Consent to Participate
 - Comparison Group
 - Mediation Group
- Declining Mediation
- Time Spent Processing Referrals
- Role of the Project Coordinator
- Supervision Orders
 - The Child & Family Services Act
 - The Initial Application
 - Conditions of Supervision Orders
 - Service to Parties
 - Direction to Make an Answer
 - Finding of Child in Need of Protection
 - Referral of Case to Outside Counsel
 - Status Review Applications

5. The 40 Cases 59

- Referrals
 - Reasons for CAS Involvement
 - The Children
 - The Parties
 - Issues Under Dispute
- Baseline Opinions
 - Understanding of the Application
 - Reasons for Contesting Application
 - Views About Court
 - Relationship with Worker
- Legal Representation
 - Legal Aid
 - Access of Duty Counsel
 - Usage of the Family Law Information Centre
 - Privately Retained Counsel
 - Reasons for not Having Legal Representation
- Differences Between Comparison and Mediation Groups
 - Changes in Court Rules for Status Review Applications

6. The 20 Mediations 77

- Mediators
- Process of Mediation
 - Assignment of Mediator
 - Facilitating Attendance at Mediation
 - Mediation Intake
 - Mediation
 - Consultation with Legal Counsel
 - Post-Mediation Meeting
 - Mediation Case Study: Brittany and Connor
- Settlement Rate
- Views of Child Protection Workers
 - Appropriateness of Case for Mediation
 - Knowledge of Mediators
 - Neutrality of Mediators
 - Voice of the Child
 - Relationship with the Client
 - Balancing of Power
 - Impact on Workload
 - Barriers to Agreement
 - Process Issues
 - Overall Reflections
- Views of Family Parties
 - Anticipation of Benefits

- Anticipatory Worries
- Voluntary Participation
- Neutrality of the Mediator
- Communication at the Table
- Relationship with CAS
- Power Imbalance
- Change in Relationship with Worker
- Role of Legal Counsel
- Process Issues
- Overall Reflections
- Follow-up

7. Comparative Outcomes 105

- Case Processing Outcomes
 - Schedule of Case for Trial
 - Referral to Outside Counsel
 - Manner of Case Resolution
 - Case Outcome
 - Length of Court Processing
- Relative Costs
 - Legal Aid Ontario
 - Legal Aid Certificates
 - Duty Counsel Involvement
 - Usage of the Family Law Information Centre
 - Office of the Children’s Lawyer
 - Children’s Aid Society
 - Child Protection Workers
 - In-house Legal Staff
 - Legal Secretaries
 - Process Servers
 - Outside Counsel
 - Total CAS Costs
 - Project Coordinator
 - Mediation
 - Expenses to Attend Mediation
 - Total System Costs of Mediation
- Views of Family Parties
 - Views of the Process
 - Change in Relationship with CAS
- Six-month and One-Year Follow-up
 - CAS Status
 - Change to Intrusiveness of Intervention
 - Subsequent Referrals/Reports
 - Physical/Sexual Harm by Commission
 - Other Reports

Change in Residence
Compliance with Mediated Agreements

8. Stakeholder Feedback 135

- Stakeholder Survey of Advocacy Groups
 - Training Issues
 - Adaptation of Mediation to Child Protection Clients
 - Family Group Conferencing
- Survey of Ontario CASs
 - Barriers to Using Mediation
 - Reasons to Contemplate Mediation
- Follow-up Opinion Survey of CAS Staff
- Reform Suggestions Offered by Family Parties

9. Overall Reflections 149

- Ten Observations
 - Mediation is not the panacea to cure court backlog
 - Funding must be addressed
 - Training for prospective mediators will be crucial
 - The vulnerabilities of some CAS clients should be safeguarded
 - Process is just as important as the outcome
 - We need to help people understand the legal process better
 - The finding of "need of protection" should be discussed beforehand
 - The power imbalance is not easily evened
 - We need to learn when mediation is the best approach
 - Conditions of implementation are important
- Community Checklist for Mediation Planning

Appendix A: Methodology

Appendix B: Factors Potentially Driving Increases in Contested Court Applications

Appendix C: Job Description for Mediators

Appendix D: Template for Mediation Contract

Appendix E: Draft Job Description for Mediation Coordinator

Appendix F: Post-mediation Survey for CAS Clients

ACKNOWLEDGMENTS

An enormous number of people contributed to the success of this project in both the developmental and operational phases. Three funders contributed resources to make the project possible: Legal Aid Ontario, the Department of Justice in Ottawa, and the Ministry of Children and Youth Services of Ontario. A Steering Committee guided the proposal development and project design, two advisory committees guided operational matters, five local mediators signed on, the local Bar and Bench were extremely supportive, the staff of the London & Middlesex Children's Aid Society contributed their time and expertise, and families associated with 40 cases agreed to help us understand their important points of view on the process of court resolution and mediation.

At the outset, a Steering Committee, to oversee the development of the initial proposal, was made up of the following people:

- Dr. Dan Ashbourne (Centre for Children & Families in the Justice System)
- Dr. Linda Baker (Centre for Children & Families in the Justice System)
- Marvin Bernstein (Ontario Association of Children's Aid Societies)
- George Biggar (Legal Aid Ontario)
- Alison Cunningham (Centre for Children & Families in the Justice System)
- Simon Davies (Legal Aid Ontario)
- Michelle Dwyer Hunte (Court Services Division, Ministry of the Attorney General)
- Rhona Fleming (Family Justice Services Division, Ministry of the Attorney General)
- John Liston (London - Middlesex Children's Aid Society)
- Willson McTavish (The Children's Lawyer, Office of the Children's Lawyer)
- Risa Sheriff (Court Services Division, Ministry of the Attorney General)
- Aneurin (Nye) Thomas (Legal Aid Ontario)
- Corrie Tuyl (Ministry of Community and Social Services)
- Judy van Leeuwen (London - Middlesex Children's Aid Society)

Once the project was established in 2002, a provincial Steering Committee was put in place to oversee the Project. Three individuals from Legal Aid Ontario served as Chair or Co-Chair at various points: Aneurin (Nye) Thomas, Mary Marrone, and Simon Davies. Membership of the Steering Committee changed from time to time (* denotes current members):

Legal Aid Ontario

- o Simon Davies * (Current Chair)
- o Mary Marrone
- o David McKillop *
- o Nye Thomas

Department of Justice Canada

- o Shirley Riopelle Ouellet*

Ministry of Children & Youth Services

- o Sheryl Cohen-Shecter*

Ministry of the Attorney General

- o Louise Barry (ad hoc member)
- o Michelle Dwyer Hunte * (Court Services Division)
- o Rhona Fleming* (Family Justice Services Division)
- o Nyla Melta (Court Services Division)
- o Corrine Moehing (Court Services Division)
- o Elaine Penalagan (Family Justice Services Division)

Ontario Association of Children's Aid Societies

- o Marvin Bernstein*

Office of the Children's Lawyer

- o Willson McTavish (until retirement June 2003)
- o Clare Burns
- o Dena Moyal*

Children's Aid Society of London - Middlesex

- o Rhonda Hallberg*

Parents' Counsel

- o Brenda Barr, Barr Watson Nyhof, London Ontario
- o Toenie Hersch,* Harrison Pensa LLP, London Ontario

Children's Counsel

- o Celia Mac Donald*

Catherine Bellinger and Jane Long provided helpful comments on the final draft.

The local sub-committee was made up of Simon Davies (Chair), Celia MacDonald, Rhonda Hallberg, Brenda Barr (past member), and Toenie Hersch (current member).

Five mediators – one social worker and four lawyers – boldly agreed to join the project: Brenda Atkison, Joanne Beasley, Kathleen Chapman, Linda Crush, and Elisabeth Lella. They brought their experience, compassion for children and families, and their knowledge of the legal system. They join the ranks of the mediation pioneers in Ontario by helping us find a “third option.” June Maresca, the original pioneer in this province, provided initial consultation to the coordinator of the project, training sessions on mediation for CAS staff, and a training day for the mediators. Her enthusiasm for mediation was infectious.

The Children's Aid Society of London & Middlesex agreed to be the venue in which to pilot the mediation. All the staff were helpful, supportive and cheerful about the many requests made of them. Each and every piece of information we needed was delivered, reflecting a remarkable commitment on the part of the agency to help us find out if mediation can help children and families.

Staff of the Legal Department at the Children's Aid Society of London and Middlesex aided the project immeasurably and we thank Pauline Trudell, the Director of Legal Services, for facilitating the involvement of CAS legal staff in the project and assisting with data collection. In-house legal counsel were: Jill-Scutton- Fulford, Denise Marshall, Randy Hammond, Deborah Sturdevant, and Sandra Welch. They tracked the time devoted to our 40 project cases and also assisted with adjournments to allow for mediation to take place. The legal secretaries at the CAS flagged supervision order applications, tracked the time spent on creating, processing, and closing CAS legal files, and tracked project cases in the court process. They are: Karen Dolson, Mary Caughlin, Jennifer Smith, Cheryl-Anne Clayton, Rita Schuhmacher, and Michelle Mosher.

The two Legal Process Servers at the Children's Aid Society of London and Middlesex also kept track of their time spent on serving court papers and filing documents in court. We thank Phillip Cook and Michael Mc Hardy.

The front-line staff of Child Protection Workers and Supervisors at the CAS also positively supported the project by attending the mediation training, making referrals, tracking time spent on legal and mediation tasks, and completing opinion surveys. Almost half of current staff referred at least one case to the project. In addition 19 workers agreed to participate in the 20 mediations and tell us their opinions of the process.

Finally, the Business Department at the CAS, specifically Randy Hull and Sheila Holt, arranged space for us, purchased equipment, and processed the expenditures and financial reports.

In the London community, we must thank the Family Lawyers of the Middlesex Law Association for their cooperation and input at all stages of the project. Without their encouragement to clients, we could not test mediation. Members of the Bench were equally important by providing the time to try mediation in cases before the court.

Finally, we must thank the CAS clients involved in the 40 matters before the courts who were willing to help out with a research project. They let us into their homes, provided important feedback on the process, and helped us understand the perspectives of an important stakeholder group in the child protection system. They were willing to try something new, to help us find a better way to resolve disputes and meet the needs of children.

Alison Cunningham, M.A.(Crim.)
LCPMP Research Coordinator

Judy van Leeuwen, M.S.W., R.S.W.
LCPMP Project Coordinator

Chapter 1

Introduction and Overview

Andrea's¹ two small children were apprehended by the Children's Aid Society after her baby was seriously injured and hospitalized. They were placed with Andrea's mother subject to a supervision order under the *Child & Family Services Act* of Ontario. Andrea could visit the children, if supervised by her mother. She was charged criminally and pleaded guilty. At the latest status review of the order, the CAS applied to the court for another order for eight months, custody to continue with the grandmother. Now, three years after the baby's injury, Andrea would consent to another supervision order, if she could re-gain custody of the children. She had attended treatment as directed, consistently maintained contact with the children, and the agency had received no new reports of abuse.

When served with papers for this latest application, Andrea exercised her legal right to contest the proposed order, essentially asking the Society to justify the need for another order to a family court judge. She had done so three times before, at each past status review, eight months elapsing on average between first court appearance and the final order. This time, Andrea knew she would again qualify for a legal aid certificate and planned to engage the lawyer who helped with her previous cases.

At the Children's Aid Society of London and Middlesex, where mediation was tested on a pilot basis, about half the court applications about supervision orders are resolved relatively quickly, by garnering the consent of all parties. Even the majority of initially contested cases – probably about 30% of total applications – are resolved prior to a settlement conference. What about the remaining 20%?

Like Andrea's, those cases start slowly to wind toward a judicial decision, through multiple court appearances, at least one settlement conference, and, in a few cases, a full trial. We tracked the progress of 20 such cases, mired in the court system for month after month without resolution. Most cases, like Andrea's, reach a settlement at some point before a trial. During this time, however, a child's life can be in limbo, for an average of nine months but sometimes closer to two years. For 27% of children, their place of residence – meaning who will be their primary caretaker – is at issue. Access to a father is an issue for 30%, including children whose fathers have been excluded from the family home by court order. One in five is living with neither parent and one or both parents is seeking their return.

¹ The name is a pseudonym and features of the case were changed to protect the anonymity of this family.

Dealing with the court-related tasks of these highly contested cases is also a drain on system resources. The CAS child protection worker will prepare for and participate in court – 26.5 hours on average according to our data – time diverted from that available to support and assist families. Many Ontario CASs employ in-house lawyers and legal staff and some also engage local lawyers to assist with trials. Staff lawyers spent an average of 5.5 hours on our sample cases and legal secretaries almost 10 hours. About 10% of cases at the CAS in London and Middlesex will be referred to outside counsel, to prepare for and conduct any trials. For these supervision order cases, that cost averaged about \$2,300.

The legal system as a whole is also over taxed: legal aid, children’s lawyers, and case volume in the family courts.² In our comparison group of cases, the average legal aid certificate was for almost \$2,500. When a Children’s Lawyer was assigned to the case, the average cost was almost \$2,100. Finally, the family parties themselves incur costs for privately retained lawyers, time off work, child care, transportation, and parking. As one mother in our study put it, a visit to court with her lawyer to see the matter eventually adjourned cost her the equivalent of a week’s worth of groceries or half a mortgage payment.

Is there a better way? Some observers suggest mediation.

Child Protection Mediation

Child protection mediation is one form of alternative dispute resolution contemplated in recently proposed amendments to the *Child & Family Services Act*.³ The use of mediation with separating and divorcing couples is now well established and its benefits well documented. In child-protection mediation, in contrast, the focus will typically be on children in need of protection or at risk for abuse. Many constellations of parties – co-habiting parents, separated parents, lone parents, foster parents, grand parents, Band representatives – could be involved. Most simply, mediation takes the form of a meeting with a parent and a child protection worker, addressing differing perspectives on an application before the court. That application could address child custody, measures to ensure safety, conditions of supervision, access, wardship and even, in some cases, termination of parental rights. As with family mediation, a representative of the Office of the Children’s Lawyer may play a role to bring the voice of the child.

² D. Gambrill (2004). AG, Judges Resolve to Clear up Backlogs: Backups in Ontario Courts Reaching Critically High Levels. *Law Times*, 15(1): 1, 4.

³ Bill 210 (*An Act to amend the Child and Family Services Act and make complementary amendments to other Acts*) received first reading on June 6, 2005.

If mediation could generate even a small reduction in the trial rate, or case processing time to disposition, it could translate into significant fiscal savings. But reduced cost is only one projected benefit. Supporters of child protection mediation suggest it can improve communication and the worker/client relationship, reduce conflict and increase cooperative problem solving, create stability for children sooner by resolving placement disputes in a timely way, and increase compliance by families with prescribed measures (e.g., counselling). In summary, the parents or other parties – being active players in the case planning process – might be more cooperative with the measures put in place to protect children. The alternative, resolution through the courts, is by nature an adversarial and conflict-driven process ending with a winner and a loser.

On the other hand, some observers warn of potential drawbacks. The power imbalance between a child welfare agency and its clients – who may be young, poor and less-well educated than child-protection staff – cannot easily be balanced. The potential for coercion to participate and coercion to agree would be inconsistent with mediation as a necessarily voluntary process. Others are concerned that a large proportion of child-welfare clients might not be amenable to mediation, being screened out because of mental illness, addictions, spousal violence or developmental issues. If a mediated agreement breaks down, necessitating a resumption of the court process, mediation might only extend the time to final order. If both sides must “give” something to get an agreement, mediated agreements could be compromises not adequately addressing child safety. Moreover, the voice of the child – who is not generally present – could get lost. Court orders may serve important instrumental functions, for example by harnessing judicial authority to enforce conditions not complied with voluntarily. Child protection workers may also see court orders as reducing exposure to liability in a difficult case. Finally, it is difficult or impossible to mediate whether a child is in need of protection or other issues of fact such as if abuse occurred.

London Child Protection Mediation Project

Because these concerns touch upon valid issues, the London Child Protection Mediation Project was initiated to study the feasibility of using child protection mediation in Ontario. During the course of this project, 20 cases were selected for mediation. Key characteristics of the cases – satisfaction of the parties, time from first appearance to final order, and costs – are compared to 20 contested cases processed prior to the advent of mediation.

Andrea’s Case

I’m willing to try mediation because I want to try and resolve this issue quicker so I can have my children come back home with me.

Andrea, mother and mediation participant

Andrea was one of 36 people who agreed to try mediation. Her case illustrates some typical issues. At the intake interview for this study, Andrea was not clear why the CAS was pursuing another supervision order. She had abided by all conditions and requirements for three years by then. While acknowledging past problems, she no longer saw her children as in need of protection from her. Moreover, she was willing to continue supervision once her children returned home. Like 83% of the people we spoke with who opposed the court application, she felt powerless relative to the CAS. She did not trust her worker, felt the worker did not understand her point of view, and believed she had not been able to explain her position. At the same time, she was afraid to say what she was really thinking to her worker.

Why was Andrea pursuing her case through the courts? Her motivations and goals were typical. She did not actually want a trial, believing that family court judges are biased against parents in her position. She did not see the judge as someone to make a better decision than the CAS, and saw the court process as too slow. She just wanted her children back and was willing to “fight” for them. Consenting to the order as proposed was her *first* option, one she rejected. While the playing field is not level in her view, court was the only avenue open. It was the *second* option by default.

When mediation was presented as a *third* option, she was willing to try.

After the first appointment was missed, Andrea attended three mediation sessions with the child protection worker on her case. The mediation focussed on a plan to transfer custody to Andrea in a staged fashion – first one then the other child – within the context of a six-month supervision order. An access plan was spelled out for Andrea in relation to the child still in the care of her mother. Likewise, an access plan was spelled out for her mother, to continue contact with the grandchildren she had been raising. As an added protection, Andrea’s youngest child would continue in day care. Andrea agreed to continue counselling.

An agreement was reached in August and the first child was returned to Andrea’s custody in September. The worker came to understand Andrea’s position in a new way. This worker felt heard in the mediation, comfortable saying what was needed, treated with respect, and not pressured into accepting an agreement.

The mediation process assisted [Andrea] to move towards an agreement while feeling that her position was heard. ... The mediator did an excellent job of listening to both sides and at problem solving with both sides to reach an agreement. Agreement was possible because [Andrea] felt heard by a third party.

Child Protection Worker and mediation participant

The children's father was not easily located so there was a delay in serving him the revised court documents. The worker's illness and an adjournment for Andrea to seek legal aid also caused delays. The final order was handed down in November. Although Andrea was eligible for legal aid, in the end she did not apply. She also chose not to consult duty counsel. The cost of mediation was about \$1,000 and the time from first appearance to final order was 7.4 months.

Andrea's case is typical of one which might be mediated in the child protection system: separated parents with varying levels of involvement, parallel family court applications, parallel criminal charges, non-parental caretakers, applications with multiple parties dealing with multiple issues, decisions about custody, siblings with different needs and plans of care, challenges faced by low income parents, people making decisions without legal advice, and an ever-present concern for the on-going safety of children. What happened in the long run?

Andrea's Case After One Year

The children were returned to Andrea's care and she secured a housing placement of appropriate size for her family. While the supervision order would be in force for six months, the worker – a different worker since the mediation – asked for an early status review, after four months. Concerns for the children's safety were mounting. Andrea was missing appointments with her worker and was not attending counselling. Her new boyfriend had a worrisome history of violence and was recently charged with assaulting a pregnant woman. An anonymous report from the neighbourhood also voiced several serious concerns.

Andrea again contested the Society's application, secured a legal aid certificate, and engaged a lawyer. One year after the mediated agreement was enshrined in a court order, her opposition to the new application was on-going. Fourteen months after that order, the dispute ended with a trial in which the Society's application was reflected in a new supervision order.

A Viable "Third Option"

Andrea's case illustrates how mediation can work and how participants can be very satisfied with the process. For her and others, mediation can offer a viable "third option" to resolve disputes outside the courtroom. Andrea's case also illustrates that mediation is not a panacea. Specifically, our experience reveals these caveats:

- only a proportion of CAS cases will be amenable for mediation
- careful screening is crucial but is time consuming and requires expertise in child protection
- using mediation can delay case resolution if mediation is not successful
- it can be difficult to contact parties and arrange attendance at mediation
- a power balance between the CAS and family parties is difficult to achieve
- the vulnerabilities of some CAS clients (e.g., learning disabilities) must be considered
- many parties are not able, or not willing, to access legal advice

At the same time,

- family parties generally liked the mediation process and felt respected
- successful mediation can resolve cases faster than the regular court process
- successful mediation can be associated with cost savings to the CAS, Legal Aid Ontario, and the Office of the Children’s Lawyer

We confirmed some proposed benefits of mediation (e.g., cost savings) while finding that others were not met (e.g., improvements in worker/client relationship). London learned a lot about implementing mediation. It may not be the panacea for court backlog, but it can be one dispute resolution strategy available. At the same time, mediation is not be appropriate for all cases and care must be exercised to screen cases, institute protections for vulnerable persons, and ensure that mediators are trained in the special contingencies of child protection mediation. A checklist of these and other issues is provided in Chapter 9.⁴

Recommendation 1:	Child protection mediation is a viable alternative dispute-resolution strategy that will be useful in some, but not all, cases involving contested court applications and to resolve other disputes.
Recommendation 2:	Participation in mediation should be voluntary rather than a mandatory requirement.
Recommendation 3:	Efforts to implement child protection mediation should include rigorous case screening to exclude clients unable to fully participate in the process and to exclude cases with a low probability of success.

Overview of the Report

This report describes London’s experience of implementing and studying mediation in the child-protection context. We describe the model of mediation selected, case outcomes, perspectives of participants, costs of the process, and results of a one-year follow-up. We began, however, by tracking the progress and outcomes of 20 cases, to determine how contested supervision order applications are typically resolved. They are the basis of comparison for the 20 cases sent to mediation. We pool information from many sources to convey what London learned about implementing mediation, to assist other communities planning the use of this alternative dispute resolution technique. Seventeen recommendations are provided for consideration.

⁴ This checklist is also available in A. Cunningham & J. Van Leeuwen (2005). *Discussion Guide for Communities Implementing Child Protection Mediation: The Community Checklist from the London Child Protection Mediation Project*. London ON: Centre for Children & Families in the Justice System.

Chapter 2: Why Child Protection Mediation?

The concept of child protection mediation is described in Chapter 2. Published evaluations tend to show high settlement rates, beneficial case outcomes (e.g., shorter time to permanent placement), and high rates of client satisfaction. There is also evidence in the literature that sustaining a mediation program can be difficult over the long term because of low utilization. The pros and cons of child protection mediation are discussed in the context of an opinion survey of CAS staff. The most common perceived benefits are that mediation is less intimidating and more satisfying for families than the court process and that mediation can improve worker/client communication. Key among the concerns was the power imbalance between a client and the agency. The importance of front-end collaboration is demonstrated through the experience of two Canadian jurisdictions, one in which mediation was successfully launched (Surrey, British Columbia) and one in which mediation was tried and failed to catch on (Nova Scotia).

Chapter 3: London Child Protection Mediation Project

In the third chapter, the project is described including the funders, partners, advisory committees, and outreach strategies. The multi-sectoral advisory committees were invaluable resources in the developmental phase of the project and to problem solve operational issues arising over time. The goals of the project are detailed in this chapter and also expressed as research questions addressing both process and outcome. The rationale for focussing on supervision orders is presented and readers are cautioned about factors affecting generalizability of the results. Specifically, there are features of our pilot that may not easily be reproduced in normal implementation of mediation (e.g., paid coordinator, paid mediation).

Recommendation 4:	Jurisdictions using child protection mediation should consider creating a multi-sectoral steering committee with representation from all stakeholder groups, especially at the start-up phase.
Recommendation 5:	Jurisdictions using child protection mediation should provide information to all sectoral groups on an on-going basis, to facilitate understanding of the mediation process as it is to be implemented.

Chapter 4: The Referral Process

In this chapter, the referral process is described including case vetting and screening. As a research project, there was a need to define criteria and apply them consistently. Case vetting is important but time consuming, requiring 3.25 hours on average per referral. Among the mediated cases, the average time expended on referral processing was 11 hours. Cases were screened and disqualified when not meeting the inclusionary criteria defined at the outset. Disqualification occurred most commonly for a pending criminal charge or the presence of a severe and active addiction that might compromise ability to follow through on commitments. Parties who declined mediation cited many reasons, most commonly the

desire to pursue a trial, legal advice against mediation, a settlement being on the horizon, or that attending mediation in London was inconvenient for out-of-area parties. Overall, we learned that case screening is crucial, case screening is time consuming, and that only a fraction of CAS cases are suitable for mediation. However, processing referrals with little likelihood of success will waste time and resources.

Recommendation 6:	Jurisdictions using child protection mediation should consider who will screen cases, when in the court process this will occur, what criteria will be applied, and how these tasks will be funded.
Recommendation 7:	The definition of “parent” in the <i>Child & Family Services Act</i> should be reviewed with an eye to determining if unreasonable and unnecessary delays are created by the requirements for repeated service of court documents on parties with no biological or emotional ties to the children.

Chapter 5: The 40 Cases

In this chapter, the 40 cases are described including demographic data and an overview of the concerns prompting CAS involvement. The data are drawn from review of CAS files and interviews with 57 of the 66 parties. In the 40 cases, there were 74 children. Intake interviews revealed that family parties, especially those actively opposing the application, did not have good communication with their workers, felt powerless, had low levels of trust, often did not understand why the CAS was involved in their families, and did not feel understood.

Only one quarter of the parties opposing the application actually wanted the case to be in court. In fact, two thirds felt the judges were biased against people like themselves. In other words, they did not see the court system as a level playing field where they can have their “day in court.” They were exercising the only option available to them to contest even the most trivial aspect of the proposed order such as a wording.

Why had they opposed the order? Some were discontent with pejorative words (e.g., abandonment), some opposed conditions perceived as pejorative (e.g., “take your children to the doctor” implies you do not take your children to the doctor), some opposed conditions they felt as inapplicable (e.g., refrain from using physical discipline when they never used physical discipline, do not use alcohol when there was no indication of an alcohol problem), and some were discontent with conditions perceived as onerous and unnecessary (e.g., approving every person who visits the home). Others refuted the “facts” as stated or noted factual errors they wanted corrected. Some felt they had satisfied every condition and requirement ever proposed and wondered why they were still under supervision. Most refuted the proposition that their children were in need of protection.

One quarter of the parties never had legal advice about the current matter. A further 30% paid at least one visit to duty counsel and did not seek nor obtain a legally aided or privately retained lawyer. About half of the parties who qualified for legal aid did not apply. This chapter concludes with the discussion of several important differences between the two groups. The comparison group is similar but not identical to the mediation group. Generally, the comparison group has more children, more children who are categorized as at extremely severe risk, and more children who have been harmed by acts of commission. The comparison cases were processed in the period prior to a change in the timing of notification of status reviews, which affects the length of court processing. And, the comparison group is a concentration of highly contested cases, as reflected in a referral rate to outside counsel that was five times the agency average.

Recommendation 8:	A video explaining the court process, from application through settlement conference to final disposition, would help parties make key decisions. The video should explain how mediation (and other ADR techniques available) fits into but is different from the regular court process.
Recommendation 9:	A video should be developed to demonstrate the mediation process to clients. Such a video could be made available in the non-official languages most commonly represented in child-welfare client populations.
Recommendation 10:	Conditions of supervision orders should relate logically and empirically to the risks faced by the child and the case-management plan.
Recommendation 11:	All parties should be encouraged to engage in early resolution talks external to the court process and the CAS should be encouraged to case manage and facilitate such an opportunity.
Recommendation 12:	In each community, a plan should be developed to encourage and mentor lawyers who currently feel unprepared to take child protection cases but are willing to do so.

Chapter 6: The 20 Mediations

This chapter describes the mediation process, mediation outcomes, and satisfaction of parties. Twenty-one cases were referred to the five mediators hired and trained for the project. One case was disqualified during the intake process with the mediator, leaving 20 cases to be studied and tracked. In three cases, a party could not be engaged in the mediation process, despite initially agreeing to it. In one case, three of the five parties attended and a partial mediation was held. In ten cases (50%), an agreement was reached. In 35% , the cases ended with a final court order that reflected a mediated agreement. Only 29% of parties reviewed

the agreement with legal counsel. Almost all the family parties would recommend mediation to a friend. They felt respected by the mediator and listened to. Most family parties felt that the relationship with their workers had not changed after the mediation, a view also held by the workers themselves in almost all cases. Like the family parties, workers generally liked the mediation process and three quarters would recommend it to a colleague. Over 80% would consider doing another mediation in the future. Predictably, workers were more likely to have positive views if the case ended in an agreement. Forty-one percent of them thought the voice of the child got lost in the process.

Recommendation 13:	Any effort to implement child protection mediation should address financial barriers that can prevent people from attending mediation.
Recommendation 14:	Efforts should be undertaken to highlight the importance of independent legal advice to parties engaged in mediation.
Recommendation 15:	If a mediator forms the opinion that the child's views should be independently ascertained, he or she should seek the consent of all parties to stop the process and find a means of ascertaining those views.

Chapter 7: Comparison of the Outcomes

In this chapter, we compare the outcomes of comparison and mediated cases, including the relative length of the court process, court outcomes, relative satisfaction with court and mediation among family parties, costs of the process, and the results of a six-month and one-year follow-up. There was no difference in case outcome but mediated cases reached final order sooner and were associated with somewhat lower costs to the CAS. The most dramatic difference was in terms of the rate at which the CAS called in outside counsel. Use of outside counsel was far more frequent in the comparison group, but this difference may be an artifact of how that sample of cases was selected. In the comparison group, 78% of parties who qualified for legal aid received a legal aid certificate. The same was true of 53% of parties in the mediation group. Our data suggest that successful mediation will be associated with lower legal aid costs. Also, children in the mediation group were half as likely to be represented by a Children's Lawyer than children in the comparison group, so the overall costs to the Office of the Children's Lawyer were lower. However, when a case involved a Children's Lawyer, the average cost per case was the same. The comparative views of family parties are also presented. Mediation parties were generally more satisfied with the process but the likelihood of an improvement in the worker/client relationship was low. A one-year follow-up suggested that children were not put at elevated risk for abuse or neglect by mediated settlements.

Chapter 8: Stakeholder Feedback

To round out the data collected from other sources, a review was conducted of the opinions of various advocacy groups, Ontario CASs, CAS staff in London/Middlesex, and the family parties who participated in the study. Advocacy groups noted the importance of training (for mediators and also other involved professionals who may be participants or referral agent). Also prominent in the comments was discussion of the growing popularity of family group conferencing in child welfare. Alternative dispute resolution, as a concept, has widespread support but some observers want more information about the relative strengths and weakness of various types. We present the results of a survey of Ontario CASs addressing barriers to mediation use and the reasons many agencies are contemplating its introduction. Barriers include the lack of trained mediators and the lack of funding. CASs are most interested in mediation as a way of improving their services. A re-survey of CAS staff opinion in London suggests that opinions about mediation did not change during the period of time mediation was used. Overall, 60% of staff recommend that the agency continue to use mediation.

Recommendation 16	A child protection mediation training curriculum should incorporate information on such issues as child welfare law, the child welfare system, augmented screening techniques, addressing the power imbalance, and sample agreements using plain language. The Ontario Association for Family Mediation and/or Family Mediation Canada may consider developing a mediator certification program and/or standards for the position of accredited child protection mediator.
Recommendation 17:	Family group conferencing, family group decision making, and other ADR techniques can co-exist with a mediation program to provide a range of ADR options from which it is possible to select the best method for each case.

Chapter 9: Overall Reflections

The report concludes with general observations about London's experience using mediation. Mediation is not the panacea to cure court backlog; funding must be addressed; training for prospective mediators will be crucial; the vulnerabilities of some CAS clients should be safeguarded; process is just as important as the outcome; we need to help people understand the legal process better; the finding of "in need of protection" should be discussed beforehand; the power imbalance is not easily evened; we need to learn when mediation is the best approach among the various ADR strategies available; and, conditions of implementation are important. Like any other intervention, mediation is not inherently good or bad, effective or harmful. What is important is HOW we do mediation. This chapter includes a checklist of issues and decisions to facilitate discussions at the community level to determine the best model of mediation to suit local needs.

Answers to Research Questions

At the outset of the Project, these process and outcome questions were defined.

- **what volume of child protection cases are suitable for mediation?**

For supervision order applications in London & Middlesex: 9%.

Being a pilot project with a finite time period, we expended considerable effort to find appropriate cases to study. The Project Coordinator reviewed each court application and actively searched for parties to secure consent. From the outset, based on experience in other jurisdictions, finding enough cases was a concern. In the end, we studied 40 cases rather than the envisioned 50, and the project was extended one year longer than originally planned. Virtually every study of child protection mediation concludes that there were fewer mediations than envisioned.

For supervision order cases in London/Middlesex, about half of court applications are followed by consent of all parties. From among the other half, about half again are screened out as inappropriate for mediation. The exclusionary criteria, discussed in depth later in the report, included developmental delay, serious and active mental illness, and family violence. Once a case was accepted as appropriate, at least one key party declined the option of mediation in almost half of the cases.

Each CAS is an autonomous agency and there is a fair degree of variation in local contexts across the province (and nation). Experience in other agencies may well differ.

- **will parents and other family parties agree to mediation?**

Yes, in more than half of cases.

Agreement to mediation was secured from all key parties in 56% of eligible cases. In the others, at least one key party declined to mediate. The most common reason to decline was because they (or legal counsel) wanted to continue through the court process, usually believing their chances to prevail at trial were strong. Other reasons were legal advice against mediation, a settlement being on the horizon, the fact that some parties lived outside Middlesex County and could not easily get to London, and language/cultural barriers. After the mediation, parties were asked retrospectively about how “voluntary” their participation had been. A quarter felt pressured but most felt it had been their choice.

- **will CAS workers agree to mediation?**

Yes.

We had no case appropriate for mediation in which the child protection worker declined the option of mediation. Initial concerns that CAS staff might not “buy in” to mediation did not materialize. No doubt this was largely due to the hard work and credibility of the Project Coordinator and also the generally positive experiences of workers who attended mediation (probably communicated to colleagues). Overall, 60% of staff surveyed at the conclusion of the pilot agreed that the Children’s Aid Society of London and Middlesex should continue to use mediation.

- **can the power imbalance be offset so a parent can mediate as an equal party?**

Not likely.

The existence of a stark power imbalance is a key concern. Can family parties be free to negotiate knowing the CAS has so much power over them? An enormous proportion of parties – 83% of those contesting the order – felt that the CAS had all the power and they had none. Three quarters of them continued to feel that way after the mediation. Indeed, one third of mediation participants did not feel like an equal party with others at the table. On the other hand, 57% of people in the comparison group felt pressured into accepting the settlement and only 29% felt like an equal party at the settlement conference. As one party said when describing that he did not feel like an equal party: “It’s not the mediator’s fault. It’s just the way it is.”

- **what are the barriers to successful implementation of mediation?**

We encountered several variables that might affect the implementation of child protection mediation in other Ontario jurisdictions. These factors would profitably be considered in any plan to start a mediation program: a paucity of appropriate cases, logistical problems contacting parties and securing their attendance at mediation, the time required to screen cases, the futility of mediating cases unlikely to be successful, and getting all parties to agree to mediation and attend. A survey of Ontario children’s aid societies suggests that many jurisdictions do not have access to mediators trained to do child protection mediation, they have no funds to cover the cost of mediation, there may not be enough appropriate cases in many agencies, and the logistics of arranging centralized meetings can be difficult in rural or remote areas. Review of other research suggests two other cautions. First, failure to secure the “buy-in” of key sectors, particularly the child welfare workers, can mean that referrals to mediation will be low. Second, it is important to identify a person to oversee the mediation – to encourage referrals and answer questions of referral agents and parties.

- **will parties be satisfied with the process and outcome?**

Yes.

The child protection workers who engaged in mediation for the most part rated the process well, with a few exceptions related to a poor outcome in the particular cases. The family parties as well had generally positive views about their experiences at the mediation table. They felt respected and listened to and 90% would recommend mediation to a friend. Their views of the process were more positive than those whose cases were resolved through court. Any frustrations voiced were associated with mediation that did not “work” or when parties reneged on agreements.

- **are there benefits of mediation compared with court-based disposition of cases?**

Yes, when mediation is successful.

The overall conclusion is this: when mediation is successful, the matter concludes sooner and at lower cost. Parties are generally satisfied with the process and outcome. However, mediation does not necessarily improve rates of compliance, worker/client relationship or change outcomes for children. When mediation is *not* successful, the process can be extended, the worker/client relationship can be compromised, and no cost savings will materialize.

- **will stability be achieved sooner for children?**

Yes, when mediation is successful.

Successful mediation can resolve cases faster compared with regular court processing. Moreover, with a signed agreement, child protection workers seem willing to move ahead with plans such as transfer of custody, even prior to the final court order. As just mentioned, however, unsuccessful attempts at mediation will not be followed by such a time saving. When children are in care, this fact has implications for the time limits defined in the *Child & Family Services Act*.

- **will the mediated agreements remain in effect for as long?**

Use of mediation *per se* did not increase compliance. For example, among 10 cases ending in a mediated agreement, three broke down prior to the final disposal of the case in court. Of the seven characterized as successful mediation, three were associated with compliance to the mediated provisions (and one family could not be tracked). As Andrea’s story suggests, families could experience unpredictable changes and challenges in the period after mediation. Also, mediation rarely precipitated an improvement in a client’s views of the CAS.

- **will mediated agreement compromise the safety of children?**

No.

Some observers worry that mediation may jeopardize child safety. Efforts to negotiate and compromise may erode protections originally sought in court applications as conditions are jettisoned to make the “deal” more palatable. We found no evidence to suspect this to be true for supervision order cases. Indeed, mediated agreements tended to have fewer conditions attached to the supervision orders and were more likely to be followed by voluntary service agreements. Would this affect the indicators of child safety such as subsequent incidents of abuse, or need for more intrusive intervention in the long run? No. Generally, for the majority of children in both groups, the level of intrusiveness stayed the same over the next year and increased for only two of the children. There were many reports from both the community and professionals about the cases over the next year, but this was true for both mediated and non-mediated cases. Finally, in a survey of CAS staff, the proportion of staff who believed mediated agreements would be compromises that jeopardized child safety declined from 16% prior to the Project’s implementation to 10%. However, participants in mediation must attend to this issue on a case-by-case basis.

- **can mediation address the risks of children in need of protection?**

In the year after case resolution, there were no verified incidents of abuse by any of the parties involved with this study. Because the worker had to endorse the agreement, and each agreement was approved by a CAS supervisor, we can assume that agreements had the components thought necessary to address child safety. In six mediated cases, agreements were not reached, indicating in part that workers were not willing to compromise protections merely to obtain an agreement.

- **will mediation improve the relationship between client and worker?**

Probably not.

About 10% of the CAS clients described an improvement in the relationship with their worker. Likewise, workers in three mediated cases said the relationship had improved. The vast majority of workers and family parties felt that the relationship had stayed the same. If the relationship was poor, it stayed that way. If the relationship was good, that did not change either. The relationship could also deteriorate. Overall, the pattern was the same for that observed in the comparison cases. In some cases, there was no contact after the final order, because the file was closed, the family left the jurisdiction, or that the a new worker was assigned to the case (e.g., case transfer, worker left the agency). By the time of the one-year follow-up, almost no clients had contact with the worker who engaged in the mediation.

- **will mediation resolve cases faster and at less cost?**

Yes, when mediation is successful.

As described in Chapter 7, judged against the comparison group (which represent the approximately 20% of hotly-contested cases), successfully mediated cases ended 3.5 months sooner. Successful mediation cases concluded 2.5 months sooner than unsuccessful mediation cases.

Adding all system costs together, successful mediation was associated with cost savings of about half while unsuccessful mediation was comparable or identical in cost to the comparison group. For example, when mediation was successful, the CAS saved about \$500 in staff costs. When mediation was not successful, the staff costs were exactly the same as in the comparison cases. There was much greater savings in cases that might otherwise have been referred to outside counsel. Successful mediation may result in a substantial savings to Legal Aid Ontario, perhaps 50% on the costs of the average certificate.

Conclusions

The intent of this project was never to give “thumbs up” or “thumbs down” to the concept of child protection mediation. We adopted instead a lessons learned approach, to provide guidance to other communities where this variant of mediation will be introduced. We leave readers to consider three overarching conclusions: mediation is a viable “third option” for some contested court applications in the child welfare system; cases must be selected carefully; and, the best question to ask is not “if” we do mediation, but “how” we do it.

Mediation is a Viable “Third Option”

When presented with a court application, a party in a child welfare matter has essentially two options: consent, or oppose the application in court. This is true whether they disagree with a few words in the historical overview or contest even one of the proposed conditions. In speaking with parties who contested applications, we learned that many people were not actively seeking their “day in court.” They were taking the only option open to them. They wanted someone to listen to their views and they wanted a speedier resolution to the case. When presented with a third option promising those features, many were willing to try. Providing a third option such as mediation may address, but not solve, the rising volume of child welfare cases in the family court system.

Select Cases Purposefully

At the same time, mediation is not a neutral intervention. Some may be tempted to take the view that, “there’s no harm in trying mediation. If it works, it works. If it fails, we just move on.” Clearly, based on our findings, mediation can work extremely well and leave everyone satisfied with both process and outcome. That is not the inevitable result, however. We also saw cases where mediation extended time to case resolution, triggered a deterioration in the worker/client relationship, and drained more resources from the CAS. Cases should be selected for amenability to this particular ADR technique (as opposed to others) and screened for likelihood of success. Experience over time will help us learn how to accomplish this.

“How” we do Mediation is Important

Like any other intervention, mediation is not inherently good or bad, effective or harmful. What is important is HOW we do mediation. At a system level, experience in other jurisdictions has shown that mediation can take off and be successful, or it can fizzle. What is the difference? Attention to the who, what, where, when and why of mediation – at the outset – may pay off in the long run with a mediation strategy that meets local needs. Child-protection mediation is different than the mediation we are all used to and taking the time to work through these issues will pay off. Ultimately, after our experience in London, we cannot recommend one model of mediation appropriate for anywhere in Ontario or Canada. Instead, we end this report in Chapter 9 by presenting a checklist as a tool for communities contemplating the adoption of mediation. It can facilitate a group discussion, or perhaps many discussions, on how mediation can add the greatest value to existing services and resources.

Chapter 2

Why Child Protection Mediation?

In this chapter, these topics are discussed...

- overview of child protection mediation
- results of an opinion survey with CAS staff
- lessons learned from other jurisdictions in Canada

Observations made from the information in this chapter are:

- the availability of child protection mediation is expanding in Ontario, now including Toronto (since 1990), Hamilton (since 2002), Muskoka (2004), and Kawartha/Haliburton (2004)
 - the most common funding arrangement now in use is that mediation is funded 50/50 by Legal Aid Ontario and the agency (when at least one party has a legal aid certificate)
 - mediation can be funded by the agency, as in Muskoka
 - evaluations tend to show high settlement rates, beneficial case outcomes (e.g., shorter time to permanent placement) and high rates of client satisfaction
 - there is also evidence in the literature that resistance is not uncommon and that sustaining a mediation program can be difficult over the long term
 - most child protection workers we surveyed believed that mediation would be less intimidating and more satisfying for families than the court process and that mediation could improve worker/client communication
 - on the other hand, they were concerned about the difficulty of equalizing the power imbalance, worried that clients may not comply with the conditions of mediated agreements, and were concerned that mediation, if tried and failed, will only lengthen the process
 - successful mediation projects typically begin with a high degree of collaborative planning
-

Child protection mediation is one form of alternative dispute resolution (ADR) used in many parts of the U.S. and in at least seven Canadian provinces and the Yukon. There are a variety of models and considerable variation exists in how mediation is used across North America. In its most basic form, it would involve a neutral and independent mediator facilitating the discussion between a representative of a child welfare agency and at least one of its clients. Key components of mediation in the child protection context include facilitated communication, problem solving, alliance/positive working relationship, and fair neutrality (not taking sides, absence of pre-existing bias, absence of decision-making authority, and having no stake in the outcomes), many of which are standard features of good child welfare practice.⁵

It is often stated that the only issue not amenable to mediation relates to finding that a child is in need of protection. All other types of issues have been mediated, with some observers urging caution for cases of child sexual abuse. In the London project, focus was on court applications, but this is not the only use posited for mediation. Specific matters, either within or outside the context of a court application, where parties could make use of mediation include:

- placement plans
- visitation and access arrangements
- treatment interventions
- long-term care issues
- determining timing/readiness for returning a child to the home
- determining when to discontinue protective supervision
- the nature and extent of a parent's involvement
- parent/child conflict
- lack of or poor communication between a worker and parents due to hostility
- negotiating length of care and conditions of return
- foster parent / agency / parent issues⁶

Some suggest that mediation might forestall court applications or encourage consent to sought-after measures prior to the launching of court applications. Mediation may be suitable for some facets of some adoption cases. Mediation has also been suggested for resolving complaints made against a child protection agency, or those not resolved using the normal procedures.

⁵ A. Barsky & N. Trcomé (1998). The Essential Aspects of Mediation in Child Protection Cases. *Children & Youth Services Review*, 20(7): 629-656.

⁶ Gerry McNeilly (1997). Mediation and Child Protection: An Ontario Perspective. *Family & Conciliation Courts Review*, 35(2): 206-222.

Interest in child protection mediation has grown over the last few years in Canada. June Maresca and her colleagues at the Centre for Child and Family Mediation in Toronto introduced the concept to a Canadian audience. In the 1980s, they developed a model of mediation⁷ and evaluated a demonstration project. Their work continues today. The Panel of Experts⁸ reviewing the *Child & Family Services Act* recommended in 1998 that child protection mediation be used. More recently, the Ontario Association of Children's Aid Societies recommended an addition to the *Child & Family Services Act*, to require the court to consider the appropriateness of alternative dispute resolution mechanisms prior to making an order at any stage of a child protection proceeding.⁹ Finally, the government of Ontario introduced, in June of 2005, a package of proposed amendments to the *Child & Family Services Act* requiring that ADR be considered as an option (Bill 210).

It is fair to say that interest in child protection mediation has grown even over the period of this pilot project. Once limited to the Toronto area, the use of mediation is now found in various pockets of Ontario. Since the fall of 2002, for example, the Children's Aid Society of Hamilton uses mediation, cost shared with Legal Aid Ontario. An estimated 10 cases were mediated in 2003. The Mediation Centre of Hamilton provides child protection mediation both to the Children's Aid Society of Hamilton and the Catholic agency in that community. Since the summer of 2004, the Mediation Centre of Simcoe County will provide mediation to the Family, Youth and Child Services of Muskoka. As of January 2005, two cases had been mediated. This arrangement was initiated by the Mediation Centre itself which first approached the agency. The Kawartha-Haliburton Children's Aid Society also accesses mediation, cost shared with Legal Aid Ontario. This arrangement was first used in September of 2004. They expect to mediate about 10 to 15 cases per year.

The spread of mediation across Ontario, once *ad hoc* and isolated, will be augmented by government support and statutory encouragement if the Bill 210 amendments are proclaimed into force. As discussed in Chapter 8, many Ontario agencies are contemplating or actively planning the adoption of mediation. Stated barriers to the use of mediation were the lack of trained mediators, lack of funding, lack of familiarity with the technique, a concern that mediation would duplicate other resolution strategies, and the logistics of implementation (e.g., serving rural or remote areas). Ontario agencies are primarily interested in mediation as a means of enhancing client service.

⁷ J. Maresca (1995). Mediating Child Protection Cases. *Child Welfare*, 74(3): 731-42.

⁸ J. Hatton, G. Campbell, H. Colantoni, R. Ferron, D. Huyer, T. Johnson Ortiz, H. MacMillan & N. Trocme (1998). *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection*. Toronto: Queen's Printer for Ontario.

⁹ Ontario Association of Children's Aid Societies (2005). *Proposed Child and Family Service Act Amendments: A Position Paper of the Ontario Association of Children's Aid Societies*. Toronto: OACAS.

Why Child Protection Mediation?

Why is this happening? A key impetus behind the London project is the observation that mediation may stem the rising tide of legal costs and high-conflict court cases common now in many parts of Ontario, and Canada. An increasing number of child protection cases are coming to the family courts for resolution, where they may bog down in lengthy pre-trial procedures. Legal costs have skyrocketed, potentially diverting resources and attention from the core business of child welfare: protecting children and supporting families. For example, each year, Legal Aid Ontario is devoting an increasing amount of funding to legal aid certificates associated with matters under the *Child & Family Services Act*. Those expenditures increased from \$4.6 million in 1997/98 to \$9.7 million in 2000/01 and \$15.4 million in 2004/05. Other system components – CAS legal departments, costs associated with outside counsel hired by CASs, and court administration costs – have experienced similar increases.

Some degree of these increases is related to the dramatic increases in CAS caseloads. Child-welfare expenditures in Ontario increased about 80% between 1998 and 2002/03. The number of children in care has increased about 56% and child protection cases about 33%. This affects both overall costs for the Societies as well as the associated legal costs. Increase in case loads is not the only driving increases in recourse to the courts. Some factors potentially driving these trends are listed in Appendix B and include new protection standards, a risk assessment model, and increased requests for independent assessments. Furthermore, changes in court rules and court forms have increased the number and complexity of tasks associated with processing court applications.

Policy makers in Ontario have also been influenced by evaluation results of mostly American and some Canadian programs that document the benefits of child protection mediation. A review conducted for the Child Protection Mediation Working Group in Ontario provides a comprehensive and timely summary of the extant literature.¹⁰ While noting that the depth and scope of the empirical knowledge base is limited, these benefits are often supported in evaluations:

- high settlement rates
- increased levels of consumer satisfaction
- more timely resolution of issues before the court
- increased compliance with protection plans
- reduced time in out-of-home placements for children

¹⁰ Child Protection Mediation Working Group (2004). *Report of the Child Protection Mediation Working Group to the Child Protection Backlog Steering Committee*, as presented to the Justice Summit, September 21, 2004.

- cost savings for child welfare and the legal system
- improved worker/client relationships

Research examining process issues is harder to find. Common weaknesses in implementation include lack of (or insufficient) front-end consultation with all sectors (family bar, child welfare staff, judiciary, etc.) and under-resourcing key components of the program such as coordination and administration. It would appear that most mediation programs are under utilized. As one observer notes, “Although mediators are convinced that their process is like the better mousetrap, prospective clients have not beaten a path to their doors.”¹¹ Most studies end with an admonition to gain the buy-in of all involved sector groups at the outset.

Strengths and Concerns

The concept of child protection mediation may be high profile today. When we began this project in 2002, however, many people in our community were highly suspicious and even questioned our involvement. Everyone agreed that the *status quo* was not ideal. Data collected for this project confirmed the dissatisfaction of parties with the current means of resolving disputes through recourse to the courts:

- in these contested supervision order cases, the average time to case conclusion was nine months
- 39% of the parties did not understand what the others were saying at the settlement conference where the case ended
- 57% felt pressured into accepting the “agreement” decided at the settlement conference
- only 50% were glad, in retrospect, that had chosen to contest the court application

It was also clear at the outset that the cooperation of CAS staff, particularly front-line child protection workers, would be crucial to the success of the pilot. To better understand their views, an opinion survey was administered early in 2003, immediately before mediation became available. The topics addressed in the 26 items were selected based largely upon a literature review and discussions with CAS staff about what might be seen as strengths and weaknesses of the concept of child protection mediation. Completed forms were received from 76 staff including 14 supervisors/managers. Most (62%) had attended a half-day information session about the concept of child protection mediation project. However, aggregate responses did not vary between attendees and those who did not attend.

¹¹ A.E. Barsky (1997). Why Parties Agree to Mediation: The Case of Child Protection Mediation. *Family & Conciliation Courts Review*, 35(2): 164-183.

Perceived Strengths of Mediation

The most common perceived benefits were that mediation would be less intimidating and more satisfying for families than the court process (92% of respondents held that opinion) and that mediation could improve worker/client communication (85%). Other perceived benefits were:

- mediation can get things back on track when the worker/client relationship has become conflictual (76%)
- most CAS clients will be more satisfied with mediation than court (76%)
- mediation will reduce the length of time a child is in limbo (70%)
- the mediation will resolve cases faster than going to court (53%)

In addition, 73% *disagreed* that mediated agreements will be compromises that jeopardize child safety and 53% agreed that the availability of mediation will greatly improve the quality of child protection services.

Perceived Concerns

They also expressed concerns about how mediation might work in practice. Key among them was the issue of equalizing the power imbalance between a client and the agency (a concern expressed by 65%). Quite a few (72%) agreed that there are benefits to court that mediation does not offer. Also of interest were these findings:

- 80% agreed that CAS workers could come to an agreement without mediation if the family is reasonable
- 54% agreed that if the family is not reasonable, mediation is not going to work
- 49% agreed that a court order was more likely than a mediated agreement to be complied with
- 40% agreed that most CAS clients would be screened out as inappropriate
- 41% agreed that settlement conferences serve the same role as mediation
- 31% agreed that mediated agreements will break down sooner than court ordered agreements
- 33% agreed that mediation will work only if the mediator convinces the family that the agency position is reasonable
- 28% agreed that most clients will not follow through with the actions they agree to in mediation
- 22% agreed that for mediation to work one side has to give in

Mixed feelings about several features or promises of mediation were evident, specifically the ability of mediation to reduce paper work, mediation as value added vis-à-vis the settlement

process or the expected role of workers, or the ability of mediation to take into account the children's needs. There was no consensus over whether mediation should or should not be mandatory for all cases scheduled for trial and there were also mixed views on whether most CAS clients would qualify for mediation.

In the open-ended comments invited at the end of the survey, the key concern was about compliance and the perceived need for judicial authority to enforce compliance. Also salient was a concern that mediation, if it does not have a high rate of agreement *and* compliance, will simply lengthen the process by adding another step toward the inevitable judicial decision.

A Tale of Two Coasts

The two Canadian provinces with some of the greatest experience with child protection mediation have had dramatically different experiences with the technique. The history of mediation in Nova Scotia and British Columbia reveals how mediation can be tried and embraced, and how mediation can be tried and fail to catch on.

Nova Scotia

This province was the first to systematically promote child protection mediation on a province-wide basis, beginning in 1993 with amendments to the *Children & Family Services Act*. A comprehensive 13-day training program was thoughtfully developed and applied, involving both knowledge acquisition and skill development.¹² The Department of Community Services approved a roster of mediators and provided funding. Despite this apparently sound beginning, the program got off on the “wrong foot” and stayed that way, struggling with low referrals and never gaining complete acceptance by child protection staff.¹³ Today, child protection mediation is rarely used in Nova Scotia while family-group conferencing is spreading in popularity.

¹² G.R. Savoury, H.L. Beals & J.M. Parks (1995). Mediation in Child Protection: Facilitating the Resolution of Disputes. *Child Welfare*, 74(3): 743-502.

¹³ S.E. Carruthers (1997). Mediation in Child Protection and the Nova Scotia Experience. *Family & Conciliation Courts Review*, 35(1): 102-126.

British Columbia

In British Columbia, a Child Protection Mediation Program – as per s. 22 of the *Child, Family & Community Services Act* – was established in 1997 but, as in many jurisdictions, it was not being well utilized. This experience led to the creation of the Facilitated Planning Meeting (FPM) model which was developed and piloted in Surrey. Over one year was devoted to the planning stage, when child protection staff, judges and lawyers worked together. At the ministerial level, it was a collaboration between the ministry responsible for child welfare and the Ministry of the Attorney General. The model was successfully evaluated.

Key features of the Surrey model include the ability to systematically review all protection applications, the capacity to pro-actively contact parties in qualifying cases to review the option of mediation, and the use of orientation sessions for parents. A crucial feature of this model is the designation of a senior child-welfare staff member to take the full-time role of Court Work Supervisor. This individual is responsible for screening, outreach, liaison with mediators, liaison and mentoring with the child welfare staff who attend mediation, and he or she attends all planning meetings. The Court Work Supervisor is empowered to approve agreements/plans on behalf of the agency. The FPM model, now only available in parts of the Fraser Region, may well be rolled out in other parts of the province. In addition, the model is being used as the basis for a pilot project in Alberta. The experience in Surrey demonstrates that collaboration and planning can lead to the development of a program that meets everyone's needs.

Lessons Learned

The experience of Nova Scotia is not unique. A project in Arkansas demonstrates that there are two phases to a successful program: getting off on the “right foot” *and* being able to maintain the program over time.¹⁴ In that jurisdiction, an evaluation yielded overwhelmingly positive results but, once evaluation funding ended, referrals dropped and continued to fall. Analysis of this situation suggested reasons which included:

- loss of the program coordinator due to budget cuts
- lack of interest on the part of child welfare staff and lawyers
- absence of vocal support from judges to encourage lawyers to use mediation
- poor communication between the court and the mediators
- mediator training not including specific information on child protection law
- short time periods allowed not being sufficient for mediation

¹⁴ K.B. Olson (2003). Lessons Learned from a Child Protection Mediation Program: If at First You Succeed and Then You Don't..." *Family Court Review*, 41(4): 480-496.

Other process problems included high turnover of staff making it difficult to gain experience with mediation, lack of preparation and other delays that caused frustration, failure of some parties to bargain in good faith, and low expectations for mediation.

Lessons learned about how to introduce child protection mediation and get off on the “right foot” include these:

- being clear on referral criteria
- involving all stakeholder groups in design of the model
- seeking and obtaining the buy-in of all involved parties
- having a project coordinator
- setting realistic expectations for number of referrals
- facilitating the delivery of a high quality and professional mediation service
- being realistic in terms of time required to conduct mediation, especially in complex multi-party cases

In London, as a result of the funding for this Project, we were able to devote sufficient time and effort to developing a pilot project that achieved these goals, including high levels of buy in by all local stakeholder groups. Our experiences implementing child protection mediation in London are described in the next two chapters.

Chapter 3

London Child Protection Mediation Project

In this chapter, these topics are discussed...

- project funders and partners
- the role of the advisory committees
- goals of the project
- the rationale for limiting the pilot to supervision orders
- generalizability of results

Observations made from the information in this chapter are:

- the multi-sectoral advisory committees were invaluable resources in the developmental phase of the project and to problem solve operational issues arising over time
- attention to “buy in” in the developmental phase paid off in that cooperation was evident in all groups
- readers interested in generalizing these findings to their own jurisdictions should consider how we implemented mediation, the profile of the London agency and local community, and the features of a pilot project that will not be reproduced (e.g., paid coordinator)

Two recommendations are made based on the data presented in this chapter:

Recommendation 4: Jurisdictions using child protection mediation should consider creating a multi-sectoral steering committee with representation from all stakeholder groups, especially at the start-up phase.

Recommendation 5: Jurisdictions using child protection mediation should provide information to all sectoral groups on an on-going basis, to facilitate understanding of the mediation process as it is to be implemented.

The London Child Protection Mediation Pilot Project reflects the collective efforts of many groups representing the federal and Ontario governments, Legal Aid Ontario, the Ontario Association of Children's Aid Societies, the Office of the Children's Lawyer, and the Children's Aid Society of London and Middlesex. The intent was to test the viability of mediation in the child-protection context and to form recommendations for implementation in other jurisdictions. Data collection strategies and instruments were designed to match the research questions defined at the outset. Specific methodologies (see Appendix A) include file review, interviews, and surveys.

Project Funders

Funding was contributed by three groups.

Legal Aid Ontario

The majority of funding to the London Child Protection Mediation Project was contributed by Legal Aid Ontario. Legal Aid is available to low income individuals and disadvantaged communities for legal problems which include criminal matters, family disputes, immigration and refugee hearings and poverty law issues such as landlord/tenant disputes, disability support and family benefits payments. LAO provides access to legal counsel for more than one million people each year, through a certificate program in partnership with almost 4,000 members of the private bar, duty counsel services (including Family Law Information Centres), and a small number of legal clinics and staff lawyers. Funding for legal aid comes from a variety of sources including the federal Department of Justice, the Ministry of the Attorney General, the Law Foundation of Ontario, and contributions from clients. The annual budget is approximately \$300 million. In 2004/05, \$15.4 million was devoted to legal aid certificates for matters under the *Child & Family Services Act*. LAO supports alternative dispute-resolution techniques of all varieties. They are interested in mediation as a promising strategy to avoid protracted litigation through early resolution of contested cases.



www.legalaid.on.ca/

Department of Justice Canada

This ministry helps the federal government develop policy and make and reform laws as needed. It acts as the federal government's lawyer, providing legal advice, and prosecuting cases under federal law (except the *Criminal Code*). Among the many expenditures on a variety of programs, the Department of Justice contributes \$126.4 million to legal aid programs across Canada (estimate for 2003/04).



canada.justice.gc.ca/

Ministry of Children & Youth Services

This provincial ministry funds Ontario's Children's Aid Societies (CASs). The government's role in child protection is to fund, legislate and monitor the child-welfare system. The Ministry sets policy and provides program design for child welfare, and licenses children's residential services (group homes and foster care). It is estimated that the Ontario government spent more than \$1 billion in 2003/04 on services for more than 30,000 children. A portion funds the legal services expended by CASs.



www.children.gov.on.ca/

Project Partners

A broad spectrum of partners came together to implement and monitor the use of mediation in London and Middlesex. In addition to the three funding agencies, representatives from these groups helped shape and guide the project.

Office of the Children's Lawyer

The Office of the Children's Lawyer is an independent law firm within the Ministry of the Attorney General. Lawyers within the Office represent children in various areas of law including child custody and access disputes, child protection proceedings, estate matters, and civil litigation. In child protection applications by a CAS, the court may request the appointment of an independent legal representative for a child under the *Child & Family*

Services Act. This happens when the court believes a lawyer for a child is necessary to represent the child's interests in protection proceedings. Among the 74 children in our sample, about one third were represented by an OCL lawyer.



www.attorneygeneral.jus.gov.on.ca/english/family/ocl/

Ontario Association of Children's Aid Societies

OACAS is a membership organization representing 51 children's aid societies in Ontario. Services include government liaison and policy development, research and special projects, quality assurance in child welfare practice and training for all protection workers throughout the province. Funded by membership fees, government grants and other revenue producing activities, OACAS works with government on the development and response to legislation, standards, policy, regulations, contentious issues and review mechanisms. OACAS represents the interests of member Societies in public forums which may affect its members and clients. OACAS makes presentations to the legislature on a non-partisan basis through standing committees, house debates and meetings with party caucuses.



www.oacas.org

Ministry of the Attorney General

This ministry is responsible for providing a fair and accessible justice system reflecting the needs of the diverse communities it serves across government and the province. It strives to manage the justice system in an equitable, affordable and accessible way. The Ministry delivers and administers a wide range of justice services including: administering approximately 115 statutes; conducting criminal proceedings across Ontario; providing legal advice to, and conducting litigation on behalf of, all government ministries, and many agencies, boards and tribunals; providing advice on, and drafting, all legislation and regulations; and coordinating and administering criminal, civil and family court services.

The Ministry provides decision making and support services to vulnerable people (e.g. through Legal Aid Ontario, Office of the Public Trustee and the Office of the Children's Lawyer), among other duties. The Attorney General provides funding to Legal Aid Ontario each year. It also funds family mediation and information services, Supervised Access Centres and Family Law Information Centres. The family mediation and information services are offered at a number of court locations, although the family mediation services are not available

for child protection matters. Supervised Access Centres and Family Law Information Centres are available across the province. Resources and publications are available at Family Law Information Centres including, the Ministry's recently released booklet titled *What You Should Know About Child Protection Cases*, written for parents and other parties.



www.attorneygeneral.jus.gov.on.ca/

Children's Aid Society of London & Middlesex

The Children's Aid Society of London and Middlesex agreed to be the venue in which to pilot mediation. It is one of the five largest Societies in Ontario. The Society has about 350 full-time staff and 100 part-time staff, about 350 foster families and over 150 volunteers. Like the other 51 societies in Ontario, it is mandated by the *Child & Family Services Act* to:

- investigate allegations or evidence that children under the age of 16 years may be in need of protection
- protect children where necessary
- provide guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children
- provide care for children assigned or committed to its care
- supervise children assigned to its supervision, and
- place children for adoption.

Agency staff assisted with the study by making referrals, attending mediations, logging time on cases, and providing feedback on the mediation process.

The jurisdiction of the agency is the City of London and the County of Middlesex. It is a non-profit organization with a local Board of Directors. This Society received 11,276 inquiries and referrals in 2003/04. About three quarters of referrals were responded to by providing information, referral to another community service, or by assessing the situation and finding no reason for investigation or ongoing services. The Society, however, completed 3,315 child-protection investigations in 2003/04. For 704 of these families, files were opened for on-going protection services. At the same time, 574 protection cases were closed. The Society provides child protection services to about 1,500 families on any given day. About 850 children are in care, living in foster homes, Society operated group homes and other community residential-care facilities. The annual budget is about \$50 million.



www.caslondon.on.ca/

Advisory Committee

The Advisory Committee played a key role in overseeing the proposal, developmental and operational phases of the project, on behalf of the funders and other partners. The committee had representation from the three funders (Legal Aid Ontario, Department of Justice, and the Ministry of Children and Youth Services) as well as the Ministry of the Attorney General, the Office of the Children’s Lawyer for Ontario, the Ontario Association of Children’s Aid Societies, and the Children’s Aid Society of London & Middlesex. In addition, one lawyer represented parents’ counsel and one lawyer represented children’s counsel. A representative from Legal Aid Ontario was the Chair.

Local Advisory Committee

This sub-committee of the advisory committee oversaw operational and administrative matters at the local level. The committee included the Area Director of Legal Aid Ontario (Simon Davies), a representative of the local CAS (Rhonda Hallberg), a lawyer representing children’s counsel (Celia MacDonald), and a lawyer representing parent’s counsel (Toenie Hersch). This committee defined the inclusionary/exclusionary criteria, interviewed and hired mediators, problem-solved operation issues, and liaised with other local stakeholders about project developments.

Recommendation 4: Jurisdictions using child protection mediation should consider creating a multi-sectoral steering committee with representation from all stakeholder groups, especially at the start-up phase.

Goals of the Project

At the outset, the following goals were defined:

- to examine mediation as a way of identifying the remedies required to address the needs of children and the risks that cause children to be in need of protection

- to provide empirical data on the effectiveness of mediation in shortening the time between the commencement of protection proceedings and final decision, thereby reducing time in limbo for children
- to determine if the durability of, and the compliance with, decisions is different in mediated agreements, as compared to those made as a result of a court hearing
- to determine if the satisfaction level for the parties is different in mediated agreements, as compared to those made as a result of a court hearing
- to determine if the communication and relationship between CAS workers and family members is different in mediated agreements compared to those made as a result of a court hearing
- to examine the legal cost effectiveness of mediation in child protection court cases

Focus was limited to cases where Society applications for supervision orders (initial application or status review) are *not* consented to by at least one party so the case is on course for resolution through court processing and, ultimately, trial. The process and outcomes of a sample of mediated cases are compared with those of 20 similar cases resolved in the usual way, either with settlement or after a trial. Specifically, we compared case outcomes, satisfaction of parties, time lines, and costs. Data came from review of CAS files, interviews of family parties before and after final disposition of the application, feedback from parties in the mediation, and feedback from stakeholder groups including child protection workers.

Process of Implementation Questions

Specific research questions derived from the project goals addressed both process and outcome issues. Process of implementation questions were:

- what volume of child protection cases are suitable for mediation?
- will parents and other family parties agree to mediation?
- will CAS workers agree to mediation?
- can the power imbalance be offset so a parent can mediate as an equal party?
- what are the barriers to successful implementation of mediation?
- will all parties be satisfied with the process and outcome?

Being a pilot, this project represented an opportunity to observe the operational workings of a mediation service.

Outcome Questions

It was also important that case outcomes be tracked. Outcome questions were:

- are there benefits of mediation compared with court-based disposition of cases?
- will stability be achieved sooner for children?
- will the mediated agreements remain in effect for as long?
- will mediated agreement compromise the safety of children?
- can mediation address the risks of children in need of protection?
- will mediation improve the relationship between client and worker?
- will mediation resolve cases faster and at less cost?

Outreach to the Community

A number of outreach activities were conducted to raise a profile for the project – initially and on a continuing basis. Aware that mediation can fail to flourish because of lack of “buy-in,” considerable efforts were devoted to these tasks. Members of the relevant sectors were informed about the project, the model of mediation selected, and the types of cases sought. In retrospect, these efforts were crucial. Without the support of judges, lawyers, and child protection workers, a mediation initiative could not attract referrals and be successful. Mediation could not be used if lawyers advised their clients against it, judges denied adjournments to facilitate mediation, and child protection workers failed to refer cases or did not cooperate with mediators.

Legal Community

In the developmental phase, a presentation was made to the Liaison and Resource Committee of the Ontario Superior Court of Justice, Family Court. This is a diverse group of judges, lawyers, court administrators, and representatives of social service agencies. They were kept apprised of progress and developments. There was also a meeting with the Superior Court Justices of the Family Division and a presentation at a meeting of the Family Bar.

A half-day familiarization session for CAS lawyers, defence counsel, children’s lawyers and band representatives was held at the Court House as the project got underway, in October of 2002. June Maresca of the Centre for Child and Family Mediation came from Toronto to present about child protection mediation. In addition, a pamphlet was developed for distribution to lawyers whose clients are eligible for mediation, to assist them when discussing mediation with clients. In addition, 13 lawyers who represent CAS clients were sent background information on the project.

CAS Staff

CAS staff, both management and front-line, had many opportunities to learn about the project. On-site training was held in September of 2002. The half-day session (provided in the morning and repeated in the afternoon) was attended by 108 front-line child protection staff and managers. The intent was to familiarize staff with the concept of child protection mediation in general and this project in particular. June Maresca gave a presentation on the benefits of child protection mediation and described several successful cases from Toronto. Specific outreach activities included presentations at the management and supervisor levels and at several general staff meetings, articles in both the internal staff and community newsletters, and general distribution of October 2003 and July 2004 Community Update reports on the project. The results of the staff opinion survey – discussed above in Chapter Two – were presented at a general staff meeting.

CAS Clients

Multiple referral avenues were contemplated, including direct referral from clients. To this end, a pamphlet was developed and placed in the waiting area at the Society and also key locations in the Courthouse. Clients were invited to call if interested in more information.

Broader Stakeholder Groups

A memo on the project was circulated by the Ontario Association of Children's Aid Societies to all member Societies in August of 2002. An article about the project was included in the October newsletter of the Office of the Children's Lawyer, also in 2002. A short web page about the project has been available from the outset, at www.lfcc.on.ca/lcpmp.html. A number of inquiries were received from people interested in the London project.

Community Updates

At the request of the Advisory Committee, a two-page project update was disseminated to community stakeholders, in October of 2003. A key message conveyed in the document was that the low number of mediated cases was not a reflection of a low number of referrals. At that point, 129 cases had been referred but only 26 cases had been inducted into the project. As continued to be true over time, a large proportion of cases proceeded on consent, failed to meet the eligibility criteria, or did not attract the consent of all parties. A second community update was produced in July of 2004. Copies were also posted (and still available) on the project's web page.

Recommendation 5: Jurisdictions using child protection mediation should provide information to all sectoral groups on an on-going basis, to facilitate understanding of the mediation process as it is to be implemented.

Rationale for Focus on Supervision Orders

Because this is a research project, and the number of suitable cases was projected to be small, it was prudent to select one type of case from among the spectrum of child protection cases (i.e., applications for supervision orders, Society wardship, or Crown wardship). In this way, the mediated cases and the non-mediated cases would have better comparability.

Supervision orders were selected for several reasons. First, supervision orders are one of the most common type of court order sought by CASs. In addition, focus on supervision orders was believed to increase CAS staff buy-in for mediation, which was far from guaranteed at the outset. Supervision order cases could be among the most amenable to mediation, because there are so many aspects to discuss: the accuracy and tone of the “agreed facts,” length of the order, number of conditions, and the nature of conditions including custody and access in some cases. There is even the possibility – which did occur – of withdrawing an application in favour of a voluntary services agreement. Cases involving more intrusive interventions – potentially even terminating parental rights – would leave less “room to manoeuvre” from the Society’s point of view and fewer issues on the table for negotiation. Statutory time limits may also constrain the outcomes.

It is certainly not the case that supervision order files, at least the ones in this study, are “easy” cases with trivial issues. The selection criteria screened out clients who cooperate with voluntary service agreements or consent to supervision orders. Parties pressing for judicial resolution of a dispute with the CAS can have deeply entrenched views or long-standing animosity to the agency. In the study cases, the main issue under dispute in 35% of the cases was where the children would live. More than half of the children (55%) have at some point prior to the application been apprehended at least once. Thirteen of the 74 children (or 18%) were thought to be at risk of sexual abuse, were the supervision orders not in place. Two cases centred on shaken babies. More information on the study cases is presented in Chapter 5.

Generalizability of Findings

As with all empirical research, anyone interested in use the findings must consider how the data will generalize to their own jurisdictions.

Generalizability of Results to Other Settings

We have endeavoured to create conditions of implementation as close as possible to a real-world usage, within the limitations of a research project. Two factors to bear in mind, however, are:

- child protection mediation was new in our jurisdiction and a number of “growing pains” were worked out in the early stages
- because this was a research project, we did not make significant changes to the eligibility criteria or model of mediation once the project was underway

Anyone looking to these results to inform local decisions about mediation should be aware of these features of the project which may affect generalizability of the London experience. In other words, the findings may to some extent be affected by the way mediation was implemented:

- focus was restricted to protection applications for supervision orders
- the model of mediation, patterned closely after that developed in Toronto’s Centre for Child and Family Mediation, involved semi-open mediation, no legal counsel present, screening out of parties whose freedom to negotiate or competency to participate is in doubt, neutral location for the mediation, and use of a contract specifying that the mediator cannot be called as a witness in subsequent court proceedings
- the Project Coordinator position was paid for with project funding
- therefore, a person was available to seek out referrals, vet cases and manage the mediation process in a flexible way as referral volume ebbed and flowed
- mediation was paid for by project funding (i.e., clients knew the CAS did not pay the mediators)
- client expenses to participate were compensated (e.g., transportation, child care)
- clients received \$25 for each research interview, which may have influenced willingness to entertain mediation (although receipt of the money was not contingent upon participation)
- the CAS in London & Middlesex is a relatively large agency with a high volume of cases

- the project enjoyed widespread support in the legal community because of the work of the Local Advisory Committee
- the project was readily accepted by CAS staff, in large measure because of the credibility of the Project Coordinator among the staff

Some of these factors may have affected referral patterns and should be taken into account if attempting to predict case volume in other jurisdictions.

Generalizability of Results About Supervision Orders to Other Cases

Does restricting eligibility to only supervision orders affect the generalizability of results to other types of cases? Outside the confines of a research project, mediation might be considered in applications for Society and Crown wardship and status review by parents regarding children who are Crown wards (if the child has not been adopted). Projections of our experience onto other types of cases need to take into account the variables which might influence case volume and settlement rate. For example, the clinical profile of family parties in wardship cases, by definition, involves factors that have chronically affected parenting capacity and these factors (e.g., addictions) may also disqualify parties from mediation. Indeed, an argument can be made that a higher proportion of cases would be disqualified from among referrals for wardship applications. In addition, the seriousness and permanence of what is at stake in wardship applications might provide less room for negotiation, on both sides. Child protection workers would have exhausted all possibility of interventions of a less intrusive nature. For Crown warship, statutory time limits afford little flexibility to devise plans other than wardship. The settlement rate would be affected by all these factors.

Chapter 4

The Referral Process

In this chapter, these topics are discussed...

- the referral process
- case vetting and screening
- reasons cases were disqualified
- reasons clients declined mediation
- the process of seeking a supervision order through the family court in Ontario

Observations made from the information in this chapter are:

- case vetting was important but time consuming, requiring 3.25 hours on average per referral
- among the mediated cases, the average time expended on referral processing was 11 hours
- half the contested cases were screened out as not appropriate for mediation
- the most common reasons for disqualifying a case was a pending criminal charge and the presence of an active addiction in a key party that would compromise their ability to follow through on commitments
- in almost half of cases where mediation was appropriate, at least one key party declined the opportunity to use mediation
- the most common reasons for declining mediation were that someone preferred to pursue a trial, a lawyer had recommended against mediation, a settlement was on the horizon, or that attending a mediation in London was inconvenient for out-of-area parties
- of all supervision order applications, 9% were appropriate for mediation (i.e., did not proceed on consent, were not screened out, and attracted the consent of all parties to mediation)
- of all *contested* supervision order applications, 34% were both appropriate for mediation and attracted the consent of all parties to mediation

Two recommendations are made based on the data presented in this chapter:

Recommendation 6: Jurisdictions using child protection mediation should consider who will screen cases, when in the court process this will occur, what criteria will be applied, and how these tasks will be funded.

Recommendation 7: The definition of “parent” in the *Child & Family Services Act* should be reviewed with an eye to determining if unreasonable and unnecessary delays are created by the requirements for repeated service of court documents on parties with no biological or emotional ties to the children.

A referral process was devised to identify all supervision order applications early in the court process, so each qualifying case could be vetted for eligibility. Referrals were accepted between October of 2002 and April of 2004. A total of 222 cases were referred, of which 41 were eventually inducted into the project. Almost half (105) were excluded because parties consented to the supervision orders. Fifty-nine cases were rejected as not suitable for mediation and 58 cases were accepted. Of these latter 58, 17 were eliminated after at least one party declined the opportunity to use mediation or the case settled. This section of the report describes the referral and screening process.

Eligibility Criteria

Using the criteria of Toronto's Centre for Child and Family Mediation as a starting point, considerable discussion went into devising case selection criteria. As widely acknowledged, not all child welfare cases will be appropriate for mediation. Capacity to participate in verbal negotiations may be compromised by factors such as cognitive delay, for example. The research mandate required definition and consistent application of inclusionary and exclusionary criteria. As determined by the advisory committees, they were:

- no immediate risk (i.e., the physical and emotional safety of the child must be assured while the mediation process occurs)
- no concurrent criminal proceedings about the safety of any family member
- a child protection concern must have been identified by the CAS
- all parties must have the capacity to participate in the mediation process (factors which may compromise capacity include severe psychological impairment, severe psychiatric impairment, severe behavioural problems, or developmental delay)
- no ongoing or current spousal violence that affects the ability of any party to participate effectively in mediation
- no current court-ordered assessment under way
- at least one party must be a subject of a protection application or a status review application requesting an order of supervision
- voluntary agreement for participation by all parties

Each party had to appreciate his or her role in the research and give informed consent to participation.

Referral Sources

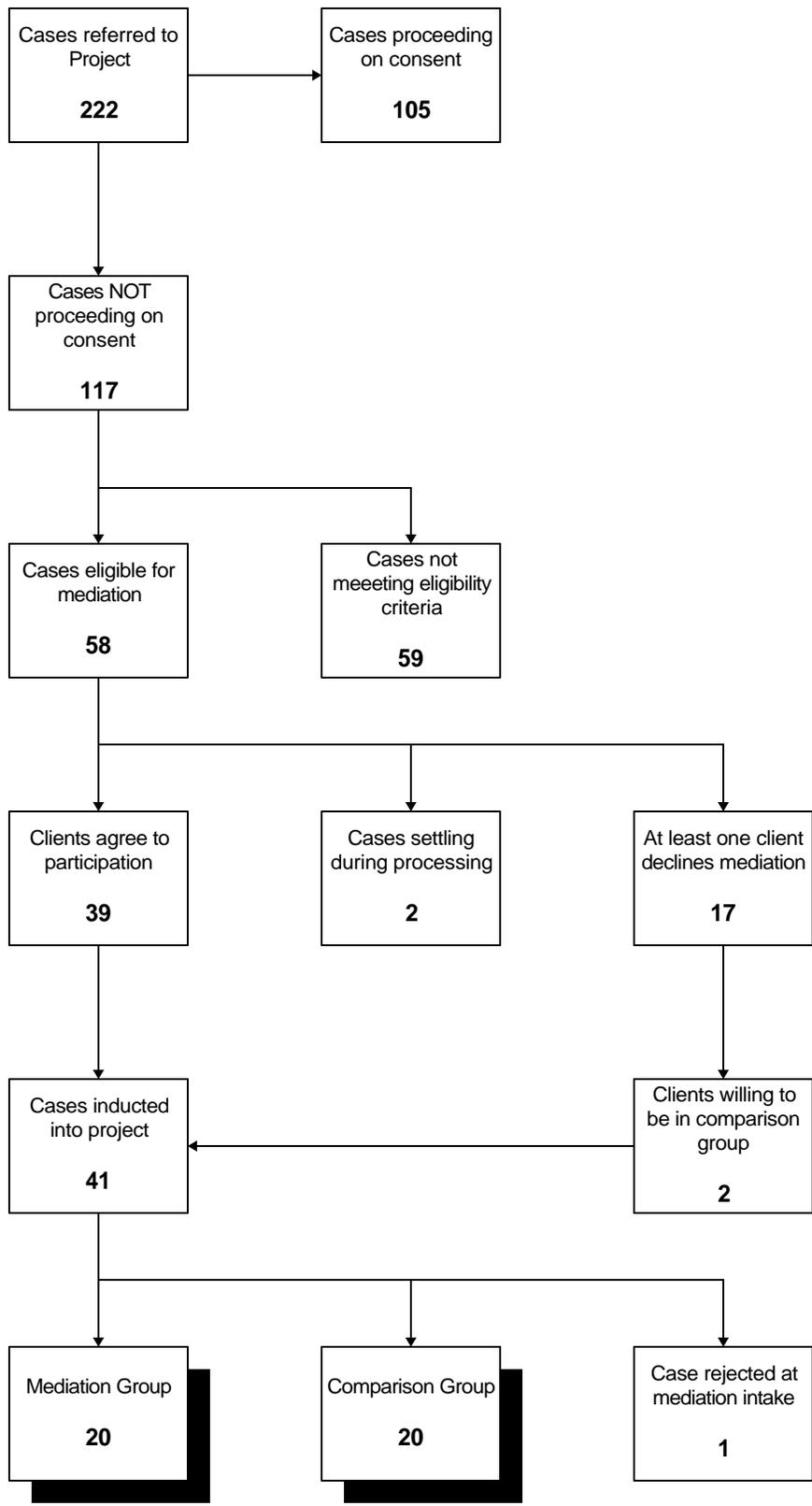
Referrals of appropriate cases were accepted from child protection workers, lawyers, and clients directly. However, because of the case-flagging system, the majority of cases were

identified by the CAS legal department when supervision order applications were launched. Referrals came directly from workers first in 10% of cases and we received one referral from a parent's lawyer, and one from a Children's Lawyer. The pamphlets elicited several calls from CAS clients – most not eligible for the study – and two cases were identified by client self-referral.

Case Vetting

For each referral, the Project Coordinator discussed the appropriateness of mediation with the worker. About half the cases ended at this point, because all parties would be consenting to the application. If the case was not proceeding on consent and there were issues in dispute, the Coordinator next assessed the case against the project's eligibility criteria. This was accomplished by speaking with the worker and reviewing case-file information. Being a research project, consistent application of eligibility criteria was important and reasons for disqualification were tracked. Fifty-nine cases did not meet the eligibility criteria, for the reasons listed in Table 4.1.

It is important to note that cases were not rejected because a mediated agreement seemed improbable, given the views or personality profile of the parties. Indeed, many cases involved challenging issues, well-entrenched positions, long-standing animosity to the Society, severe and bitter conflict between former partners, or mental health issues not meeting the level of disturbance required for disqualification. Some parties in this study would be described as problem drinkers. Non-proficiency in English would not disqualify a case because funds were available for cultural interpretation services. The mediated sample, despite the high rate of disqualification, is a fair representation of cases that are processed through court. Put another way, the case vetting process did not yield a sample of "easy" cases.



Disqualifying Cases

Twenty-two cases were rejected for a logistical reason, often factors that could change over time. For example, the referral might be re-considered once a parenting capacity assessment is complete or if the party returns to the local area. Pending criminal charges was a common reason to disqualify cases. An example might include when the issue under dispute was access by a father to his children while he faced charges for assaulting those children. Disposal of criminal charges re-qualified two cases for mediation after initially being disqualified. In about 10% of the cases rejected, the case had settled or the application had changed, no longer involving a supervision order.

Disqualifying Parties

In 37 cases, at least one party would not be an appropriate candidate for mediation, a decision made by the Project Coordinator in reference to the eligibility criteria. This decision was taken after reviewing the case file and consulting with the worker. Developmental delay (an IQ under 70), for example, would compromise a person's ability to participate as an equal party, as would a severe mental disorder involving active and unmedicated psychosis or high suicidality with clinical depression. One case was disqualified because the only party, the mother, was a minor and herself a Crown ward.

Another common reason for disqualification involved active and serious addictions. Experience in Toronto indicated that people struggling with such issues might not reliably attend mediation sessions and had difficulty following through with agreed plans. Disqualification for this reason was undertaken when a party had evidenced chronic unreliability in access visits with children, appointments with the worker, attendance at meetings in other settings, and poor follow through with referrals and suggested measures on behalf of the children. Cases disqualified for addictions might also involve a party who refused entry into residential treatment when program completion was required before the issue under dispute (e.g., return of the children) will be contemplated by the Society or where residential treatment had occurred but the follow-up plan has not been adhered to. In one case, the referral proceeded to mediation after a key party completed a residential treatment program.

Likewise, rejection for family violence was not undertaken merely for the presence of family violence, a sadly frequent feature of child protection cases. A case was eliminated if the ability of one party to make a free and voluntary agreement might be compromised because of intimidation or concern for the consequences of expressing a contrary view. This criterion was applied most often when a couple were currently living together, making the woman especially vulnerable to reprisal.

Table 4.1

Reasons for Rejection of Cases from Eligibility for Project

CLIENT DISQUALIFIED (n=37)		
Developmental delay	4	7%
Domestic violence	10	17%
Severe and active addiction	14	24%
Severe mental illness	8	14%
Parent under 16 and a CAS ward	1	2%
SYSTEM REASONS PROHIBIT USE OF MEDIATION (n=22)		
Criminal charge pending	12	20%
Party left the jurisdiction	1	2%
Objecting parent missing or outside province	3	5%
S. 54 parenting capacity assessment underway	1	2%
Application changed (e.g., now seeking wardship) or case settled	5	8%
TOTAL	59	100%

Definition of a Party to the Mediation

Many individuals could be parties to a court application. By statute, these include not only biological parents, but anyone with lawful custody of the child (e.g., a grand parent); anyone who, in the previous year, demonstrated a settled intention to treat the child as a child of his or her family, or has acknowledged parentage and provided for the child's support; an individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child; and a person who had the actual care and upbringing of the child immediately before the application. In the case of Indian children, a Band representative will be a party.

In practice, defining parties to the mediation did not prove difficult. A "party" was anyone whose presence was required at the table, given the scope of issues under discussion. The number of (non-CAS) parties ranged from one to five, for an average of 1.8. Two thirds of cases involved more than one (non-CAS) party. Sometimes multiple parties shared the same views on the case. Other times, parties would bring divergent views to the table. In the

sample overall, one (non-CAS) position would be brought to the table in 68% of cases and two (non-CAS) positions would be brought in 30% of cases. In one case, four parties each sought custody.

Not all the parties to a court application need be present at a mediation. As discussed in more detail below, a range of “parents” must be notified of court proceedings. Generally, parents not expressing interest in the proceedings (usually people having little or no contact with the children in recent years), are not likely to be seen as parties to a mediation. For example, for 42% of the children in this study, their fathers were not an active party to the court proceedings and had not expressed an opinion on the CAS application. Ultimately, it is left to the mediator to decide the scope and number of parties to attend the mediation.

Securing Consent to Participate

For eligible cases, the parties were informed verbally and in writing about the project, their eligibility for mediation, and the expectations associated with participation in the research component. The Coordinator also contacted any legal counsel acting for the parties, asking them to discuss the option of mediation with their clients. The Coordinator followed up this conversation with a letter containing written information about the project and mediation. The same was done with the client. The Coordinator also sought the agreement of any Children’s Lawyer associated with the case. Clients without representation were encouraged to consult Duty Counsel and contact information was provided.

Contacting clients at this stage proved to be a time-consuming process in some cases, complicated when people did not have telephones, had screening devices on their telephones, or were distrustful of anything involving the CAS. Many calls, letters and sometimes personal visits were required. However, the clients had to provide consent for the Project Coordinator to pass their names and contact information to the Research Coordinator. Once that consent was secured, the Research Coordinator contacted parties to arrange a home visit to discuss the research component and have the necessary consents signed.

The first 19 cases came to be the comparison group (one was added later) and 21 cases were referred to mediators. One case was subsequently disqualified by the mediator.

Comparison Group

Between October of 2002 and January of 2003, all eligible cases were inducted into the comparison sample. For these referrals, the Project Coordinator contacted the clients, seeking their consent to participating in research about mediation. All participants in the comparison group met the eligibility criteria and at least one party agreed to participate in the study. They all agreed they would consider mediation had it been available.

Reviewing the docket of active court applications provided an initial spurt of cases, some of which had been launched as far back as February of 2002. Many of these cases had been languishing in the court system for quite some time with no resolution. Once this batch of cases were processed, the pace of referrals slowed considerably. It took 15 months to amass a comparison group of 19 cases. One was added later, after mediation was declined by one key party.

Mediation Group

Because of the slow pace at which appropriate cases were coming to light, it appeared certain that budgeted funds for mediation would not be spent by March 31, 2003, as contemplated in the original proposal. With 19 cases in the comparison group, we switched gears in January of 2003 to direct eligible cases toward mediation. Beginning in February of 2003, the same referral process unfolded but cases were inducted into the mediation group. The consent process was repeated for all parties expected at the mediation. At this point, the funders agreed to extend mediation availability for one year. Referrals for mediation were accepted until April of 2004.

Declining Mediation

While creating the comparison group, parties in five eligible cases declined to be involved. Once mediation became available, at least one key party declined the opportunity in 12 of the 32 eligible cases. Because mediation is a voluntary process requiring all parties to be at the table, lack of participation by a key party disqualified the case from proceeding further. In addition, informed consent to participation is a key tenet of research ethics.

Why did people decline mediation?

- declined by default (not returning calls, not replying to letters, etc.)
- preference for trial by at least one party
- lawyer recommended against mediation
- settlement on horizon
- London too far for out-of-area parties
- cultural / language barriers

This last factor was inferred based on contact with one family. While not the stated reason for declining mediation, this family could not speak English and were reluctant to participate in a process where private family matters were openly discussed.

Time Spent Processing Referrals

Processing the 222 referrals required 3.25 hours per referral, on average. A time study revealed this breakdown:

- screening cases ultimately deemed not suitable – 74% of all referrals – required slightly over one hour of time for file review, telephone calls, and interviews with workers
- screening cases ultimately deemed suitable but in which clients declined mediation required 5.5 hours on average, for file review, telephone calls, interviews with workers, home visits, letters to parties, e-mails to parties, and faxes to parties including lawyers
- screening cases accepted for mediation and processing those referrals required an average of 11 hours, for file review, telephone calls, interviews with workers, home visits, letters to parties, e-mails to parties, and faxes to parties including lawyers

Case screening was facilitated by an on-site office at the CAS, access to CAS files, the Coordinator's knowledge of child welfare, and personal acquaintance with the legal staff and many workers. Nevertheless, this was a time-consuming process. The 20 mediation cases required, collectively, 464 telephone calls, 132 e-mails, 92 letters, 56 faxes, and 41 interviews. Contacting clients proved especially challenging in some cases, particularly when people did not have telephones, moved frequently, changed telephone numbers frequently, or had complicated call-screening systems. Home visits were required in several cases when other avenues of contact were unavailable or unsuccessful.

Role of the Project Coordinator

The Project Coordinator position was made possible by the project funding. The Coordinator oversaw the operational and administrative aspects of the mediation pilot. As just described, the position entailed, in part,¹⁵ the vetting of referrals, assessment of case eligibility, and approaching clients to explain mediation. Liaising with the CAS, other members of the local advisory committee and mediators was also an important aspect of the role, as well as processing expenditures and overseeing the budget. Knowledge of the child welfare system was crucial and clinical judgment was often required, most commonly to apply the addiction and mental health criteria. This position effectively incorporated both administrative tasks and also the important yet separate function of case screening.

¹⁵ The Coordinator's position entailed many other tasks associated with the research aspects of the project and liaising with the funders and advisory bodies. Time spent on these aspects of the project are not included in the time-study data.

There are several models of referral *administration*, which might include Ministry staff housed at the courthouse, private-practice mediators who incorporate administrative costs into their hourly rate, or a CAS staff member who oversees referrals. Even in an agency the size of London/Middlesex, it is unlikely that a full-time position would be warranted. Moreover, there may be a need to distance administration from the CAS, to assure clients the process is independent. However, given the time required to process mediation referrals, efforts should be made to ensure these tasks do not fall to child protection workers.

There are also several models of *case screening*. In some models, judges might select cases at any of several points throughout the court process. Workers might refer cases, even before first court appearance, or lawyers could suggest mediation to certain clients. In any event, it seems imperative that cases be screened, to select those most amenable to this technique. Time spent on unsuccessful mediations can extend the court process, as discussed in a later chapter. For jurisdictions considering the adoption of a mediation coordinator, a draft job description for this position is provided in Appendix E.

Recommendation 6: Jurisdictions using child protection mediation should consider who will screen cases, when in the court process this will occur, what criteria will be applied, and how this position will be funded.

Supervision Orders

For the purposes of this project, cases qualified if they involved an initial application or status review application that was requesting a supervision order and at least one party was contesting the CAS application. Data were collected by CAS staff on the court-related time spent on cases. In reference to the 18 comparison cases concluded as of this writing, legal secretaries spent 9.7 hours on average to process these applications, from the launching of the application to the closing of the file after a final order. The CAS in-house counsel spent 5.6 hours per case, and the child protection workers spent 26.5 hours on the court-related aspects of the case. Costs associated with these tasks are discussed in Chapter 7.

At this point, it may be helpful to some readers to review the application process.

The Child & Family Services Act

A supervision order is one type of court-ordered protection that can occur when a child protection application is made under the *Child & Family Services Act* of Ontario. When a

children's aid society considers a child to be in need of protection according to s. 37(2) and a voluntary plan of service is insufficient to protect the child, an application can be made to the Court for one of the orders spelled out in s. 57(1). A supervision order is one such order, as set out in s. 57(1)1, typically sought when the child's need for protection falls short of a situation where the Society should acquire actual care and custody. The court may order "that the child be placed with or returned to a parent or another person, subject to the supervision of the society, for a specified period of at least three and not more than twelve months."

The Initial Application

When a supervision order is being sought, the child protection worker works with legal staff to prepare a court application. Set out in the application are the reasons the CAS considers the child to be in need of protection (often a chronological list of past contacts and present concerns). The Society proposes a period of supervision, up to 12 months. According to the time-study data collected for this project, workers spend an average of 6.9 hours preparing court documents.

Conditions of Supervision Orders

In its application, the Society can request conditions felt reasonably necessary to ensure the protection of the child/ren. Conditions commonly used include: refraining from using physical punishment; ensuring children see doctors regularly; signing consent forms for third-party information (e.g., doctors); allowing the worker access to the home on a scheduled and unscheduled basis; allowing the worker independent access to the children (e.g., while they are at school); and, advising the Society of changes in residence and telephone numbers. Some orders also require that the custodian not permit specified people to contact the children, that specified people not live in the residence with the child, that prospective babysitters be approved by the Society, or that any visitor to the home be approved by the Society. Conditions may also require attendance at a counselling program, having a child attend day care, or define restrictions on alcohol or drug use by a caretaker.

Service to Parties

All parties to the application are served a copy of the application itself and notified of the first court date. A worker may serve these papers during a routine appointment. In half of our cases, the workers served the papers themselves. Alternatively, service of court papers can be accomplished by one of the two, full-time process servers on staff at the CAS in London and Middlesex. In the cases under study, this task took about one hour per case (averaged across all cases) but could take as many as five hours for cases with multiple parties and when parties lived outside of London.

Cases can be delayed at this point when parties cannot easily be located. When found, 30 days must elapse to let them make an “answer” to the application. Such delays increase costs and also delay resolution for children. A common scenario involves fathers or former step-fathers who are no longer involved with the children. The CAS may have trouble locating them, especially those now living outside Ontario. Nevertheless, the *Child & Family Services Act* defines the parties who must be served, and this includes several categories of “parents.” The definition of a “parent” incorporates paternity presumptions under the *Children’s Law Reform Act*. The extremely broad definition has no regard for level of involvement with the child. Tangentially related to this topic, we also observed two cases where women’s efforts to hide from violent ex-partners were thwarted by service requirements. In both cases, the children were negatively impacted by the re-appearance of abusive fathers in their lives.

It is difficult to dispute the fact that a biological father may retain an interest in his children’s well-being, even if he has no contact with them. Some so-called “fathers,” however, are men whose only contact with the family took the form of a brief involvement with the children’s mother. It has been suggested elsewhere,¹⁶ after a review of the court back-log issue, that a tighter definition of “parent” under the *Child & Family Services Act* might prevent needless delays associated with serving parties of this nature. Also recommended are amendments that would see:

- provision to terminate parental status after a period of non-involvement with the child
- provision that service of a parent on subsequent status review applications is not required if service was dispensed with initially (unless circumstances change)

Even when a non-involved parent can be located, the case may be delayed as 30 days elapse to give the party time to respond and state the desired involvement with the proceedings. When the party truly has no interest in the children, these 30 days are a needless delay. Delays also occur when the court application changes and these “parents” must be served again.

Recommendation 7: The definition of “parent” in the *Child & Family Services Act* should be reviewed with an eye to determining if unreasonable and unnecessary delays are created by the requirements for repeated service of court documents on parties with no biological or emotional ties to the children.

¹⁶ V. Torrance & J. Van Leeuwen (2004). *Review of Legal Services: Children’s Aid Societies of the Central West Region*. Funded by the Ministry of Children & Youth Services.

Direction to Make an Answer

The papers direct parties to make an “answer” to the application within 30 days (Figure 4.2). The “answer” is a document setting out which parts they agree with and which they contest. People may contest the “statement of facts,” the length of the proposed order, the conditions requested, or even the very fact that a supervision order is necessary. If they contest the need for a supervision order, they contest the fact that the child is in need of protection.

Figure 4.2

Directions to Respondents in Supervision Order Applications

TO THE RESPONDENT(S):

A COURT CASE HAS BEEN STARTED AGAINST YOU IN THIS COURT. THE DETAILS ARE SET OUT IN THE ATTACHED PAGES.

THE FIRST COURT DATE IS (date) THURSDAY, MAY 1, 2003 **AT 10:00 a.m.** or as soon as possible after that time, at: (address)

FAMILY COURT 80 DUNDAS STREET, LONDON, Ontario N6A 2P3

If you have also been served with a notice of motion, there may be an earlier court date and you or your lawyer should come to court for the motion.

IF YOU WANT TO OPPOSE ANY CLAIM IN THIS CASE, you or your lawyer must prepare an answer (Form 10 – a blank copy should be attached), serve a copy on the applicant children’s aid society and all other parties and file a copy in the court office with an affidavit of service (Form 6B). **YOU HAVE ONLY 30 DAYS AFTER THIS APPLICATION IS SERVED ON YOU (60 DAYS IF THIS APPLICATION IS SERVED ON YOU OUTSIDE CANADA OR THE UNITED STATES) TO SERVE AND FILE AN ANSWER. IF YOU DO NOT, THE CASE WILL GO AHEAD WITHOUT YOU AND THE COURT MAY MAKE AN ORDER AND ENFORCE IT AGAINST YOU.**

WARNING: This case is subject to case management, which means that the case runs on a timetable. That timetable says that the following steps have to be finished by the following number of days from the start of this case:

<i>Temporary care & custody hearing.....</i> 25 days	<i>Settlement conference.....</i> 80 days
<i>Plan of care to be served and filed.....</i> 33 days	<i>Protection hearing or status review..</i> 120 days
<i>Case conference.....</i> 40 days	

You should consider getting legal advice about this case right away. If you cannot afford a lawyer, you may be able to get help from your local Legal Aid office. (See your telephone directory under LEGAL AID).

Finding of Child in Need of Protection

Under current legislation, to justify the need for a supervision order, the CAS must satisfy the court that a child is “in need of protection.” When granting a supervision order, therefore, the Court will first make a finding that the child is, as alleged by the Society, in need of protection. The court must also determine that continued intervention is necessary to protect the child in the future. This is an important point because, as we shall see later, many parties who contest supervision orders are essentially contesting the fact that the children are in need of protection.

Referral of Case to Outside Counsel

The CAS in London & Middlesex has a large legal department, with six full-time lawyers and six full-time legal secretaries. In order to be sufficiently available to workers for consultation and manage day to day court activities on cases, they use outside lawyers to prepare and present cases scheduled for trial. These lawyers bill the Society for their time spent. According to our data, the average bill is about \$2,300, for a supervision order application scheduled for trial. Data collected by the legal department at the CAS of London & Middlesex suggests that 9% of court applications will subsequently be referred to outside counsel, for all types of applications combined.

Status Review Applications

Immediately prior to the expiry of a supervision order, the Society must apply to the Court, either requesting another supervision order, a wardship order, or requesting that the former order be terminated. Also, once a supervision order is in force, the Society can return to Court to have a term revised and/or added at any point prior to its expiry. For status reviews, the same process as in new applications unfolds, including service of documents and a request for an answer. Where notice of a status review application is concerned, an important change in court rules mid-way through the project is discussed in Chapter 5.

Chapter 5

The 40 Cases

In this chapter, these topics are discussed:

- description of the study sample of 40 cases
- profile of the 74 children
- reasons parties contested the CAS application
- legal representation and reasons for being unrepresented
- baseline attitudes of contesting parties at intake to the study
- differences between the comparison and mediation group
- a change in court rules that affects the project

Observations made from the information in this chapter are:

- most of the children had been known to the CAS before and 55% had been apprehended at some point in their lives
- one in four of the parties opposing the application did not understand what was being sought by the CAS
- many people were contesting the proposition that their children are in need of protection
- few were actively seeking a resolution through court and most were exercising the only option they had if there was a disagreement with the wording or conditions of the application
- among the parties opposing the CAS application: 83% agreed with the statement that “the CAS has all the power and I have none,” 62% did not believe their workers understood their points of view; 63% said they sometimes get confused by what their workers say; and, only 14% trusted the CAS to do what is right for their families
- one quarter of the parties never had legal advice about the current matter
- a further 34% paid at least one visit to duty counsel and did not seek or obtain any other type of legal representation
- 26% had a legally aided lawyer (meaning they qualified for legal aid, applied for legal aid, and found a lawyer who would take the certificate)
- half the parties who qualified for legal aid did not apply for legal aid
- the main reason for being unrepresented was financial
- a change in court rules, effective April of 2003, disproportionately affects the mediation group by reducing by one month the average time between first appearance and final order

Five recommendations are put forward:

Recommendation 8: A video explaining the court process, from application through settlement conference to final disposition, would help parties make key decisions. The video should explain how mediation (and other ADR techniques available) fits into but is different from the regular court process.

Recommendation 9: A video should be developed to demonstrate the mediation process to clients. Such a video could be made available in the non-official languages most commonly represented in child-welfare client populations.

Recommendation 10: Conditions of supervision orders should relate logically and empirically to the risks faced by the child and the case-management plan.

Recommendation 11: All parties should be encouraged to engage in early resolution talks external to the court process and CAS should be encouraged to case manage and facilitate such an opportunity.

Recommendation 12: In each community, a plan should be developed to encourage and mentors lawyers who currently feel unprepared to take child protection cases but are willing to do so.

For this project, 40 cases served as the study sample, selected and vetted as described earlier to meet the inclusionary and exclusionary criteria. At the point of intake into the project, parties were interviewed for research purposes, to determine understanding of the process, baseline opinions, reasons for contesting the application, and hoped for outcomes. Data were also taken from CAS file reviews including key dates and the concerns that prompted the Society to request a supervision order.

Referrals

These 40 cases involved 74 children and 66 parties; 16 initial applications (40%) and 24 status reviews (60%). The number of children per case ranged from one to five, with an average of 1.9. In four families, there were five children. About half of the cases (55%) involved one child. Thirteen cases had Children’s Lawyers appointed to represent 22 children.

Table 5.1

Primary Eligibility Spectrum Category at Time of Application, 40 Referrals

HARM BY COMMISSION		
Physical force/maltreatment	10	25%
Abusive sexual activity	2	5%
Threat of harm	1	2.5%
HARM BY OMISSION		
Inadequate supervision	2	5%
Neglect of child’s basic needs	2	5%
EMOTIONAL HARM		
Adult conflict	6	15%
CAREGIVER CAPACITY		
Caregiver has a history of abusing/neglecting	5	12.5%
Caregiver with a problem	8	20%
Care-giving skills	4	10%
TOTAL	40	100%

Reason for CAS Involvement

Using the Ontario Child Welfare Eligibility Spectrum of the Ontario Risk Assessment Model, the main issue of concern was caregiver capacity (42.5% of cases), harm by commission (32.5%), emotional harm (15%) or harm by omission (10%). Specific scale items are listed in Table 5.1 on the previous page.¹⁷ Issues were deemed to be extremely (36%), moderately (62%), or minimally severe (3%). Who was seen as posing the risk? A mother (45%), father (32.5%), mother's current/former partner (12.5%), or both parents equally (10%).

The Children

Among the 74 children,¹⁸ slightly more than half (57%) were boys and 43% were girls. The average age at the point of application was 6.5 years, ranging from newborns to the eldest at 15.4 years. One in ten was younger than one year and 43% were under six. They were living with their mothers (55%), both parents (15%), grandparents (12%), fathers (10%), a foster family (5%), joint custody (1%) or other relative (1%). Ten of them (14%) were living with a lone mother because the father had been excluded from the home by court order and 19% lived with neither parent. Their custody – with whom they would live – was the key issue under dispute for 27% of the children. The biological fathers were not in contact with the children in 33% of the cases and they had supervised access in 21% of cases. The children lived with their fathers in 32% of the families, including joint custody arrangements.

For about half of the children (47%), the current court application was the initial application for a supervision order and for 53% it was a status review. Most had been involved with the CAS before, as can be seen in Table 5.2. Indeed, 55% of them had been apprehended at least once prior to the launching of this application. It was usually their mothers who were opposing the applications, either by herself (53%) or with her partner (32%). Fathers alone opposed the application in the case of 15% of these children. As noted above, 22 of the 74 children had Children's Lawyers. From the children's point of view, the most common issues under dispute were: their custody (27%), conditions of access by a father (17%), and if the court will permit a father to return to the family home (12%).

¹⁷ Categories frequently changed as new information came to light and reports from the community were received. These scales characterized the case at the point when the application was launched. In addition, only the "primary" category was recorded here.

¹⁸ In two cases, other siblings were the subjects of temporary care agreements or wardship applications. These children are not included in the study. Also excluded are siblings not named in the supervision order, including those who were over 15 years of age and those who were not deemed to be in need of protection.

Table 5.2

Most Intrusive CAS Involvement Prior to Current Application, 74 Children

Protective care and custody of the CAS	27	36.5%
Supervision	24	32.4%
Voluntary services	10	13.5%
Investigation, no further action taken by CAS	4	5.4%
Child just born	3	4.1%
No previous involvement	6	8.1%
TOTAL	74	100%

The Parties

Of the 66 parties actively involved in these 40 cases, there were mothers (59%), fathers (35%), grandmothers (5%), and the boyfriend of a mother. There were often people in the immediate family, or with legal ties to the children, who were not taking an interest in the legal proceedings. For example, in 17 of the 40 cases, a parent had chosen not to play a role in the court application. The majority of parties (60%) qualified for legal aid, as discussed in greater detail below.

Of the 39 mothers, 27 had legal custody of, and lived with, the children at the time of the application. Of the other 12, seven had access and six had supervised access. Of the 23 fathers who were active parties, 11 lived with the children, six made access visits, and five had supervised access. In 12 of the cases, separated parents were each seeking custody of the children, so the case took on many features of a custody/access dispute under the *Children's Law Reform Act*. Sometimes the CAS supported one parent over the other, and sometimes the CAS position was to let the two parents come to an agreement on custody.

In two thirds of cases, one (non-CAS) view would be brought to the table, either by a lone parent or by two parents who held the same opinions and sought the same outcomes. In the other third, there would be from two to four different positions, usually two ex-partners with different views on the application, one in support and one opposed. In one case there were four parties each seeking custody.

Mediation, by definition, involves negotiation and the capacity to track and comprehend verbal debates. Part of the concern about power imbalance pertains to the possibility that CAS clients could be disadvantaged in a debate with two other highly educated people. Almost half the parties (45%) had not finished high school and 27% had not advanced beyond

high school. Many, but not all, parties in child protection mediation have vulnerabilities that must be protected, including literacy deficits, learning disorders, and communication disabilities. Eight percent of the parties spoke English as a second language, including three parties who spoke American Sign Language. Many families were struggling financially, including the half of parties on government support such as Ontario Works.

Issues Under Dispute

Some parties approved of the CAS plan but, in this sample of contested cases, most did not. From the parties' point of view, what was the issue they were disputing? The principal issue under dispute in the 40 cases is the custody/residence of a child or children (35%), the need for a supervision order (23%), the conditions of a supervision order (18%), whether the father can return to the home (13%), type of access by a father (8%) or type of access for mother (5%).

Baseline Opinions

At intake into the project, each party was interviewed and asked to complete a short survey. In total, 57 parties were interviewed.¹⁹ All the parties in the mediation group were interviewed and the parties opposing the applications in the comparison group were interviewed. In the comparison cases, parties not opposing the application were not interviewed. In total, 57 of the 66 parties were interviewed. Several questions were asked again after resolution of the case, and these before/after comparisons are discussed in Chapter 7.

Understanding of the Application

Each party was asked if they understood the application currently before the court. All parties supporting the application said they understood what was being requested. Among parties opposing the application, however, one in four did not clearly understand what the CAS was seeking in the current application or why they were seeking a supervision order.

¹⁹ The data here do not include the two parties associated with the case disqualified by the mediator and dropped from the study.

Do you understand what the CAS is asking for?

Not really. There's no evidence, nothing factual. This is clearly a custody dispute. My worker has 'concerns' but cannot describe why CAS wants to be involved.

No, I'm lost.

I understand "what" but I don't understand why.

There are a few things I don't understand, like how long the supervision order's for.

Not everyone understood they were expected to make an answer and at least one person did not know that consenting to the application was an option. In a related vein, not everyone was clear on their current status with the CAS and some people asked the researcher if she could find out for them. For many, their ability to understand was limited by an inability to digest the court application itself, a lengthy and challenging document using legal (and often social work) terminology. It was a common occurrence for parties to ask the researcher to read the application to help them understand what was being requested.

Figure 5.1
I understand what the CAS wants me to agree to

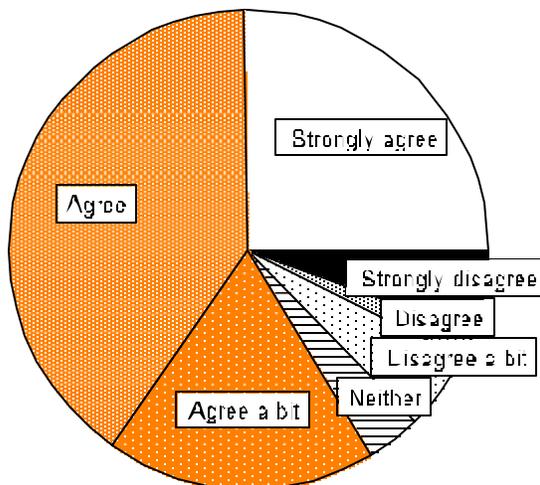


Figure 5.2
My worker helps me understand why my children may be at risk

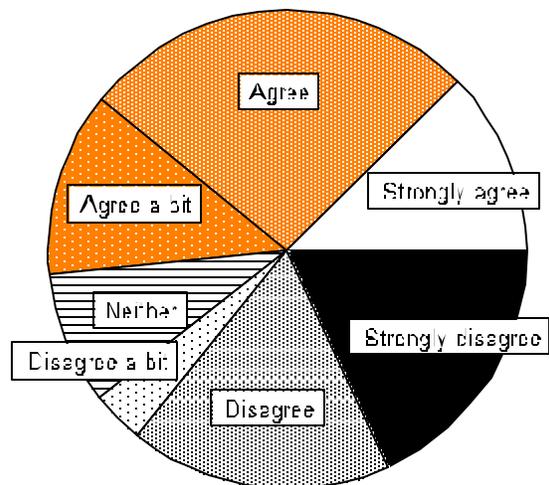


Figure 5.3

I agree with the plan the CAS has outlined for my family

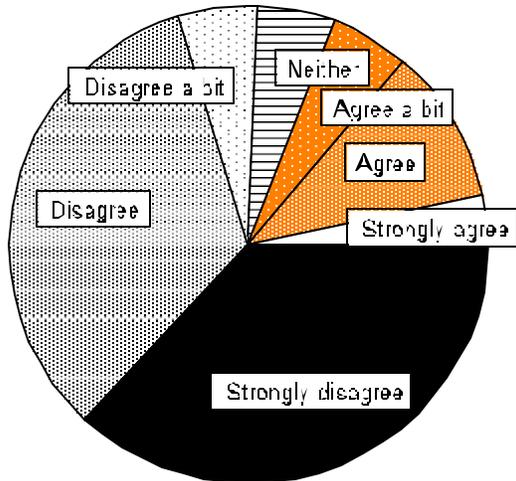
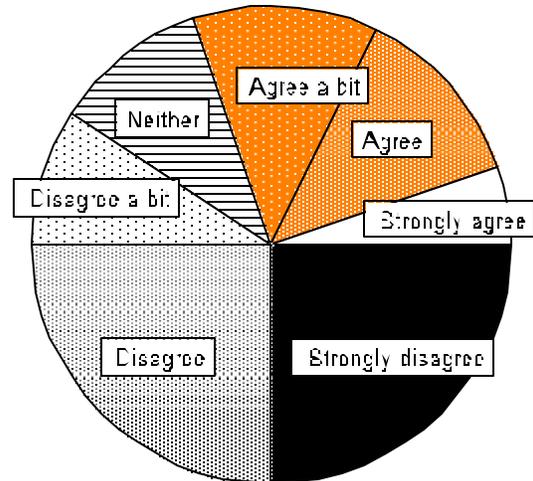


Figure 5.4

I need the kind of help the CAS is offering me



Recommendation 8:

A video explaining the court process, from application through settlement conference to final disposition, would help parties make key decisions. The video should explain how mediation (and other ADR techniques available) fits into but is different from the regular court process.

Recommendation 9:

A video should be developed to demonstrate the mediation process to clients. Such a video could be made available in the non-official languages most commonly represented in child-welfare client populations.

Reason for Contesting Application

In each of these 40 cases, at least one party was contesting the court application. Overall, 20% of the parties we interviewed agreed with the plan outlined in the court application (or were resigned to its inevitability). Focus here is primarily on the other 80%. It is their opposition that necessitates the court processing of applications and, in turn, the need for mediation.

The parties were asked why they opposed the application. Most commonly (57%), they contested the idea that children were in need of protection. This was true if, for example, they believed an allegation of abuse was untrue, the concern of the CAS was based on false information (e.g., vindictive neighbours), or the situation causing risk had changed (e.g., mother's partner left the family, alcohol problem had been treated). In a similar vein, 20% felt they had met all requirements outlined in previous orders (e.g., counselling) so the file should be closed. Fourteen percent believed the children to be at risk in their current residence (e.g., with ex-partner) and would be safer with them. Two people did not feel that the CAS involvement had been helpful and saw little point in continuing and one woman acknowledged she needed her child for emotional support during a difficult time in her life. Stigma was also a common theme, many people feeling embarrassed to have a CAS worker speak to their children at school or come to their homes. Several people believed that a finding that their children were in need of protection would constitute a permanent and public record that might compromise reputations or employment prospects.

Sometimes, concern focused on the conditions. Parties could be discontent with pejorative words (e.g., abandonment), conditions perceived as pejorative (e.g., "take your children to the doctor" implies you do not take your children to the doctor), conditions felt to be inapplicable (e.g., refrain from using physical discipline when they never used physical discipline, do not use alcohol when there was no indication of an alcohol problem), or conditions perceived as onerous and unnecessary (e.g., CAS approval for every person visiting the home).

Recommendation 10:	Conditions of supervision orders should relate logically and empirically to the risks faced by the child and the case-management plan.
--------------------	--

Views About Court

In contesting the application, a party is in essence seeking a third opinion from a judge. They are beginning a process that could, if no settlement ensues, lead to a full trial. Why were people using the court system to resolve disputes? They were not choosing court so much as opposing the application, and court was the only available avenue. Some parties were purposefully seeking a trial, some were willing to give it a try, and some saw advantages in the court process, such as having a lawyer speak for them and having a third party listen to them. As can be seen in Table 5.3, the majority did not really want the case to go to court, most did not see the judge as a person to make a better decision, they saw the court process as too slow, and did not see the court as an unbiased arbiter. Two thirds of opposing parties felt that judges were predisposed to believing the CAS and stereotype people "like us" as bad parents. Those who support the CAS position are more likely to want the case to proceed to court, usually because they agree with the plan outlined in the court application.

Table 5.3

Parties' Views of Court

I hope this case goes to court
Parties opposing the application: 24% agree Parties consenting to the application: 40% agree
I think a judge will make a better decision than the CAS
Parties opposing the application: 50% agree Parties consenting to the application: 20% agree
This case is moving too slowly
Parties opposing the application: 58% agree Parties consenting to the application: 40% agree
When the CAS goes to court, the judges are biased against people like me
Parties opposing the application: 65% agree Parties consenting to the application: 40% agree

How do you feel about going to court?

Courts don't listen to us. They only hear what the CAS says.

I don't like it. It's a lot of work, preparing affidavits, etc.

I don't have a lawyer and I am worried about that. [My ex-partner] has money for a lawyer. I was turned down for legal aid.

The only way this will get resolved is if it goes to trial.

I feel left out. The lawyers do all the talking.

I never understood [at the outset] that this case would go to court. It doesn't need to go to court. I just want an opportunity to talk with someone who will listen.

That's fine. I am more than willing. But it's wasting tax payers' dollars on false allegations. Plus, it is not a nice feeling that you are being scrutinized.

It's okay. I don't mind fighting for [custody of my child].

It sounds kinda scary. But there are things I can't say myself that my lawyer can say better.

One part of me, I hate the whole thing. I would stay away from it if I could. The other part of me says, this is my grandchild. If I have a chance...

I'm used to it, comfortable with it now.

Well, [by opposing the order] things are not going to get any worse.

I am not looking forward to it, would like to avoid it.

I don't like court, the judge looks down on me. But I want to speak directly to the judge about how I feel, not through a lawyer.

I want a trial. The CAS won't compromise.

It's a stupid, waste of time. The CAS needs to sit down and speak with the kids. A better investigation would show that the allegation [made by one child] was a lie. It was swat on the bum not a punch in the back.

I am very frustrated and tired of the fight [with my ex-partner]. I hate fighting with people, hate the drama.

I don't want to go to court, but I don't want the supervision order.

Court doesn't bother me. I feel like a number. But my lawyer says I have a 90% chance of winning at trial because the CAS has no case.

I feel like I am overpowered, with the CAS against me.

I'd prefer not to, prefer to hash it out between us [me and my ex-partner]. When you go to court, you're stuck with the judge's decision.

Mediation is a *dispute resolution* technique. In cases where opposition is based on confusion or misunderstanding, mediation is a cumbersome and expensive solution. Moreover, the best way to deal with the spiralling number of disputes is to reduce the number of disputes, so no dispute resolution is necessary. We know from experience that almost all disputes end in a

settlement at some point. Understanding why parties withhold consent may help us design strategies to gain agreement earlier in the process. It seems that most parties do not seek a *judicial* resolution when opposing an application. Moreover, most of their goals could be achieved outside the courtroom by, for example, creating a forum for them to speak and be heard, perhaps with their lawyers present.

Recommendation 11: All parties should be encouraged to engage in early resolution talks external to the court process and CAS should be encouraged to case manage and facilitate such an opportunity.

Relationship with Worker

Supporters of mediation suggest that its use can improve the worker/client relationship. For this reason, a number of intake questions touched upon this issue. Concepts tapped included trust, clear communication, and mutual understanding. Because only contested cases were selected for study, it is to be expected that many parties were not happy with their relationship with the Society, as described in Table 5.4.

Among the parties who opposed the CAS application, the majority agreed that “the CAS has all the power and I have none,” did not believe their workers understood their points of view, sometimes got confused by what their workers say, did not need the type of assistance the CAS was offering, and had not been able to describe their side of the situation. Half could not say what they were really thinking to their workers. Would mediation ameliorate these beliefs? That topic is addressed in Chapter 7.

Table 5.4

Views of Relationship with CAS

My worker helps me understand why my child(ren) may be at risk
Parties opposing the application: 48% agree Parties consenting to the application: 70% agree
I feel like the CAS has all the power and I have none
Parties opposing the application: 83% agree Parties consenting to the application: 50% agree

I trust the CAS to do what is right for my child(ren)
Parties opposing the application: 21% agree Parties consenting to the application: 90% agree
I trust the CAS to do what is right for my family
Parties opposing the application: 14% agree Parties consenting to the application: 80% agree
My worker seems to understand my point of view
Parties opposing the application: 35% agree Parties consenting to the application: 70% agree
I sometimes get confused by what my worker says
Parties opposing the application: 63% agree Parties consenting to the application: 50% agree
I need the help the CAS is offering me
Parties opposing the application: 24% agree Parties consenting to the application: 60% agree
My worker listens to my opinions even if he/she does not agree with me
Parties opposing the application: 58% agree Parties consenting to the application: 80% agree
My worker and I disagree about everything
Parties opposing the application: 36% agree Parties consenting to the application: 20% agree
I haven't been able to explain my side of the situation
Parties opposing the application: 58% agree Parties consenting to the application: 40% agree
My worker understands the needs of my children
Parties opposing the application: 44% agree Parties consenting to the application: 70% agree
I am afraid to say what I really think to my worker
Parties opposing the application: 49% agree Parties consenting to the application: 20% agree

My worker and I are working as a team to keep my child(ren) safe
Parties opposing the application: 21% agree Parties consenting to the application: 70% agree

Legal Representation

It is important to have independent legal advice, even when using mediation. Was this the case for the parties here? Overall, about 75% spoke with a lawyer at least once:

- no legal advice (25%)
- duty counsel only (34%)
- duty counsel and lawyer (15%)
- lawyer, no duty counsel (26%)

Put another way, half the parties consulted duty counsel at some point about this matter and about 40% had a lawyer (either legally aided or privately retained).

Legal Aid

Qualification for legal aid involves a means test of income, assets, and family expenses. Legal aid can be granted free of contribution, granted with contribution, or refused. Parties granted a legal aid certificate can then engage the lawyer of their choice from among the panel of lawyers taking child protection cases.

Of the 66 parties associated with the 40 cases, 60% qualified for legal aid and 27% were granted a legal aid certificate for the matter under study here. One party had a certificate but was never able to find a lawyer. In summary, 26% of the parties had a legally aided lawyer while half of those who qualified for legal aid did not apply for legal aid.

Access of Duty Counsel

London uses an expanded duty counsel model. Two full-time, family-law lawyers, employed by Legal Aid Ontario, are available for consultation five-days a week at the Middlesex County courthouse. This service is augmented as needed by *per diem* lawyers. Here, clients can receive legal information and advice, be accompanied to court appearances, and receive assistance in preparing documents such as the “answer” to court applications. Continuity is

achieved through a file maintenance system. Anyone can receive 20 minutes of consultation per visit and those who qualify for legal aid can receive more. A quick means test is administered at the outset to determine financial qualification for legal aid. People who qualify for legal aid are advised to apply for a legal aid certificate.

The data base in the duty counsel offices was consulted to determine which of the parties had ever paid a visit. Files were then reviewed to determine which visits pertained to the matter under study. Visits for general family law matters or for different CFSA applications were excluded from consideration.

Half (51%) the parties (or a spouse) sought advice from duty counsel in relation to the present matter. This represented one or more party in 24 of the 40 cases. For 34% of the parties, this was the only legal advice they sought. People who saw duty counsel did so between one and nine times for an average of 2.5 visits. Almost half (47%) paid one visit but a quarter made four or more visits. They spent an average of about one hour in total. In three cases, duty counsel assisted with the preparation of an answer.

Usage of the Family Law Information Centre

The same data base used to record information on client contact with the family law duty counsel also records client attendance at the Family Law Information Centre in the London/Middlesex Courthouse. The FLIC was accessed by 12% of the parties, either directly or because their spouses attended, between the first appearance and final order on the current matter. However, it was not possible to determine if the visit was for the CFSA matter or for another family court application such as child custody, child maintenance, or divorce.

Privately Retained Counsel

Forty percent of the parties did not qualify for legal aid, because their income disqualified them, they had assets which disqualified them, or a spouse had income or assets. Nine parties in seven cases retained the services of a lawyer using their own funds. Put another way, about one third of parties who did not qualify for legal aid retained a lawyer privately.

Reasons for Not Having Legal Representation

Among parties who did not qualify for legal aid, the principle reason they had no legal representation was financial. A few could afford a lawyer but chose not to spend their money in that way or did not need a lawyer because another party in the case was represented. Parties who consented to the application often saw the CAS lawyer as acting in their interests,

negating the need for a lawyer. One person with a legal aid certificate could not find a lawyer willing to take the certificate. Indeed, there is a small, and possibly shrinking, pool of local lawyers who are willing and able to take CFSA cases in our community. This situation may well be true for many parts of Ontario.

Recommendation 12: In each community, a plan should be developed to encourage and mentor lawyers who currently feel unprepared to take child protection cases but are willing to do so.

Differences Between Comparison and Mediation Groups

Because the two study groups will not likely be identical, key characteristics must be contrasted to identify discrepancies that could compromise comparability. The two groups were similar in most respects but there was some indication that the cases in the comparison group might be more challenging to resolve. As a reflection of how and when the comparison sample was defined, this group may well represent highly-contested cases rather than a cross-section of all contested cases. They were referred by the CAS legal department to outside counsel at a rate five times the agency average. Cases in the comparison group were more likely to have an OCL assigned (9 vs 4) and several were finally resolved only on the day a trial was scheduled to begin.

Children in the two groups were similar in many respects, such as the extent to which their residence/custody was at issue, whether they had been apprehended before, and their sex. However, there were more children in the comparison group (42) than the mediation group (32). This situation is related to the fact that there are three families of five children in the comparison group and only one family of five children in the mediation group. Children in the comparison group were older as a group, by slightly over one year (comparison = 7 on average, mediation= 5.8). According to the Eligibility Spectrum, the comparison group has a higher rate of cases judged to be extremely severe risk (45%) than the mediation group (26%). It also has more cases rated as harm by commission (40% versus 26%).

Changes in Court Rules for Status Review Applications

A change in court rules mid-way through the project likely affects the length of processing in the 60% of cases involving status review applications. Length of court processing is a key outcome variable for this project. Readers should be aware that status review applications

processed after the change, on April 28, 2003, would be resolved sooner than a similar case from before the change.

Prior to the change, the CAS scheduled the first court date for the Thursday before the existing order was due to expire. The legal papers were drawn up a week or two in advance so parties could be served prior to the court date. The parties then had 30 days from the date of service to file an answer. With this schedule of events, the answer was not due until as much as three weeks after the first court date. Adjournments were common because parties rarely were able to organize an answer by the first court date.

In the new system, since April of 2003, the Society must serve papers on parties 30 days before the existing order expires. Now, parties who contest the application will have a month to organize an answer, making it possible (but not a certainty) that an answer can be presented on the first court date. An adjournment to permit time to make an answer can now be avoided.

How will this affect the study? Some of the difference in cases processing time between the two groups will be explained by this change. There are slightly more status reviews in the comparison group (65%) than the mediation group (55%). In addition, only one comparison case was started after the rule change. Nine cases in the mediation group were both status reviews and initiated after the rule change. Status review cases from before the change took an average 235 days between first appearance and final order, compared with 196 days for cases making a first appearance after the change. This is an average difference of over one month. Comparative data on case outcomes are presented in Chapter 7.

Chapter 6

The 20 Mediations

In this chapter, these topics are discussed:

- the mediation process
- settlement rate and outcomes of mediation
- views of child protection workers and clients who participated in mediation

Observations made from the information in this chapter are:

- in the 20 cases referred to the five mediators, at least one key party failed to attend any mediation session in four cases
- agreements were reached in 10 cases (50%)
- seven cases (35%) ended in a final court order reflecting a mediated agreement
- workers did not generally see mediation as saving them time or paperwork
- 77% of workers would recommend mediation to a colleague
- 82% of workers would do another mediation in the future
- 41% of workers felt the child's voice got lost in the process
- family parties generally felt understood by the mediator, comfortable saying what they were thinking, and treated with respect
- one quarter of family parties felt some pressure to undertake mediation
- one third of family parties did not feel like an equal party at the table
- one third felt that the mediator favoured the CAS over them
- only 29% of parties reviewed the agreement with a lawyer
- 90% of family parties would recommend mediation to a friend

Three recommendations are offered:

Recommendation 13: Any effort to implement child protection mediation should address financial barriers that can prevent people from attending mediation.

Recommendation 14: Efforts should be undertaken to highlight the importance of independent legal advice to parties engaged in mediation.

Recommendation 15:

If a mediator forms the opinion that the child's views should be independently ascertained, he or she should seek the consent of all parties to stop the process and find a means of ascertaining those views.

Mediation is a voluntary process of negotiation among parties facilitated by a neutral mediator to aid effective communication and to build consensus. Parties control the outcome and resolutions must be agreed to by all. The model adopted here was patterned closely after that used by Toronto's Centre for Child and Family Mediation. Lawyers were not present but all parties were encouraged to seek independent legal advice.

Mediators

Wide-spread advertisement sought expressions of interest from candidates who had qualifications comparable to those of a "practising mediator" as set out by the Ontario Association for Family Mediation but who also had specialized knowledge of the child welfare system, the needs of its clients, and the community resources available to families and children in the London/Middlesex area (see Appendix C for a full job description).

Five mediators hired by the local sub-committee participated in a day-long training session. Five mediators were brought on to the project to ensure timely assignment of mediators to cases and also so that the style or strengths/weakness of any one individual would not unduly influence the project results. Mediators were arm's length from both the project and the CAS. The mediators collectively designed a template for mediated agreements (see Appendix D). Their responsibilities were to conduct an intake interview with each party, schedule the sessions, conduct the mediation, write-up the agreement and distribute copies to all parties, oversee a follow-up meeting to sign the mediation agreement, prepare a report on each case.

Process of Mediation

All referred cases were vetted by the Project Coordinator against the inclusionary/exclusionary criteria, as described earlier. For appropriate cases, the Project Coordinator sought consent from all parties and their legal counsel. As described in Appendix A, the Research Coordinator then interviewed parties to learn their baseline opinions. In total, 36 people were interviewed before the mediation.

Assignment of Mediator

Mediators were assigned on a rotational basis from the roster. The selected mediator was given a copy of the application before the court. The Project Coordinator contacted all parties and their lawyers to identify the assigned mediator and to outline the next steps.

Facilitating Attendance at Mediation

As with court attendance, costs incurred to attend mediation could include child care, transportation, time off work, and the costs of consulting with privately retained legal counsel. So that finances would not constitute a barrier to attending mediation, financial assistance was offered to participants for transportation and child care. Seven parties were travelling from outside London and, in three cases, from outside Middlesex County. These expenditures were crucial to facilitating the participation of some clients. People will incur an expensive taxi ride when compelled to attend court, but may be reluctant to do so for mediation.

For these 20 cases, about \$350 was directed to these supports. Though we offered to cover expenses, some participants shouldered the costs themselves. Often, people had bus passes, their children were at school or in daily child care placements. Some parties used the child care services at Merrymount Children's Centre. We did not reimburse participants for lost time from work or for consulting with privately retained legal counsel.

Recommendation 13: Any effort to implement child protection mediation should address financial barriers that can prevent people from attending mediation.

Mediation Intake

Once assigned to the case, the mediator contacted the CAS worker and the adult clients to schedule a pre-mediation discussion. The mediator also contacted the Children's Lawyer, if applicable. The final decision about appropriateness of the case rested with the mediator. In one case, information coming to light during the intake process suggested the mediation should not continue.²⁰ This case was dropped from the Project and not included in the research data reported here.

Mediation

Mediation took place in a neutral location – usually the mediator's office -- and was never held at the Courthouse or CAS offices. Only the adult parties and the CAS worker attended the mediation. No legal counsel were present in the room, and neither was the CAS

²⁰ In this case, a custody order from the family court, pre-dating CAS involvement, directed that the two parties have no contact with each other outside the period immediately prior to pick-up and after drop-off of their child for access visits.

supervisor there. All parties signed a standard contract developed by the mediators for this project (Appendix D). Arrangements were sometimes made for a party's legal counsel or the CAS supervisor to be available by telephone for consultation. The mediation unfolded over one to three sessions, as needed. Any agreement was to be provide in written form to all parties and their legal counsel.

Consultation with Legal Counsel

While lawyers were not present in the mediation, it is important that all parties have an opportunity to review any agreement with a lawyer. Each party was strongly encouraged to do so, by the Project Coordinator and the mediators as well. An admonition to seek legal advice is also spelled out in the mediation contract. As discussed in the next chapter, 38% of parties in the mediation group consulted duty counsel only (not necessarily about the agreement), 32% had a lawyer, and 29% never had legal advice. Relative to the comparison group, this represented a higher rate of using duty counsel as their only source of legal advice and a slightly lower rate of securing legal aid, even though the rate at which parties qualified for legal aid was the same in the two groups.

Why did some parties not have legal representation? Many reasons were probably typical for a similar group of people. The most common reason was not qualifying for legal aid and yet not being able to afford a lawyer. The second most common reason was that they qualified for legal aid but never applied. Other reasons were that they could not find a lawyer or a spouse had a lawyer. We also found these reasons among the mediation group:

I had a legal aid certificate but cancelled it when mediation was scheduled.

I knew [the mediator] was a lawyer and she would know if my rights were violated.

There was no time to get down to legal aid and apply before the mediation started.

When an agreement was reached, only 29% of the parties reviewed that agreement with a lawyer. Most people (but not all) with legal-aid lawyers sought the opinions of those lawyers about the agreements. This move was probably facilitated greatly by the fact that agreements were sent to lawyers by the mediators. Why did some parties not review the agreement with counsel? Mostly because they had no lawyer. Other reasons included:

- did not get a copy of agreement so could not review with lawyer
- did not get a copy of agreement so could not review with duty counsel
- inconvenient to get to duty counsel office because worked during the day
- did not want to pay private lawyer to review the agreement
- felt the Children's Lawyer would represent mother's interests as well

A disinclination by some to see legal advice as necessary in the context of mediation should be addressed in informational material provided to mediation participants.

Recommendation 14: Efforts should be undertaken to highlight the importance of independent legal advice to parties engaged in mediation.

Post-Mediation Meeting

In a feature of the process added after experience with a few cases, the mediators organized a post-mediation meeting to which parties returned to sign the agreement. Lawyers were encouraged to attend or be available by telephone should the need arise for consultation.

Mediation Case Study: Brittany and Connor

Brittany and Connor struggled financially to support their young family on Connor's income. Financial challenges found them homeless last year and they now lived with relatives. The CAS had been involved sporadically over the years, typically concerned about poor hygiene in the home, lack of dental care, and inadequate supervision of the children.

The current status-review application sought a 12-month extension of a previous supervision order. Brittany and Connor had consented to that previous order, hoping to access services for the emotional needs of one child. This time, they opposed the order because the CAS involvement had been more troublesome than helpful, in their view, and promised services had not materialized. They would consent to voluntary services if offered and were not clear why the CAS was seeking another supervision order. They consulted duty counsel at the first appearance. A financial assessment at that point determined they did not qualify for legal aid so they never applied. They prepared an answer on their own, something they had done before.

Brittany and Connor were willing to try mediation because it could afford an opportunity to speak freely with their worker. Like most of the parties with whom we spoke for this study, they felt the CAS did not understand their point of view but, at the same time, were not able to say what they really thought to the worker. They believed CAS involvement was based on a misunderstanding about their intentions to seek medical treatment for the children and other expectations that were unrealistic given their income. At the same time, they acknowledged later, they felt pressured to engage in mediation, believing it is ultimately futile to oppose a CAS request.

At the table, they felt understood by the mediator and treated with respect by her. They did not feel the mediator favoured the CAS position. They wanted a lawyer (but could not afford one) and would have liked the lawyer at the table with them. Had a CAS supervisor been present, however, they would have felt "ganged up on." As it was, they felt the power imbalance but believed it was present to the same extent it usually was. An agreement was reached whereby the worker would seek a long adjournment while Brittany and Connor satisfied a key concern of the CAS, that two children receive a medical procedure. When the procedure was complete, the application would be withdrawn. The first appearance in April was quicky followed by the mediation session in May. As agreed, the case was adjourned until September, when the CAS terminated supervision. The couple declined voluntary services when offered. The file was closed.

Settlement Rate

A mediated agreement was reached in ten cases (Table 6.1) and a final court order based on a mediated agreement was made in seven cases of those cases (Table 6.2). In the 10 cases where no agreement was reached, these were the circumstances:

- in four cases, at least one key party could not be engaged in the process, even though they had agreed to mediation
- one case had aspects of an acrimonious custody and access dispute between ex-partners who could not agree on custody
- in one case, new information coming to light caused one party to withdraw from the process
- one case settled before mediation concluded
- in two cases, the parties and the CAS could simply not agree

In the 10 cases where an agreement was reached, these were the final outcomes in court:

- parties in two cases repudiated the agreement prior to a final court order being obtained, and the cases were resolved at settlement conferences
- in one case, delays in getting a final order caused a lawyer to encourage the client to reject the agreement and the CAS withdrew the application in favour of a voluntary services agreement
- in seven cases, the mediated agreement was reflected in the final court order

In other words, of the 20 cases, 35% ended in a final order based on a mediated agreement. For the other 65%, the cases resolved in the normal settlement process.

Table 6.1

Outcome of Mediation

Parties	Mediation Outcome
mother & father (separated)	<u>Agreement reached</u> focussing on primary residence and access
mother & father (together)	<u>Agreement reached</u> focussing on father's access, counselling and timetable of changes.
mother	<u>Agreement reached</u> focussing on change of worker and return of a child in foster care
mother	Client could not be engaged: no mediation
mother	<u>Agreement reached</u> focussing on wording of "agreed facts."
mother	<u>No agreement</u> .
mother & grandmother	<u>Agreement reached</u> focussing on transition of children back to mother's custody
mother & father (sep.), two grandmothers	Two parties did not attend (including party with care & custody). Two parties in attendance dealt with some issues.
mother	<u>Agreement reached</u> Application to be withdrawn in favour of voluntary services agreement
mother & father (sep.)	<u>No agreement</u>
mother & father (tog.)	<u>No agreement</u>
mother	<u>Agreement reached</u> Application to be withdrawn in favour of voluntary services agreement.
mother & father (tog.)	<u>No agreement</u>
father	<u>No agreement</u>
mother & father (sep.)	Client could not be engaged: no mediation
mother & father (sep.)	<u>Agreement reached</u> Child to return to mother's care and custody.
mother & father (sep.)	Client could not be engaged: no mediation
mother & father (sep.)	<u>No agreement</u>
mother & step-father	<u>Agreement reached</u> supervision order with access for mother's boy friend.
mother & father (tog.)	<u>Agreement reached</u> Application to be withdrawn.

Table 6.2

Final Disposal of Mediated Cases in Court

Original Application	Court Outcome
Status review, 6 month extension	One party repudiated agreement before final order. Court settlement, SO for 3 months.
Initial application, SO for 6 months	Final order based on mediated agreement, with some changes to agreed facts: SO for 6 months.
Initial application, SO for 6 months	Final order based on mediated agreement, SO for 6 months.
Initial application, SO for 6 months	Court settlement, SO for 6 months.
Status review, 6 month extension	After delay, party would not sign agreement, as per legal advice. CAS withdrew application in favour of voluntary services agreement.
Status review, 6 month extension	Court settlement: supervision order terminated.
Status review, 6 month extension	Final order based on mediated agreement: SO for 6 months. Children returned to mother's custody as per agreement.
Initial application, SO for 6 months	Court settlement: child returned to mother's care & custody, SO for 3 months.
Initial application, SO for 12 months	Application withdrawn in favour of voluntary services agreement, as per mediated agreement.
Status review, 6 month extension	Court settlement: application withdrawn.
Status review, 6 month extension	Court settlement: SO for 6 months.
Initial application, SO for 6 months	CAS withdrew application in favour of voluntary services agreement, as per mediated agreement.
Status review, 6 month extension	Case settled before mediation concluded, SO for 6 months.
Initial application for wardship but CAS willing to consider SO	Court settlement, child became Society ward.
Initial application, SO for 6 months	Court settlement, supervision order for 6 months.
Status review, 12 month extension	One party repudiated agreement, court settlement reached for status quo, SO for 12 months.
Status review, 6 month extension	Court settlement, supervision order for 6 months
Status review, 6 month extension	Court settlement, supervision order of 3 months with <i>status quo</i>
Initial application, SO for 6 months	Final order based on mediated agreement: SO for 6 months
Status review, 12 month extension	Supervision terminated, as per mediated agreement.

Views of Child Protection Workers

Each mediation was attended by the worker assigned to the case. In cases where at least one mediation session was held, the workers were asked to provide feedback on their views of the process. As the families were re-assured at the outset, worker feedback focussed on views of the process rather than views of the clients. Predictably, opinions were in part related to the case outcome, being less positive if no agreement had been reached.

Appropriateness of Case for Mediation

Five of the 17 workers felt in retrospect that the case had not been appropriate for mediation. In all five cases, no agreement had been reached. Conversely, 12 agreed that it had been appropriate, even when the process did not lead to an agreement or the agreement broke down.

Knowledge of Mediators

The workers generally felt that the mediators on this Project understood the legal process for supervision orders and understood the constraints facing workers in their positions (see Figures 6.1 and 6.2).

Figure 6.1: **The mediator had a good understanding of the court application process for supervision orders**

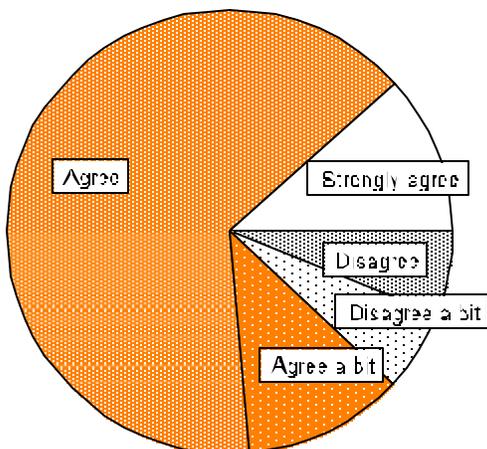
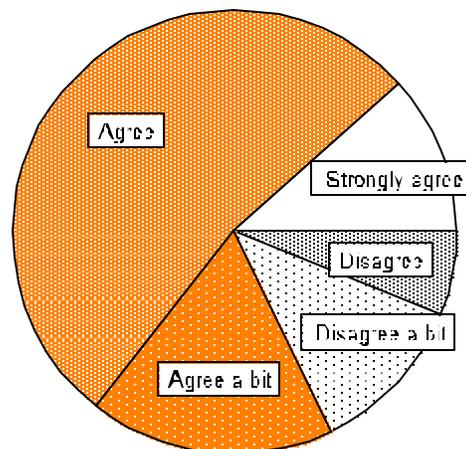


Figure 6.2: **The mediator had a good understanding of the constraints facing me in what I can and cannot agree to**



Neutrality of Mediators

It is important that a mediator be seen as a neutral party who facilitates communication but does not herself take a side. Most workers did not see the mediators as biased against the CAS, Three of them did feel the mediator favoured the client, including this worker:

I felt that I was out there on my own while the client had the mediator clearly supporting her. I would not do it again without support [i.e., supervisor, CAS lawyer].

This is important given that several of the mediators represented other CAS clients in the past.

Figure 6.3: **The mediator was biased against the CAS**

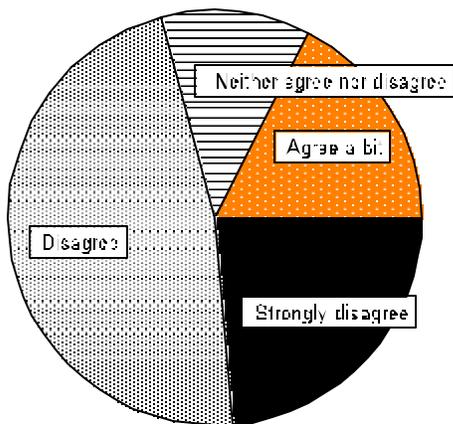


Figure 6.4: **The mediator favoured the client over me**

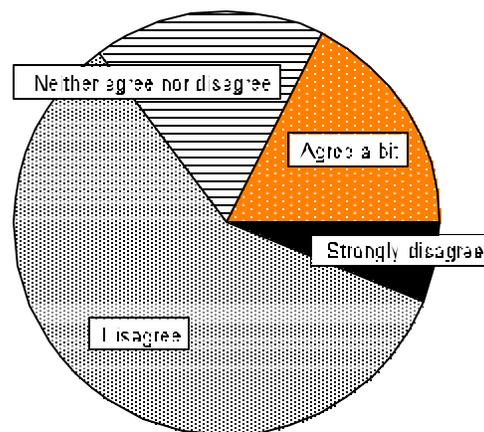


Figure 6.5: **The voice of the child or children got lost in the process**

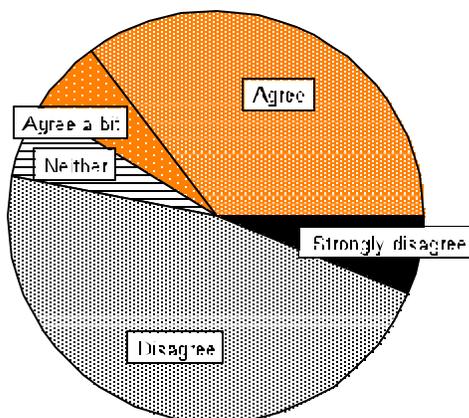
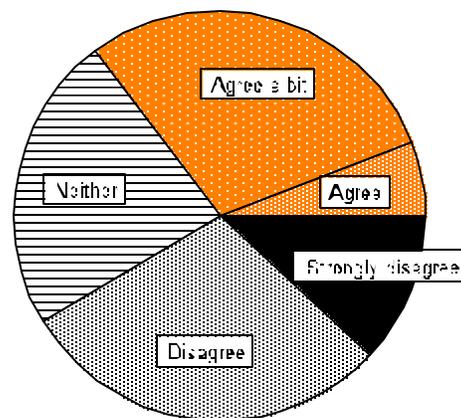


Figure 6.6: **I came to understand the client's position in a new way**



Voice of the Child

Of concern from the outset was that the voice of the child could be lost in the mediation process. Workers had mixed views on this topic, with seven of them (41%) feeling it had (Figure 6.5). In three of those seven cases, the child was represented by a Children's Lawyer (who was not to be present in the model used here).

Recommendation 15: If a mediator forms the opinion that the child's views should be independently ascertained, he or she should seek the consent of all parties to stop the process and find a means of ascertaining those views.

Relationship with the Client

Another goal of mediation is that parties will be able to see the other's point of view more clearly, because of facilitated communication. Did workers come to see the client's position in a new way? Not often (Figure 6.6).

Some observers suggest mediation might improve the worker/client relationship in the post-mediation period. Almost all the workers believed the relationships had remained the same, staying bad if it was previously bad and good if it was previously good. Some workers had no continuing contact because a new worker was soon assigned, the worker left the agency, or the CAS file was closed. Three workers did report improvements, as in this case:

My relationship with the client improved. She cooperates with the Society in interventions. Before she did not.

The worker's observations were shared by the client herself. This woman re-gained custody of her baby (likely an inevitable occurrence, with or without mediation) but appreciated the opportunity to understand why the baby had been apprehended.

In two cases ending without an agreement, the relationship deteriorated:

I think our relationship became more negative. The client did not believe she needed any involvement which set her up for great disappointment. The client felt that it was my fault that she was not able to end involvement.

My relationship with the mother remains positive and basically unchanged. My relationship with the father has deteriorated further, as he lost his temper with me at the court and had to be directed to leave the court building by police.

Balancing of Power

Perhaps the greatest concern of those who urge caution in adopting child protection mediation involves the stark power imbalance between a child protection agency and its clients. Are clients truly “free to bargain” as equal parties? Twelve of the 17 workers believed the clients did feel like equal parties at the table with the CAS. Specific comments on this point were:

I do think this was achieved. The mediator met with the family ahead of time, provided transportation through the Project, encouraged them to voice their thoughts, and was very supportive of them through the whole process.

I think that both clients [parents] felt that they were able to speak their minds and have some input into what the supervision order should look like.

Yes, I believe that the clients were given an opportunity to express their views during mediation.

My sense is that she felt as if she had more opportunity to get her point across, compared with court.

Client was present and treated equally but there were differences with regards to level of understanding the court process, our mandates, etc.

Some workers acknowledged not having a sense of how the clients felt. Two workers felt the client did not feel like an equal party at the table with the CAS:

I believe that the client felt heard during the mediation. However, I do not believe that she felt equal. This may have been due to her long history of CAS involvement or simply the known power differentials between herself as a client and single mother, a lawyer (mediator) and her CAS worker.

Each family party was also asked this question. This results are reported later in this chapter.

Impact on Workload

For workers, mediation does not obviate the need to prepare a court application and attend some hearings. On the other hand, if mediation can avert a trial, it would likely save significant time in court preparation and attendance. As related in the next chapter, a time study demonstrated that successful mediation can save workers time with court-related tasks of cases involving court applications. However, workers did not see mediation as saving them time or reducing their paper burden in the case overall. These views did not vary in terms of mediation outcome.

Figure 6.7: **Using mediation has meant a lot less paper work for me on this case**

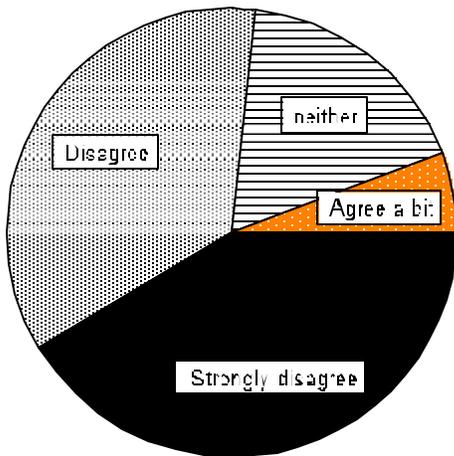
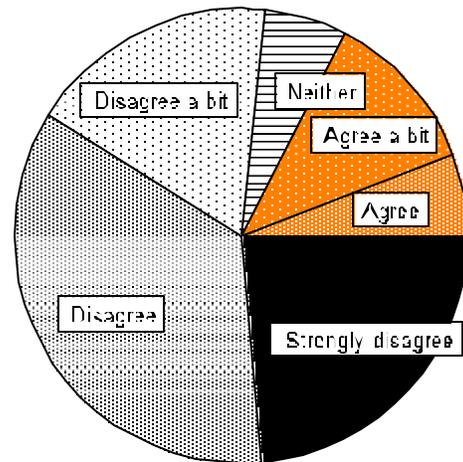


Figure 6.8: **The mediation has saved me a lot of time compared with regular court proceedings**



Barriers to Agreement

For the workers, barriers to agreements included severe inter-parent conflict, perceived rigidity in positions, tendency of some clients to bring up issues from the past, time constraints, and encouraging parties to attend scheduled meetings. Some clients resisted the premise that CAS had to be involved in their lives at all, which could be an obstacle to discussing the issue at hand.

Mother's partner, and the father of her child, was rigid and concrete in his thinking. He simply wanted 'CAS out of my life.' He was very hostile to the CAS.

The biggest obstacle was getting the parents to understand that just because we were in mediation it did not mean that the Society would change or get rid of all the terms that were in the supervision order.

[The biggest obstacle to getting an agreement was] parent conflict and custody issues.

Parent not willing to agree that any CAS involvement is acceptable. Once she got past this, input from her lawyer facilitated the process.

This client did not want any CAS involvement (which could not happen). The client's goal and the CAS's goal (i.e., child protection) were different and therefore we were unable to reach an agreement.

Client used mediation time to vent and discuss CAS involvement prior to mediation and current application.

Parent not willing to consent that the Society had a legitimate child protection concern.

The father's unrealistic perspective and chronic aggression and his distorted perception of the Society's role.

There wasn't enough time. Agreement was reached in the meantime. I suspect clients lost interest.

On-going resistance by parent.

Frequently missed appointments prior to mediation process.

Some parties did not show up for mediation.

Getting the parties to follow through with meeting.

The parents wanted to discuss past difficulties they had with CAS and I was expected to respond to all complaints.

Process Issues

Several questions centred on the process of mediation. Fourteen of the workers (82%) felt the mediator understood their points of view, 13 (77%) felt comfortable saying what they really felt during the mediation, and all but one felt they were treated with respect by the mediator. Workers rarely felt pressured to accept an agreement. About a third of workers would have preferred an agency lawyer to be present.

Figure 6.9: **The mediator understood my point of view on the case**

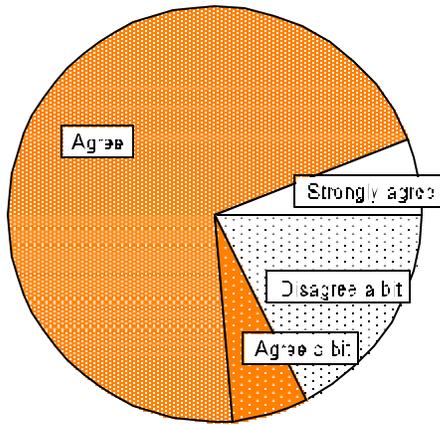


Figure 6.10: **I felt comfortable saying what I really felt during the mediation**

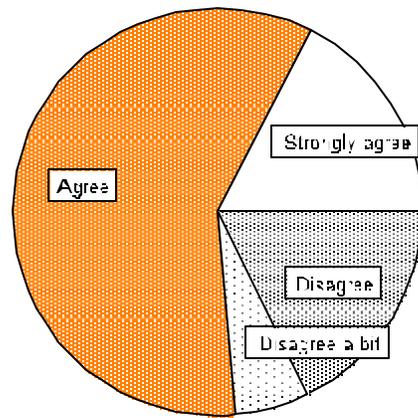


Figure 6.11: **I felt pressured to participate in the mediation**

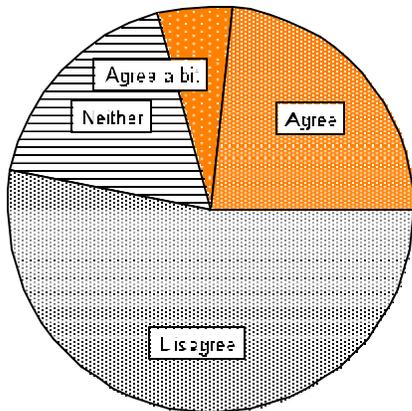


Figure 6.12: **I felt pressured into accepting the agreement**

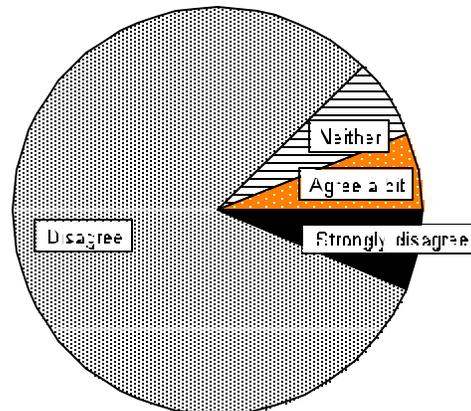


Figure 6.13: **I was treated with respect by the mediator**

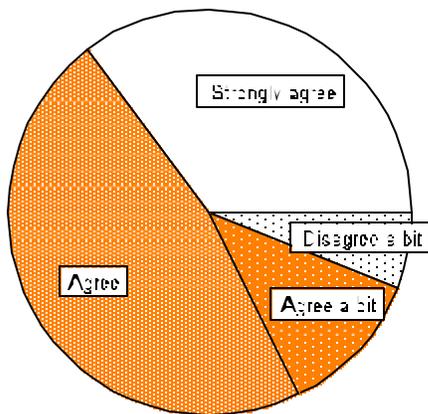
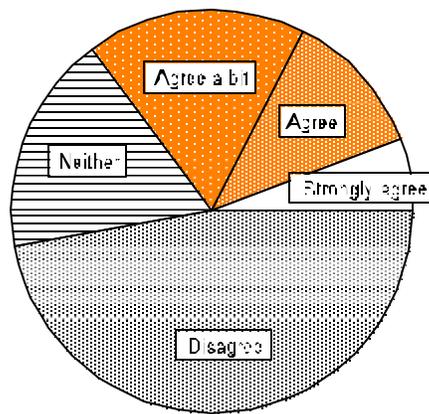


Figure 6.14: **I would have preferred to have the agency lawyer present at the mediation**



Asked about general observations, such as what they would have done differently, several issues were mentioned. In one case, the agreement broke down after three weeks, before the court could make a final order. The worker believed in retrospect it would have been better to expedite the case into court. In one case, confusion arose about what paperwork was to be returned to the court. In that case, many changes were made to the “statement of agreed facts.” These are examples of routine operational issues that can be worked out over time.

The comments of one worker portrayed the awkwardness of maintaining a hard line on the Society position while preserving a good relationship with the client. In court, a lawyer would argue the case. This worker felt that a more “neutral” CAS representative would be better. This observation may help us understand why the worker/client relationship can deteriorate

Overall Reflections

Looking back, workers were asked to reflect on the experience. About two-thirds agreed they were glad the case went to mediation and the same number would do another mediation on the same case. The majority (82%) would consider using mediation on another case in the future and 77% would recommend mediation to colleagues.

Generally, the workers had positive views of the process and any negative views were associated with cases that did not end in an agreement. This is another finding that highlights the importance of selecting the most appropriate cases for mediation. As one worker said, “The process itself may have merit, but this case was challenging enough without adding an extra process that neither the client nor I felt was very likely to succeed.”

Figure 6.15: **In retrospect, I am glad this case went to mediation**

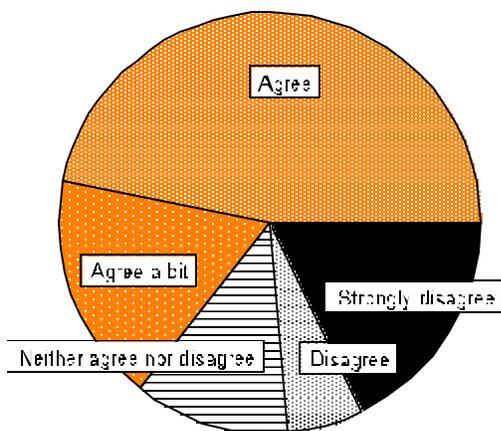


Figure 6.16: **If the need arises, I would suggest mediation for this case in the future**

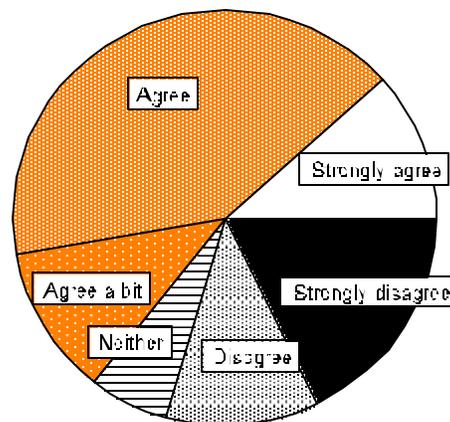


Figure 6.17: **I would consider doing mediation in another case in the future**

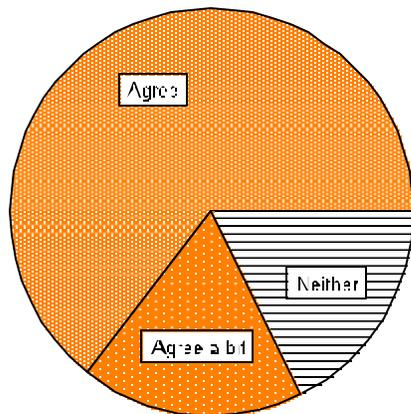
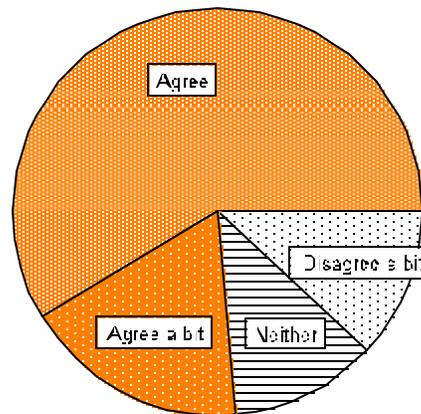


Figure 6.18: **I would recommend mediation to my colleagues**



Views of Family Parties

Family parties were interviewed at intake and, if they consented, again after the case concluded (true of 21 parties). The nine parties who never attended a mediation were not re-interviewed.

Anticipation of Benefits

Why were people willing to try mediation? What did they hope to achieve? Were they worried about anything? Did they think mediation could resolve their disputes? Parties were willing to try mediation principally because of the potential for a quicker and cheaper resolution and because they saw the mediator as a neutral person who would listen to them and let them have their say. Many hoped it would be effective and obviate the need to continue through the court process. Will the mediation resolve the dispute? Half the parties (52%) gave it a 50/50 chance, while a third of people gave it better than 50/50. Misunderstandings were apparent, most commonly that the mediator was an arbitrator, someone to whom you tell your side so they can choose whom to believe. This explains why some people saw mediation as a contest which they could win or lose.

Why are you willing to try mediation?

To settle this.

[Mediation is] faster, not as costly [and I] can express my ideas and thoughts better.

I feel additional outside mediation would help my son.

Unbiased in nature. Cost is extremely appealing.

To have the case go by faster and without the father being involved.

To avoid going to court [and] to free up valuable time and move on with our lives.

It's quicker.

I am willing to try, to see if we can get this to court faster. The most appealing factor would be because they seem more understanding and don't make you feel like a little person.

[I am] willing to try mediation because even if there is a small chance CAS could win I do not want a court order under any circumstances and feel a court order (although innocent) could ruin my reputation and future employment opportunities.

Maybe others will compromise and not be so harsh – I will get some credit for things I've done, without waiting to produce evidence.

I will do anything the CAS requires because I WILL NOT lose another child.

To resolve [case] without going to trial.

Resolve issues before court.

That we can come to an agreement about what is best for [the children].

The fact that [the other parties] and I never actually sat down and talked about our opinions or concerns for [my child's] well being.

To see what the CAS has to say to my face instead of behind my back.

It is done out of court.

A non-biased intervention, a chance to say my piece and be heard. Someone to help me understand what CAS is actually saying.

Get [the case] out of court.

Hope to prevent a trial if possible.

Help.

I need help from someone that might hear what I am saying.

To find an end that works for my son.

Cost reduction and maybe CAS will understand some of my concerns. Hopefully, even if it doesn't work, [my ex-partner] will receive some help.

Quicker, cheaper, and I'm willing to do anything to resolve this matter.

Let's hear what is getting said. I will get my point and feelings across.

I like the fact that there can be a solution reached that is beneficial to all involved. This in turn is good for my son also.

It will be quicker than court.

I believe that CAS and I could come to an agreement without court.

Less stressful than court, our side can be heard, and I don't have to take a day off work.

It hopefully creates a level ground so both parties can reach a decision.

Anticipatory Worries

Most people had no concerns about using mediation. Those who did worried about mediation not being successful and having to go to court anyway, saying something that is used against them later, getting an outcome they would not want, and an inability to enforce the agreement.

Is there anything that worries you about using mediation?

That CAS wins.

I guess maybe failing, not winning when they seem to be so helpful because they seem to be on your level.

I'll say something that someone will use against me.

[My daughter] going back to her mother.

Just [the other party] and us not being able to see eye to eye.

I'm not sure [my ex-husband's] problems will be resolved.

The CAS might use it in court and even if they can't they will lie!

Yes! The power CAS has over basically everything.

That there's just more people involved keeping "tabs" so to speak.

How do we enforce the agreement? No method for that.

I don't know if anything will be resolved and we will have to back go to court.

Information being leaked to other people.

Voluntary Participation

In retrospect, had their participation been voluntary. One quarter were aware of some pressure:

I was reluctant to do mediation because I felt it would not work out. The CAS was putting pressure on me.

With our worker pushing for it, we didn't have the option of saying no. It's either this or they'll get another supervision order and the courts always agree with Children's Aid.

I felt a little bit pressured, like I had no choice. I didn't want to go to court so I gave in.

On the other hand, 75% felt agreeing to mediation was their own decision.

Yes [I felt it was voluntary]. I was hopeful it might work and was willing to try.

I wanted a middle person, someone objective.

I could have walked out.

I felt no pressure to do mediation but at the table I felt pressure to agree to what CAS wanted.

Neutrality of the Mediator

At the outset, a few people were concerned that the mediator would not be neutral if paid by the CAS, but we could assure them funding was independent for this project. What about the perceived neutrality of the mediator at the table? Two thirds(63%) felt the mediator did *not* favour the CAS position (Figure 6.19) and 95% felt they were treated with respect (Figure 6.20).

Communication at the Table

Almost everyone felt that the mediator understood their points of view (Figure 6.21) and 84% felt comfortable saying what they really thought (Figure 6.22).

Figure 6.19: **The mediator favoured the CAS position**

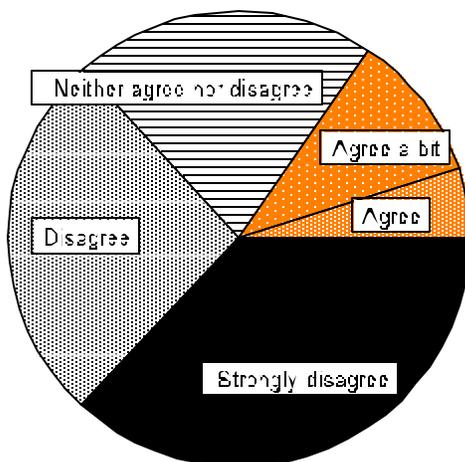


Figure 6.20: **I was treated with respect by the mediator**

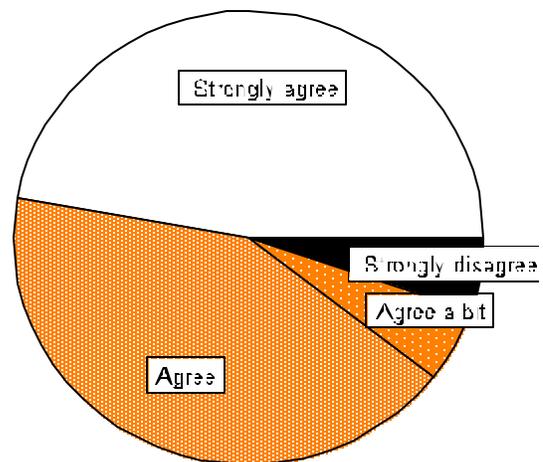


Figure 6.21: **I felt the mediator understood my point of view**

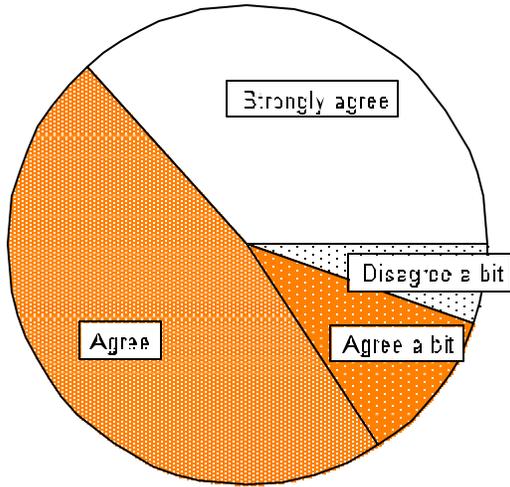


Figure 6.22: **I felt comfortable saying what I really thought**

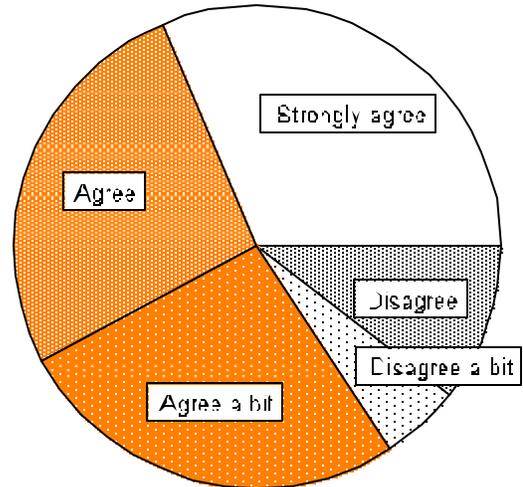


Figure 6.23: **My worker described my case fairly**

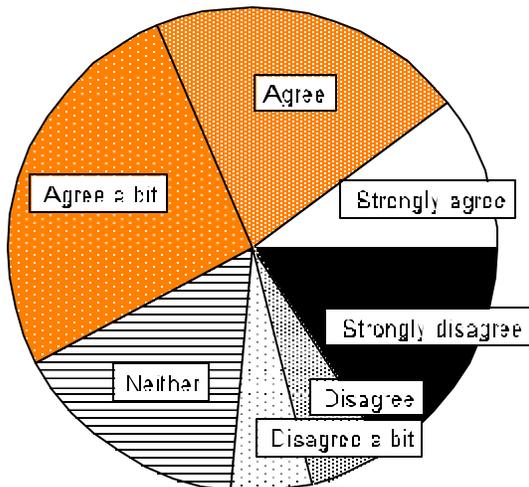
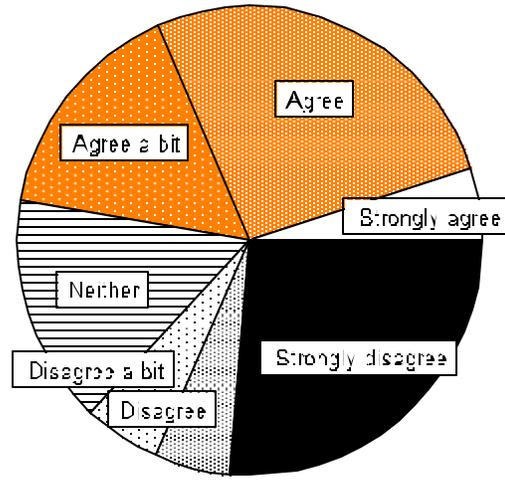


Figure 6.24: **My worker was willing to change the position he or she started with**



Power Imbalance

Two thirds (68%) felt equal with others at the table (Figure 6.25) but 74% continued to feel like the CAS had all the power and they had none (Figure 6.26).

We felt a little more equal than usual, but not so far as being “equal.”

[I did not feel equal] but it's not the mediator's fault. It's just the way it is.

Sometimes I felt equal and sometimes I felt criticised.

[Yes, I felt equal]. I was finally bargaining with her.

No, not at all.

Personally, I did not feel unequal but I understand how others might.

I could let loose and let her [worker] know how I felt.

At first, I felt intimidated. The worker spoke over me.

I felt equal but I have felt the power imbalance before.

As we see in the next chapter, parties in the comparison group were even less likely to feel equal.

Figure 6.25: I felt like an equal party with others at the table

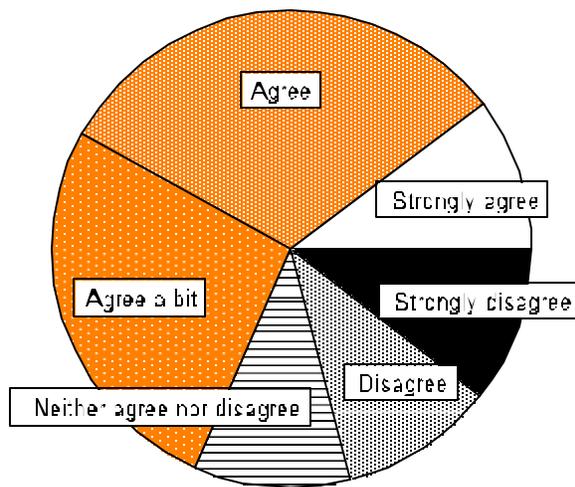
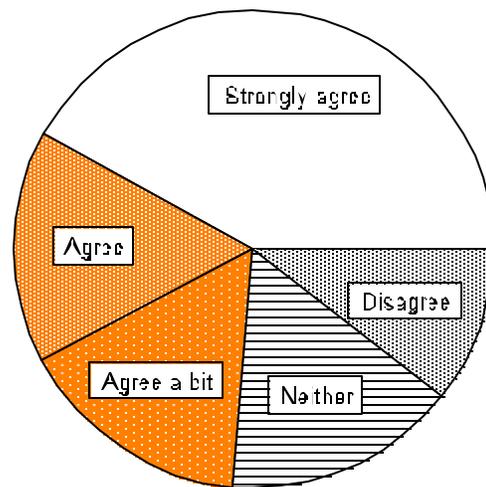


Figure 6.26: I feel like the CAS has all the power and I have none



Change in Relationship with Worker

One anticipated benefit of mediation is that it might improve the worker/client relationship. Most workers did not see a change and there are many reasons why the relationship did not continue anyway (e.g., change of worker). The family parties generally had the same view. In some cases – 22% – the relationship worsened and in a third – 33% – the relationship improved somewhat. In many cases – 44% -- there was no change. If the worker/client relationship was already good, it remained good. If it was already conflictual, it tended to remain that way.

[If conflict is reduced] it is because I have given up the fight – you have to do what they say. I have to listen to her [worker], I have to let her in, go along with everything. I can't win.

It changed the relationship initially but it probably had more to do with my lawyer. Now she [worker] knows I have people behind me. My lawyer is respected by the CAS.

I talk to her more openly now.

After mediation, I could let her know how I felt.

After the mediation, 42% thought their workers understood their point of view (Figure 6.27) and 37% were afraid to say what they were really thinking to their workers (Figure 6.28).

Figure 6.27: **My worker seems to understand my point of view**

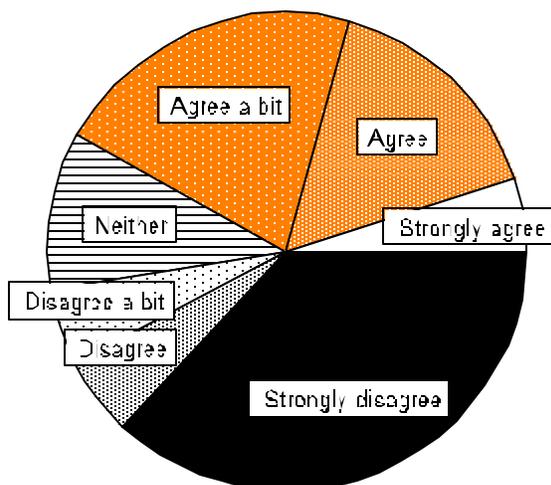
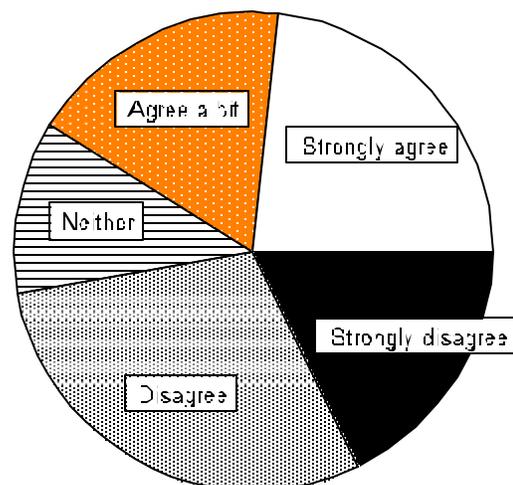


Figure 6.28: **I am afraid to say what I really think to my worker**



Role of Legal Counsel

As noted above, parties were strongly encouraged to review any agreement with legal counsel. Of 21 parties in cases reaching an agreement, one reviewed the agreement with duty counsel, five with their legal aid lawyer, while 15 did not seek or obtain advice. In two cases, this was because they did not have a copy of the agreement and in one case because the party did not want to pay a privately retained lawyer to review the agreement. This finding highlights the fact that it is important to stress the need for legal advice to mediation participants.

Process Issues

As a pilot project, there was a learning curve and some operational issues were worked out over time. As already noted, some parties told us they did not receive copies of the agreement, there had been no opportunity for a pre-mediation interview, and some parties did not clearly understand that their “agreement” meant a supervision order would be made.

Overall Reflections

What was the most helpful part of mediation?

Clearly being able to express my concerns and have them heard while my ex-partner was present.

Having someone to talk to about the case.

Avoiding going to court and access was granted quicker with mediation.

It saved us from going through court.

Had a chance to talk to and see others positions.

Having the third party.

Someone actually listened to what I had to say and I wasn't dismissed as being wrong.

I felt like she was backing me up, so I didn't feel belittled.

I felt like the mediator was not on anyone's side.

Having my questions answered by CAS and having my opinions out in the open.

The mediator listened to me, didn't criticise me, talked to me like a human being.

Being able to speak about how I feel and what I disagree with without interruption.

Learning to work together.

Understanding that there are neutral parties available to help find a better working relationship.

What was the most unsatisfactory part of mediation?

[There is] no way to enforce the agreement.

It didn't work.

Worker couldn't agree without her supervisor.

I feel mediation would have worked towards settling the issues at hand, but if any of the involved parties fails to live up to their agreement(s), then it will fail. That is my situation.

I felt the mediator was more for CAS on the first meeting.

Did not get everything we wanted.

The bad language is still in the order, calling me a bad mother.

Listening to my worker say she didn't want my son to come home.

Nothing [was helpful]. The agreement we made was not enforced by anyone when the agreement was reneged upon.

My worker told me CAS would not negotiate nor budge on their position and mediation was a waste of time.

The other party did not show up.

Nothing [was helpful]. The CAS worker did not want to be there.

There really wasn't [a helpful part]. I didn't get what I wanted.

The taking down of notes that could be used against one by CAS.

Overall, upon reflection, family parties had generally positive experiences at mediation. About half (53%) left the mediation with a good feeling about their future relationships with the CAS, only one party felt the mediation had been a complete waste of time, 63% would agree to another mediation, and 90% would recommend mediation to a friend.

Figure 6.29: I left the mediation with a good feeling about my future relationship with the CAS

Figure 6.30: This mediation has been a complete waste of time

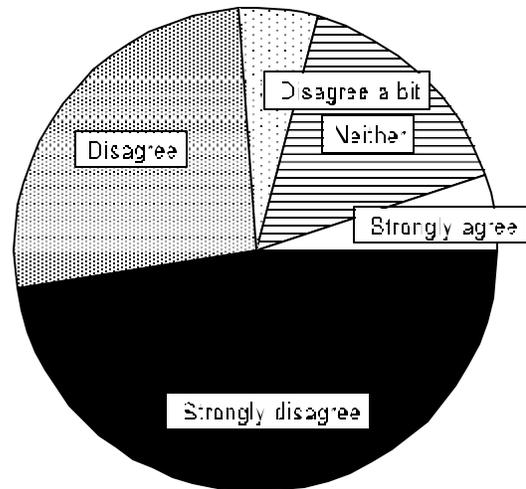
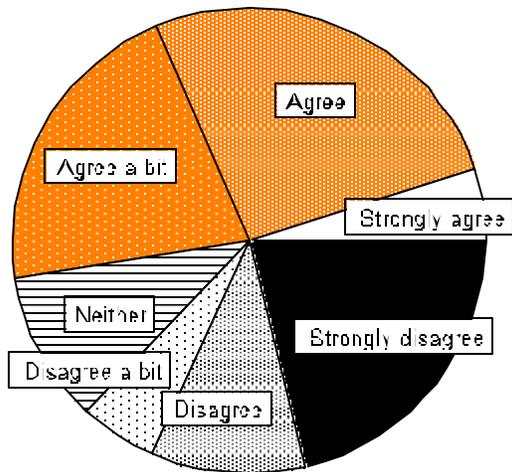
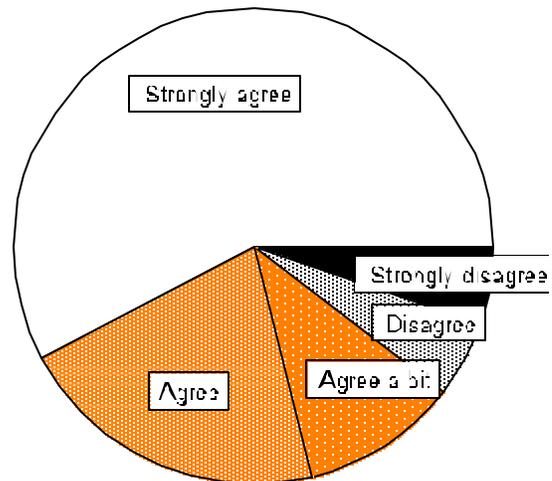
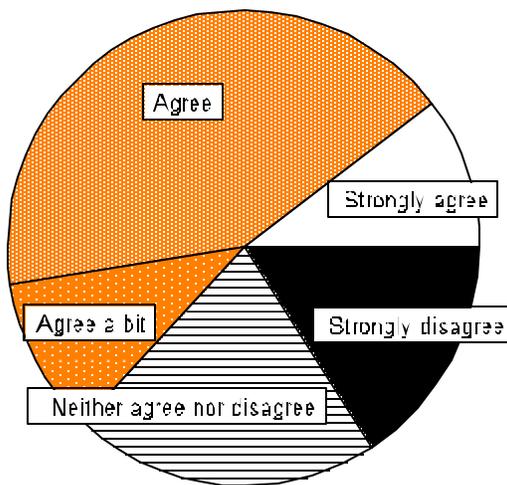


Figure 6.31: I would agree to another mediation

Figure 6.32: I would recommend mediation to a friend



Chapter 7

Comparative Outcomes

In this chapter, these topics are discussed:

- outcomes of comparison and mediated cases including length of court processing
- relative costs of the process
- relative satisfaction with court and mediation among family parties
- six month and one year follow-up

Observations made from the information in this chapter are:

- comparison cases were more likely to be scheduled for trial and referred by the CAS to outside counsel, compared with cases in the mediation group
- there was no overall difference in case outcome between the groups
- however, voluntary service agreements were negotiated in two of the seven successful mediations, a higher rate than observed in other groups
- when final court disposition reflected a mediated agreement – true of 7 cases – those cases concluded on average 3.5 months sooner than the comparison cases
- unsuccessful mediations concluded in an average of 8 months, similar to the 9 months observed in the comparison group
- the average legal-aid certificate cost was lower for cases where mediation was used, especially if the mediation was successful
- parties engaging in mediation were less likely to seek legal aid but more likely to visit duty counsel
- while a higher proportion of the mediation group paid at least one visit to duty counsel, the average number of visits per case was lower and the cost per case was less
- although the cost per case was the same between the two groups, twice as many cases in the comparison group had Children’s Lawyers for a higher total cost
- when mediation was successful, the CAS saved \$530 in staff costs
- when mediation was not successful, staff costs were about the same as in the comparison group
- when mediation was not successful, the system costs (LAO, OCL, CAS) were only somewhat lower than those in the comparison group
- looking at system costs as a total, costs associated with successful mediation cases were one half those in the comparison group (\$2,380 vs. \$4,750) and almost half the cost of unsuccessful mediation (\$4,200)

- from the perspectives of both clients and workers, mediation did little to change their relationship for the better, but it could be followed by a deterioration
- parties in mediation were more likely to feel like an equal party, feel comfortable saying what they really thought, feel they were treated with respect, and leave with a good feeling about their future relationship with the CAS
- how the case resolved was not associated with level of intrusiveness of CAS interventions in the one-year period after final order
- for only two children did the level of intrusiveness increase, because they were brought into care
- 23 reports of concern were received by the CAS from community or professional sources about 14 cases in the one year after final order
- there was one verified report of sexual abuse in the one-year follow-up period, by a babysitter
- while the majority of community reports pertained to mediated cases, there does not appear to be any evidence that mediated agreements increased risk for children
- however, it is clear that each case subject to child protection mediation carries with it a special responsibility to understand the dynamics of child abuse and those factors associated with its occurrence

A key intent of this project was to compare the outcomes of mediated cases with those of cases processed in the standard way, called here the comparison group.²¹ All cases were studied prospectively to collect time-usage data and opinion feedback as cases progressed. Moreover, to increase comparability, one type of application was studied (i.e., supervision orders) and cases were drawn from the same time period, to reflect the same legal and policy context. Identical eligibility criteria were applied to both groups and members of the comparison group indicated a willingness to use mediation (had it been available). Nevertheless, with such small numbers, the two groups are unlikely to be identical. Indeed, we found this to be true. As noted in Chapter 5, there were differences between the two groups that should be borne in mind. Most importantly, the comparison group had a higher concentration of protracted legal cases, as reflected in a rate of referral to outside counsel five times the agency average.²² In addition, an April 2003 change in how parties are notified by the CAS of impending status reviews affects the length of processing time, perhaps reducing it by one month on average for the mediation group (which was compiled beginning in January of 2003). Readers are cautioned to consider these differences when interpreting the data in this chapter.

Case Processing Outcomes

Five variables were used to compare the processing of each group through the court system.

Schedule of Case for Trial

In 11 of the 20 comparison cases, the case was at some point scheduled for a trial (see Table 7.1). This typically occurs when the settlement process has been unsuccessful. A trial did result once (for a different issue than in the original application) while the 10 other cases eventually ended in a settlement. In the mediation group, three cases were scheduled for trial, but no case concluded with a trial. None of those three cases was associated with a successful mediation. One case was on the trial list prior to the mediation referral and two cases were scheduled for trial after the mediation.

Outcome Summary: 11 of the 20 comparison cases were scheduled for trial at some point in the process compared with 3 of 20 cases in the mediation group.
--

²¹ Readers are referred to Appendix A, in which the methodology is described, for a discussion of control groups versus comparison groups, and why a comparison group was used here.

²² Many of them were already assigned to outside counsel for trial preparation at the time of selection into the comparison sample.

Referral to Outside Counsel

In the London/Middlesex CAS, cases on course for trial are referred to outside counsel. The agency average is a referral rate of 9% of all court applications. In the comparison group, ten of 20 cases were referred to outside counsel (Table 7.1). In the mediated cases, two were referred to outside counsel, consistent with the agency average. The large difference may be related to how the comparison sample was compiled and should be viewed with caution.

Outcome Summary: There was a large difference in the rate at which the comparison cases were referred by the CAS to outside counsel – 50% – compared with the mediation group – 10% – a difference which may be related to sampling bias.

Manner of Case Resolution

In the comparison group, 17 cases ended with a settlement, sometimes on the day of trial. One case went to trial, albeit over a different issue than the one originally contested (the party opposing the original application supported the plan proposed in the revised application). Two comparison cases have yet to be resolved, one being an appeal (quite a rare event) and one being repeatedly bumped from the trial list to make room for wardship cases. That case was launched in September of 2002. In the mediation group, seven cases ended with a final order reflecting a mediated agreement. Thirteen cases ended in a settlement through the regular court process. There were no trials in the mediation group.

Outcome Summary: 17 of 18 comparison cases ended in a settlement and one in a trial. Two are in progress. In the mediation group, 13 ended in a settlement using the conventional settlement process and there were no trials.

Case Outcome

The case outcomes were not remarkably different in the two groups (see Table 7.2). Thirteen cases in both groups ended with a supervision order. Two comparison cases ended with a supervision order of shorter duration than originally sought, and the same was true for two mediated cases. Considering the successful mediations separately, there was a slightly higher tendency for cases to conclude with a voluntary services agreement (see Table 7.3).

Outcome Summary: There was no overall difference in case outcome between the groups. Two thirds of cases ended with the granting of a supervision order, as originally sought in the application.

Table 7.1

Referral to Outside Counsel and Schedule of Case for Trial

	Case ever scheduled for trial		Case referred to outside counsel	
Comparison Group (n=20)	11	(55%)	10	(50%)
Mediation Group (n=20)	3	(15%)	2	(10%)
Successful Mediations† (n=7)	0	0	0	0
Unsuccessful Mediations (n=13)	3	(15%)	2	(10%)

† Cases where agreement was reached and final court disposition reflected mediation agreement.

Table 7.2

Case Outcomes of Comparison and Mediation Groups

	COMPARISON		MEDIATED	
Supervision Order	13	65%	13	65%
Voluntary Services Agreement	2	10%	3	15%
Supervision Terminated or Application Withdrawn	3	15%	4	20%
Case in progress	2	10%	0	--
TOTAL	20	(100%)	20	(100%)

Table 7.3

Case Outcomes of Comparison and Two Mediated Groups

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
Supervision Order	13	65%	9	69%	4	57%
Voluntary Services Agreement	2	10%	1	8%	2	29%
Supervision Terminated or Application Withdrawn	3	15%	3	23%	1	14%
Case in progress	2	10%	0	--	0	--
TOTAL	20	(100%)	13	(100%)	7	(100%)

Table 7.4

Number of Days from First Court Appearance to Final Disposition

	Lowest Days	Highest Days	Average Days	Average in Months
Comparison Group (n=18)	70	630	271.1	9
Mediation Group (n=20)	49	583	213.6	7
Successful Mediations† (n=7)	66	259	165.6	5.5
Unsuccessful Mediations (n=13)	49	583	239.5	8

† Cases where agreement was reached and final court disposition reflected mediation agreement.

Length of Court Processing

The length of court processing is the time from first court appearance to disposal in court (see Table 7.4). In the comparison sample, nine months elapsed on average, ranging from 2.3 months to over 20 months. The two unresolved cases are not included in these figures. The trial case took 241 days, one month less than the group average. When the mediation was successful, reaching an agreement that held until the matter was disposed of in court, the average elapsed time was 5.5 months. When the mediation was not successful – when clients could not be engaged, no agreement resulted, or the agreement broke down prior to disposal – the processing time was eight months, similar to the nine-month average of the comparison group, especially considering the change in service policy in the case of status reviews.

Outcome Summary: When the mediation was successful, the case concluded on average 3.5 months sooner. When the mediation was not successful, the case concluded in an average of 8 months, similar to the 9 months observed in the comparison group.

Relative Costs

One of the questions posed at the project's outset was this: would mediation be associated with reduced financial expenditures? Several costs were measured, those related to Legal Aid Ontario (certificates and duty counsel), the Office of the Children's Lawyer, the CAS, and family parties. While not the intention at the outset, we have three groups to compare instead of two: normal processing of highly contested cases as indicated by the comparison group, costs associated with cases where mediation was successful, and costs associated with cases where mediation was tried but the case ended with a regular court settlement.

Legal Aid Ontario

Sixty-six parties actively took an interest in these 40 cases, 32 in the comparison group and 34 in the mediation group. The proportion of parties qualifying for legal aid was the same in both groups. The data reported here pertain to the costs of legal aid certificates only and do not include administration costs. We also examined the extent to which duty counsel were consulted, also a cost supported by Legal Aid Ontario.

Legal Aid Certificates

Of the 66 *parties*, 59% qualified for legal aid and 29% were granted a legal aid certificate for the matter under study here. In total, of the 40 *cases*, 31 had at least one party who would qualify for legal aid. About \$33,000 in legal aid certificates were registered. Total costs associated with certificates in the comparison group were \$19,860 while total costs in the mediation group were \$13,125.

For the costing analysis, the unit of count is “case,” to be comparable to the other data. Parties in 10 mediation cases were granted legal aid but two of those involved no expenditure. Looking at cases where a cost was billed back to Legal Aid Ontario – eight of 18 cases in the comparison group and eight of 20 in the mediation group – the average costs are listed in Table 7.5. Each certificate on average was \$2,482 in the comparison group, \$870 when mediation was successful, and \$2,103 when mediation was not successful.

Table 7.5

Costs of Legal Aid Certificates

	No. of parties	No. who qualified	No. of parties w. certs.	No. of cases w. cert.	Avg. Cost per case [*]	Avg. Cost (across all cases)
Comparison Group (n=18)	29	18	10	8	\$2,482	\$1,103.33
Mediation Group (n=20)	34	19	10	10	\$1,640	\$656.25
Successful Mediation Cases [†] (n=7)	10	6	3	3	\$870	\$372.86
No Agreement, No Med. or Agreement Broke Down (n=13)	24	13	7	7	\$2,103	\$808.85

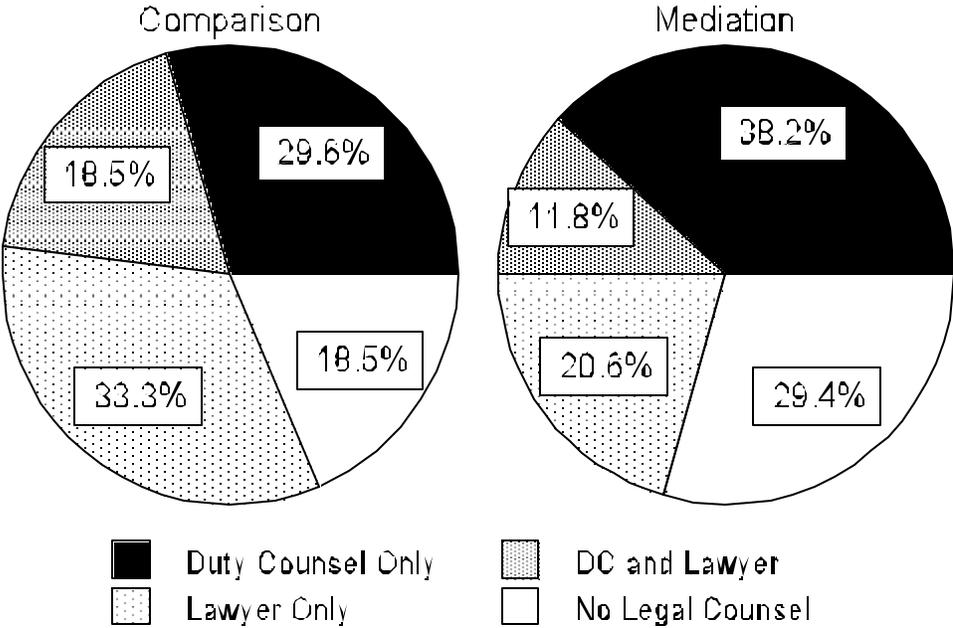
[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

^{*} Cases in which certificates were issued and an amount was billed back to Legal Aid Ontario (i.e., 8 in mediation group).

In summary, overall costs for legal aid certificates were lower in the mediation group *when mediation was successful*. It is also important to note that there were differential patterns in the access of legal counsel. Members of the mediation group were more likely to have no legal advice (29%) than members of the comparison group (19%). Members of the mediation group were more likely to have accessed duty counsel only (28%) than the comparison group (30%), as can be seen in Figure 7.1. Overall, therefore, more parties in the comparison group had legal advice (82%) than in the mediation group (71%). The difference is not great but, when combined with the anecdotal information from the interviews, it suggests that parties entering mediation may need extra encouragement to seek legal advice as necessary.

Outcome Summary: When mediation was successful, legal aid certificate cost was substantially lower, almost one third of levels seen in the comparison group.

Figure 7.1
Type of Legal Representation for Parties, Comparison and Mediation Groups



Duty Counsel Involvement

About half (53%) of the 66 parties (or a spouse) sought advice from duty counsel in relation to the present matter. This represented one or more party in 24 of the 40 cases. Members of the mediation group (or a spouse) were more likely to have visited duty counsel (61%) than parties in the comparison group (45%). Put another way, at least one party in 10 of the 18 comparison cases and 14 of the 20 mediation cases visited the duty counsel office. Duty counsel assisted with the preparation of an answer for two cases in the comparison group and one case in the mediation group. As noted in Chapter 6, one party reviewed the mediated agreement with duty counsel.

What about relative costs? An hourly rate of \$73.87 was used, the *per diem* rate for lawyers acting as duty counsel. It does not include the myriad other costs associated with operating a duty counsel office, including administrative support. In addition, length of time spent with each client is not consistently recorded in the files. Some numbers are based on estimates of the average time to deliver the specific service (e.g., one hour to assist with preparing an answer).

Despite the higher overall usage of duty counsel, members of the mediation group tended to make fewer visits to the duty counsel office, reducing the associated costs (Table 7.6). On balance, the average cost per case, averaged over the entire group, was \$1,133 (comparison) and \$1,034 (mediation), a difference of about \$100. Considering only cases where duty counsel were accessed, the average cost per case was lower: \$113 versus \$74. Again, successful mediation was associated with the lowest cost per case: \$35.

Outcome Summary: Parties in the mediation group were more likely to use duty counsel as their only source of legal advice but made fewer visits on average.

Table 7.6

Cost Estimates of Time Spent by Duty Counsel

	Cases using DC	Avg. # visits	Total cost (summed)	Avg. cost (case w. DC)	Average Cost (across all cases)
Comparison Group (n=20)	10	4.1	\$1,132.67	\$113.27	\$56.63
Mediation Group (n=20)	14	2.57	\$1,034.18	\$73.87	\$51.71
Successful Mediation Cases [†] (n=7)	5	2	\$246.23	\$49.25	\$35.18
Unsuccessful Mediation (n=13)	9	2.9	\$787.95	\$87.55	\$60.61

[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

Usage of Family Law Information Centre

The same data base used to record information on client contact with the family law duty counsel also records client attendance at the Family Law Information Centre in the London/Middlesex Courthouse. The FLIC was accessed by 12% of the parties – or parties in six of the 40 cases – either directly or because their spouses attended, in the period between first appearance and final order on the current matter. We cannot tell if the visit related to the CAS case or to a matrimonial one. The two often co-exist. At least one party in five of the 20 comparison cases visited the FLIC compared with a party in one of the mediation cases. Because we cannot determine the reason for the visit or the type of service provided, the FLIC data are not incorporated into the costing estimates for this project.

Outcome Summary: 12% of the parties visited the FLIC but we cannot determine the reason for the visit. Costs for this service could not be calculated.

Office of the Children’s Lawyer

At the discretion of a judge, a Children’s Lawyer may be assigned to represent the child or children in a matter before the court. The Office of the Children’s Lawyer maintains a panel of legal counsel across the province who perform this function on a fee-for-service basis. The OCL also absorbs some costs associated with their own inside counsel. The figures described here reflect both those costs. In these 40 cases, 13 cases had OCL lawyers representing 22 children for a total cost of just over \$27,000. About 15% of this figures relates to inside counsel and the remainder relate to fees (including disbursements) of the panel lawyers.

In the comparison group, nine of the 20 cases had Children’s Lawyers, to represent 18 children (an average of two children per case). In two of these families, there were five children. The total cost for these nine cases was \$18,792, or \$940 averaged over the 20 cases. Looking only at cases where a Children’s Lawyer was assigned, the cost was about \$1,000 per child and about \$2,000 per case. In the mediation group, four of the 20 cases had Children’s Lawyers, assigned by the court to represent four children (one child per case). The total cost was \$8,225, or slightly more than \$2,000 per child and about \$2,000 per case.

Outcome Summary: The number of cases with Children’s Lawyers was lower in the mediation group, by half. Although the cost per case was the same in the two groups, twice as many cases in the comparison group had Children’s Lawyers for a higher total cost.

Table 7.7

Costs of Time Spent by Children's Lawyers

	No. of Cases with a CL	No. Of Children with a CL	Avg. Cost per case with a CL	Avg. Cost per child with a CL	Avg. Cost (across all cases)
Comparison Group (n=20)	9	18	\$2,088	\$1,044	\$939.60
Mediation Group (n=20)	4	4	\$2,056	\$2,056	\$411.23
Successful Mediation Cases [†] (n=7)	0	0	0	0	0
Unsuccessful Mediation (n=13)	4	4	\$2,056	\$2,056	\$411.23

[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

Children's Aid Society

The costs to the CAS were measured by four groups of staff recording time spent on court-related tasks of the 40 cases: child protection workers, legal counsel, legal secretaries, and process servers. They collected data on a proactive basis as the case evolved, to maximize the accuracy of time estimates. Data were provided by staff in 100% of cases. In addition, the bills of outside legal counsel were collected and the Project Coordinator recorded activities associated with vetting referrals and arranging mediations.

The time spent by supervisors consulting with and offering guidance to workers is not included here. To some extent, these activities might require the same amount of time for court applications as for mediations. Also, the costs calculated here pertain solely to staff salaries and benefits and do not take into account other costs associated with service provision including office space, telephones/pagers, transportation, etc. Sign-language interpreters were required for two cases, one in each group, so this cost was balanced and not considered here. Accordingly, the cost estimates used to compare the two groups and do not reflect the actual cost of providing service. The intent is to highlight the relative costs on these indicators.

Child Protection Workers

Workers recorded time spent on five court-related tasks: preparation of court documents, service of court documents, meetings and consultations about court application, waiting at the courthouse, and participating in court. The 19 workers associated with the 20 mediation cases (one worker did two mediation cases) also recorded time spent making the mediation referral, meeting the mediator prior to mediation, meeting with a supervisor to discuss mediation, attending mediation, and for follow-up activities such as debriefing. This required five hours on average.

For the mediation cases, workers spent about 20 hours on average, compared with about 26.5 hours for comparison cases. On average, they spent 6.7 fewer hours on mediation cases (Table 7.9). The salary figure is based on the average B.S.W. rate plus 19% benefits. When mediation is successful, the cost saving is \$286 per case (after factoring in time for mediation). When the mediation is not successful and the case carries on through the settlement process, the costs for worker time was \$175 less than in the comparison group of highly contested cases.

Outcome Summary: Costs for time spent by child protection workers on court-related tasks were lower in the mediation group. Successful mediation is associated with greater cost savings than unsuccessful mediation.

Table 7.8
Average Time Spent by Child Protection Workers on Five Court-related Tasks, by Group

	Average Hours, Comparison Group (n=18)	Average Hours, Mediation Group (n=20)
Preparation of court documents	6.88	4.01
Service of papers	1.83	1.06
Meetings or consultations	7.18	2.71
Waiting at the courthouse	7.03	6.09
Participating in court	3.61	0.93
TOTAL	26.53	14.81

Table 7.9
Costs of Time Spent by Child Protection Workers on Court-related Tasks, by Group

	Hourly Rate	Lowest Hours Reported	Highest Hours Reported	Average Hours per Case	Average Cost per Case
Comparison Group (n=18)	\$32.03	8.25	51.7	26.53	\$849.76
Mediation Group (n=20)	\$32.03	4.25	33.75	14.81	\$474.36
Successful Mediation Cases [†] (n=7)	\$32.03	5.25	18.5	12.57	\$402.62
Unsuccessful Mediation (n=13)	\$32.03	4.25	33.75	16.02	\$513.12

Table 7.10

Mediation-related Tasks Reported by Child Protection Workers

	Hourly Rate	Lowest Hours Reported	Highest Hours Reported	Average Hours per Case	Average Cost per Case
Making referral for mediation	\$32.03	0	1.5	0.48	\$15.37
Meeting with mediator	\$32.03	0	2	0.66	\$21.14
Meeting with supervisor	\$32.03	0	4	0.71	\$22.74
Attending mediation	\$32.03	0	6.5	2.82	\$90.32
Debriefing etc.	\$32.03	0	2	0.35	\$11.21
TOTAL	\$32.03	0.25	12.25	5.02	\$160.79

In-house Legal Staff

There are five, full-time legal counsel on staff at the London/Middlesex CAS plus a Director of Legal Services. They recorded their time on all study cases (see Table 7.11). The average cost per case is \$22.43 less for mediated cases than for comparison cases, reflecting half an hour difference. Dividing the mediation group into two categories reveals interesting differences, however. When a case is mediated, ends in an agreement, and that agreement is reflected in the final disposal in court, the average cost is less than one half of that observed in the comparison cases. When a mediated case does not end in a successful outcome, the case requires more of the lawyer's time.

Outcome Summary: Time spent by in-house legal staff at the CAS does not change greatly if the case is mediated or not. However, time required for successfully mediated cases is much less than average, and time required if the mediation is unsuccessful is greater. Overall, however, the differences are quite small.

Legal Secretaries

The CAS counsel are assisted greatly by six legal secretaries. For the 40 cases, they recorded the number of hours spent on these tasks: initial preparation of the file, processing material for show cause hearings, processing material regarding adjournments, processing material for settlement briefs, preparing information for outside counsel, and closing out the files.

In the comparison group, as a reflection of normal processing of contested supervision-order applications, legal secretaries spent an average of 2 hours opening files, 20 minutes on show cause material, 3 hours on adjournments, 2 hours on settlement-related material, 40 minutes to prepare a package for outside counsel (averaged over all cases or 1.5 hours for cases with outside counsel), and almost 2 hours to close out the file (Table 7.12). This all adds up to about 10 hours per case for a total cost of about \$240. How does that compare to mediation?

Overall, legal secretaries spent about nine hours processing the mediation cases, a difference reflected in a cost savings of about \$14.50 per case. Most of the savings in mediation cases are associated with preparation of packages for outside counsel, required 10 times for the comparison group and two times for the mediation group. As with the in-house lawyers, there are differences in the time required to process mediation cases that are successful versus those that did not work out, about two hours difference.

Outcome Summary: If the case is referred to outside counsel, more time is spent by legal secretaries because of tasks associated with package preparation. Otherwise, there is little difference in a legal secretary's workload between a mediated case and a case processed in the conventional way.

Table 7.11
Costs of Time Spent by In-house Legal Counsel at CAS

Type of Case	Hourly rate	Lowest Hours Reported	Highest Hours Reported	Average Hours	Average Cost per Case
Comparison Group (n=18)	\$43.99	0.9	22.6	5.55	\$244.14
Mediation Group (n=20)	\$43.99	0.9	13.3	5.04	\$221.71
Successful Mediation Cases [†] (n=7)	\$43.99	0.9	3.33	2.42	\$106.46
Unsuccessful Mediation (n=13)	\$43.99	1.9	13.3	6.46	\$284.18

[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

Table 7.12

Average Costs of Time Spent by Legal Secretaries at CAS

Type of Case	Hourly Rate	Lowest Hours Reported	Highest Hours Reported	Average Hours	Average Cost per Case
Comparison Group (n=18)	\$24.61	3.5	19	9.67	\$237.98
Mediation Group (n=20)	\$24.61	4.5	16.5	9.08	\$223.46
Successful Mediation Cases [†] (n=7)	\$24.61	6	10.5	7.7	\$189.50
Unsuccessful Mediation (n=13)	\$24.61	4.5	16	9.82	\$241.67

[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

Process Servers

The CAS in London & Middlesex employs two full-time process servers. The average hourly rate for process servers, including benefits, is \$17.14. Not included in these figures are other costs, such as mileage. There are two components to the job. The first is to serve parties with court papers. In half of our cases, the workers served the papers themselves. Overall, therefore, this task took about one hour per case (averaged across all cases) but could take as many as five hours for cases with multiple parties and when parties lived outside of London. The second task is to file papers at the courthouse. This task was performed for all cases, for an average of 44 minutes per case. With almost two hours per case devoted to these two tasks, the average cost was about \$28 but could go as high as \$100 per case. What were the differences between the two groups? As can be seen in Table 7.13, there was essentially no difference. Regardless of the group, these tasks had to be performed once a court application was launched.

Outcome Summary: There was no difference between the two groups in time spent by CAS process servers in serving parties and filing court papers.

Outside Counsel

Another cost borne by the CAS is that of payments to legal counsel who take cases to trial. As previously noted, the rate at which comparison cases were referred to outside counsel was five times the agency average. This may reflect the way the comparison case was compiled, by mining the court docket for cases that had been languishing with no resolution. Care must be exercised in interpreting these figures.

In the 10 comparison cases referred to outside counsel, the average bill was about \$2,300. Averaged over all 18 cases, the figure is about \$1,300 per case. In the mediation group, two cases were referred to outside counsel, and the average per case was about \$150 (see Table 7.14).

Outcome Summary: When a case was sent to outside counsel, the cost averaged \$2,300. About 9% of court applications are eventually referred to outside counsel in London/ Middlesex.

Table 7.13
Average Costs of Time Spent by Process Servers at CAS

Type of Case	Hourly Rate	Lowest Hours Reported Mins.	Highest Hours Reported Mins.	Average Minutes	Average Cost per Case
Comparison Group (n=18)	\$17.14	20	280	103	\$29.51
Mediation Group (n=20)	\$17.14	20	350	102	\$29.07
Successful Mediation Cases [†] (n=7)	\$17.14	30	150	91	\$26.12
Unsuccessful Mediation (n=13)	\$17.14	20	350	107	\$30.00

[†] Cases where agreement was reached and final court disposition reflected mediated agreement.

Table 7.14
Average Costs for Outside Counsel

	Range of Cost			Avg. Cost (cases w. OC)	Average Cost (across all cases)
Comparison Group (n=18)	\$1,423.05	to	\$4,607.27	\$2,329.42	\$1,294.12
Mediation Group (n=20)	\$1,088.86	to	\$1,792.94	\$1,440.90	\$144.09
Successful mediation cases (n=7)	0	to	0	0	0
Unsuccessful mediation cases (n=13)	\$1,088.86	to	\$1,792.94	\$1,440.90	\$221.68

Total CAS Costs

Adding all the staff costs together, court-related tasks for the average comparison case cost the agency \$1,361.39 (see Table 7.15). When mediation was successful, it saved \$530 of staff time. When mediation was not successful, the staff costs were the same as in the comparison group. This finding again underlines the importance of selecting cases with a high probability of success.

If the CAS were to absorb some or all of the cost of mediation itself, this fact would have implications for the cost savings. In addition, these figures do not include the cost of tasks performed by the Project Coordinator, estimated to be \$378 per case.

It is the expense associated with outside counsel that makes these two groups different in terms of cost to the CAS, as can be seen in Table 7.15. We have previously noted, and stress again here, that the high rate of outside counsel in the comparison group may be the result of sampling bias. Specifically, the comparison group is a high concentration of highly conflicted cases. Using this as a basis of comparison, however, the mediation cases were associated with fairly dramatic costs savings, especially true when the mediation was successful.

Outcome Summary: When mediation was successful, it saved \$530 of staff time. When it was not successful, the staff costs of processing cases were the same as with convention case processing. The most important cost differential was associated with the much less frequent need to refer cases to outside counsel.

Table 7.15

Total Staff CAS Costs

Type of Case	Process Servers	CPWs	Staff Lawyers	Legal Secretaries	Average Cost per Case
Comparison Group (n=18)	\$29.51	\$849.76	\$244.14	\$237.98	\$1,361.39
Mediation Group (n=20)	\$29.07	\$696.07	\$221.71	\$223.46	\$1,170.31
Successful Mediation Cases [†] (n=7)	\$26.12	\$509.18	\$106.46	\$189.50	\$831.26
Unsuccessful Mediation (n=13)	\$30.00	\$797.30	\$284.18	\$241.67	\$1,353.15

[†] Cases where agreement was reached and final court disposition reflected mediation agreement.

Table 7.16

Total CAS Costs Including Outside Counsel (Averaged across Cases)

Type of Case	Process Servers	CPWs	Staff Lawyers	Legal Secretaries	Outside Counsel	Average Cost per Case
Comparison Group (n=18)	\$29.51	\$849.76	\$244.14	\$237.98	\$1,294.12	\$2,655.51
Mediation Group (n=20)	\$29.07	\$696.07	\$221.71	\$223.46	\$144.09	\$1,314.0
Successful Mediation Cases [†] (n=7)	\$26.12	\$509.18	\$106.46	\$189.50	0	\$828.26
Unsuccessful Mediation (n=13)	\$30.00	\$797.30	\$284.18	\$241.67	\$221.68	\$1,574.83

[†] Cases where agreement was reached and final court disposition reflected mediation agreement.

Project Coordinator

Time spent by the Project Coordinator must be factored into the system-level costs. The Coordinator's position was supported entirely by project funding. Without this support, the administration of mediation referrals would have been absorbed by people acting in one or more other positions. Excluding from consideration the tasks associated with the research project itself, the Coordinator's tasks were: reviewing referrals, reading file information, speaking with the worker about the eligibility of case, vetting referrals against inclusionary/exclusionary criteria, contacting parties about mediation, contacting lawyers including Children's Lawyers, mailing informational material to all parties, contacting mediators about availability, and processing bills for all expenditures. As described in greater detail in Chapter 4, these tasks required 3.25 hours on average for the 222 referrals. For cases that went to mediation, the average was 11 hours per case. Assuming an M.S.W. would fill this role, an average hourly rate of \$34.37 (salary and benefits) was used to estimate a figure of \$378.07 per case.

Mediation

Another cost is that of mediation itself. The hourly rate for mediation was \$100 and the average cost in the 20 cases was \$885. Costs ranged from \$214 for a case that did not lead to a mediation, to \$2,875 for a complicated, multi-party case. Categorizing cases in various ways as in Table 7.17, it is apparent that cost does not vary greatly by outcome, which is logical because the same effort must be expended regardless of outcome. Even cases that never resulted in a mediation session cost on average \$500 (range of \$214 to \$738). Variation in the cost seems related to the complexity of the case and the style of individual mediators.

Table 7.17

Costs of Mediation

	Range of Bills			Average Cost per Case
Total Mediation Group (n=20)	\$214	to	\$2,875	\$884.93
Successful Mediation Cases (n=7)	\$401.44	to	\$1,551.50	\$765.84
Failed Mediation Cases (n=13)	\$214	to	\$2,875	\$949.06

Expenses to Attend Mediation

To remove financial barriers for participants, funds were available for transportation and child care, to facilitate attendance at mediation sessions. Transportation could involve taxis or mileage paid to clients, an issue for the seven participants who travelled from out of town. For the 20 mediation cases, about \$350 was devoted to these expenses. Participants also reported expenses for which they did not seek reimbursement, such as transportation, parking, long-distance telephone calls, and time missed from work. Those with privately retained lawyers incurred costs for this service. Many or most of these expenses would also be incurred to attend court appearances so they are not being used to calculate the total costs of mediation.

Total System Costs of Mediation

Pooling the above information provides an estimate of the relative costs of mediation compared with regular court processing. Some costs are consistently associated with every case, such as the time spent by CAS staff. Other costs come into play in only some cases, such as those for legal aid, Children's Lawyers, or CAS outside counsel. To factor in variable rates of service usage – because lower usage is a good outcome, from an economic point of view -- the costs have been averaged over all cases in Table 7.18. These figures take into account the higher or lower rate of usage of the legal services between the two groups. Successful mediation saved about \$2,370 over the cases in the comparison group but unsuccessful mediation was only about \$500 less, a small difference that evaporates if you discount the elevated rate of outside counsel.

There is another way to organize the same data. Because variable rates of service usage may be seen as a function of other factors (such as sampling bias) or may be seen as undesirable outcomes, we have also provided the figures in Table 7.19. In this table, averages for the four types of legal services are calculated, but only for the cases in which these costs were incurred. These figures represent a hypothetical set of cases where each one involves a legal aid certificate, use of duty counsel, appointment of a Children's Lawyer, and referral by CAS of the case to outside counsel. Successful mediation saved about \$5,480 over the cases in the comparison group while unsuccessful mediation cost the same.

Table 7.18

System Costs of Mediation Versus Comparison Cases, Averaged Across All Cases

	Comparison Group (n=18)	Mediation Group (n=20)	Successful Mediation Cases (n=7)	Unsuccessful Mediation (n=13)
LAO - certificates (group average)	\$1,103.33	\$656.25	\$372.86	\$808.85
LAO - duty counsel (group average)	\$56.63	\$51.71	\$35.18	\$60.61
OCL (group average)	\$939.60	\$411.25	0	\$411.25
CAS Staff	\$1,361.39	\$1,170.31	\$831.26	\$1,353.15
Coordinator	0	\$378.07	\$378.07	\$378.07
CAS Outside Counsel	\$1,294.12	\$144.09	0	\$240.15
Mediation	0	\$884.93	\$765.84	\$949.06
TOTAL	\$4,752.07	\$3,696.61	\$2,383.21	\$4,201.14

Table 7.19

System Costs of Mediation Versus Comparison Cases, Averaged for Applicable Cases Only

	Comparison Group (n=18)	Mediation Group (n=20)	Successful Mediation Cases (n=7)	Unsuccessful Mediation (n=13)
LAO - certificates	\$2,482.34	\$1,640.00	\$870.00	\$2,103.00
LAO - duty counsel	\$113.27	\$73.87	\$49.25	\$87.55
OCL	\$2,088.00	\$2,056.25	0	\$2,056.25
CAS Staff	\$1,361.39	\$1,170.31	\$831.26	\$1,353.15
Coordinator	0	\$378.07	\$378.07	\$378.07
CAS Outside Counsel	\$2,329.42	\$1,440.90	0	\$1,440.90
Mediation	0	\$884.93	\$765.84	\$949.06
TOTAL	\$8,374.42	\$7,644.33	\$2,894.42	\$8,367.98

Outcome summary: Summing all system costs, successful mediation was associated with savings of about half while unsuccessful mediation was comparable in cost to the comparison group cases.

Views of Family Parties

After disposal of the case, parties interviewed at the outset were contacted again to determine if they would consent to another interview. Here, the views of 14 parties in the comparison group are compared with those of 21 parties in the mediation group.

Views of the Process

People who engaged in mediation had much more favourable views of the resolution process than people whose cases ended in the traditional settlement process (Table 7.20). Specifically, mediation participants were far more likely to feel like an equal party in the process, more likely to feel comfortable saying what they really thought, and more likely to feel they were treated with respect. They were much less likely to feel that the mediation was a waste of time (compared with parties' feelings about court). Finally, only 16% of mediation participants felt the mediator favoured the CAS position while 50% of the comparison group felt the judge favoured the CAS. Interestingly, 86% of the comparison group said they would take a case to court again but an equal number said they would be willing to try mediation if that option were to be available in the future. Overall, twice as many people in the mediation group left the mediation with a good feeling about their future relationship with the CAS.

Change in Relationship with CAS

Did mediation change the worker/client relationship? When asked, most parties said it had not (as described in Chapter 6). Compared with the comparison group, this outcome was the same: no change in the majority, deterioration in a few, and improvement in some. People whose cases resolved through the court system were more likely to feel CAS had all the power (93% felt that way after court and 74% felt that way after mediation). However, the other indicators of worker/client or agency/client relationship did not suggest that mediation was followed by an improvement (Table 7.21). There was no difference in the extent to which people felt able to tell their workers what they were really thinking. Moreover, there was evidence that mediation participants were less likely to feel listened to and understood in the period after mediation. This finding suggests, again, that cases should be chosen with care and that expectations for mediation be realistic.

Table 7.20

Comparative Views About the Process of Resolution

When we settled the case/at mediation, I felt like an equal party with everyone there
Parties in comparison group: 29% agree Parties in the mediation group: 68% agree
I felt comfortable saying what I really thought
Parties in comparison group: 43% agree Parties in the mediation group: 84% agree
My worker described my case fairly
Parties in comparison group: 50% agree Parties in the mediation group: 58% agree
I was treated with respect by the judge/mediator
Parties in comparison group: 57% agree Parties in the mediation group: 95% agree
All this time (in court or in mediation) has been a waste of time
Parties in comparison group: 50% agree Parties in the mediation group: 5% agree
The judge/mediator favoured the CAS position
Parties in comparison group: 50% agree Parties in the mediation group: 16% agree
My worker was willing to change the position in the court papers
Parties in comparison group: 57% agree Parties in the mediation group: 47% agree
I left the courthouse/mediation with a good feeling about my future relationship with the CAS
Parties in comparison group: 21% agree Parties in the mediation group: 53% agree

Table 7.21

Comparative Views About Post-resolution Relationship with CAS

I feel like the CAS has all the power and I have none
Parties in comparison group: 93% agree Parties in the mediation group: 74% agree
My worker understands my point of view
Parties in comparison group: 79% agree Parties in the mediation group: 42% agree
My worker listens to my opinion even if he or she does not agree with me
Parties in comparison group: 86% agree Parties in the mediation group: 58% agree
My worker understands the needs of my child(ren)
Parties in comparison group: 71% agree Parties in the mediation group: 21% agree
I'm afraid to say what I really think to my worker
Parties in comparison group: 36% agree Parties in the mediation group: 37% agree

Six-month and One-year Follow-Up

Tracking case outcomes shows that some families underwent many changes and faced many challenges in the year after their disputes with the CAS were resolved. For example, in nine of the 40 families, babies were born. Newborns alter family dynamics, potentially increasing the intensity of CAS scrutiny. Parents and parental surrogates left some families or, as in Andrea's case from Chapter 1, joined the family. Some parties experienced personal crises, residential moves, hospitalizations, job loss, criminal victimization, and eviction. It would not be fair to attribute any negative outcomes to mediation, just as it would not be fair to attribute positive outcomes unequivocally to the mediation.

Because different children in the same family can have different outcomes, the follow-up uses child as the unit of analysis. We look at:

- status of CAS file at six months and one year
- whether children continue to be under supervision
- increase in the intrusiveness of the CAS intervention
- apprehensions
- changes in custodial/residential arrangements for the children
- any new allegations/referrals
- compliance by mediation participants

Four children whose cases were still in progress are excluded from the analysis, as were 11 children whose families left Middlesex County.²³ We also excluded referrals, investigations, and interventions specifically focussed on babies born during the follow-up period or that occurred after 12 months had elapsed. Data are complete for all children at the six-month point, but the project ended before the one-year point in the case of eight children. Also, it is important to note that our review was necessarily limited to the records of the Children's Aid Society of London & Middlesex. We were aware that four families left the jurisdiction but other families associated with closed cases might also have moved. Had there been reports or referrals in other jurisdictions, we would not have been aware of that information.

CAS Status

Using "child" as the unit of analysis, mediation was followed by a lower rate of supervision and a higher rate of voluntary services and file closure than observed in cases settled through court (Table 7.22). Would this translate into a higher risk for children, requiring more intrusive intervention in the long run? In all three groups, the rate of supervision declined over time (Table 7.23 and 7.24). At six months, 76% of comparison children were under CAS supervision and 45% were under supervision at one year (Table 7.23 and Table 7.24). One child asked to be taken into care and was living in a foster home. In the mediation group, one can generally see the same trend of a declining number of children under supervision, although not so strongly in the case of successful mediation.

²³ In the comparison group, nine children in three families left London and neighbouring Societies agreed to supervise the Middlesex County orders. The same was true for two children in one mediation family. Two of the four families left to find housing and two moved for personal reasons. Not being able to track these 11 children, they were dropped from the follow-up analysis. This leaves 59 children in the follow-up sample, 29 in the comparison group and 30 in the mediation group.

Table 7.22

CAS Status at Case Resolution, 70 Children

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
In Care	0	--	1	6%	0	--
Court-ordered Supervision	32	84%	11	69%	7	44%
Voluntary Services	3	8%	2	13%	4	25%
File Closed	3	8%	2	13%	5	31%
TOTAL	38	(100%)	16	(100%)	16	(100%)

Table 7.23

CAS Status After Six Months, 59 Children

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
In Care	1	3%	1	6%	0	--
Court-ordered Supervision	22	76%	9	56%	5	36%
Voluntary Services	2	7%	3	19%	3	21%
File Closed	4	14%	3	19%	6	43%
TOTAL	29	(100%)	16	(100%)	14	(100%)

Table 7.24

CAS Status After One Year, 51 Children

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
In Care	1	3%	2	15%	0	--
Court-ordered Supervision	13	45%	5	38%	5	56%
Voluntary Services	10	34%	1	8%	2	22%
File Closed	5	17%	5	38%	2	22%
TOTAL	29	(100%)	13	(100%)	9	(100%)

Changes to Intrusiveness of Intervention

Another, perhaps better, indicator of relative outcome is the need by CAS to increase the intrusiveness of the intervention. This outcome assumes a hierarchy of intrusiveness that ranges from file closure, voluntary services, supervision, to protective care. It has an advantage over the previous figures in that level of intervention at the final order is the base line against which to judge changes in intrusiveness for each child. If a file was closed at case disposition, and was never re-opened during the follow-up, that represented no change in the level of intrusiveness. If a supervision was in force at the time of final order and supervision was terminated, that represented a decrease in intrusiveness of involvement.

Looking at the data in this way (Table 7.25 and 7.26), it is apparent that the level of intrusiveness increased for only two children, in both cases because they were taken into care. Overall, six children were apprehended in the 12-month follow-up period but four were quickly transferred to the custody of a relative. One child was apprehended to facilitate attendance at a residential treatment program. The caregiver refused to consent to the treatment.

Table 7.25
Change in Intrusiveness of CAS Intervention, Six Months

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
Decrease	1	3%	2	12%	2	14%
Same	27	93%	14	88%	12	86%
Increase	1	3%	0	--	0	--
TOTAL	29	(100%)	16	(100%)	14	(100%)

Table 7.26
Change in Intrusiveness of CAS Intervention, One Year

	COMPARISON		MEDIATED (unsuccessful)		MEDIATED (successful)	
Decrease	10	34%	3	23%	2	22%
Same	18	62%	9	69%	7	78%
Increase	1	3%	1	8%	0	-
TOTAL	29	(100%)	13	(100%)	9	(100%)

Subsequent Referrals/Reports

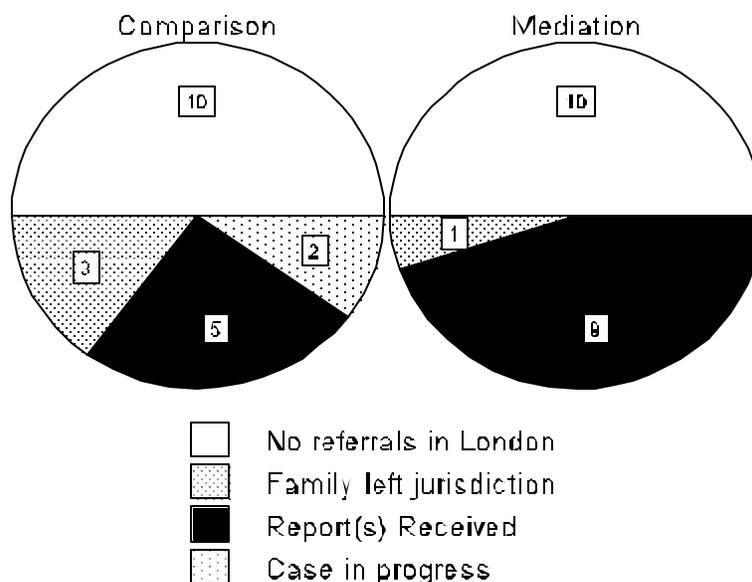
Ultimately, the only outcome of importance child safety. In the one-year period, five reports were received about five comparison cases and 18 reports about nine mediation cases. Reports came from the community (e.g., neighbours), professionals (e.g., police, school), or both. It should be noted that four families left the jurisdiction and could not be tracked: three in the comparison group and one in the mediation group (see Figure 7.2). Also, two comparison cases were excluded because they had not yet concluded. This will affect how the two groups are compared.

How does this translate to children?

The majority of reports pertained to cases in the mediation group. Analysis of each report on a case-by-case basis leads us to conclude that mediation itself did not compromise the safety of children. For example, mediated agreements mirrored the outcomes that would have occurred anyway, reports pertained to new members of the family or non-caregivers, or reports pertained to issues not directly associated with harm (e.g., head lice). Nevertheless, the data gathered in the follow-up period highlight the fact that child protection mediation carries with it a responsibility to understand the dynamics of child abuse and the factors associated with its occurrence. Child safety is the goal, not reaching an agreement.

Figure 7.2

Reports Made on 40 Cases in One-year After Final Resolution, as of June 2005



Physical/Sexual Harm by Commission

By the 12-month point, among 59 children, there were eight reports received by the CAS about abuse causing harm, four of them about parties involved with this study. Reports pertained to one child in the comparison group and six children in the mediation group (one child was the subject of two reports). Four reports pertained to successful mediation cases and three were in unsuccessful mediation cases. Four reports involved sexual abuse and four involved physical abuse. Specifically, there were four reports of harsh or inappropriate discipline by a parent, two reports of sexual abuse by the new partner of a parent, one report of sexual abuse by a babysitter, and one report of sexual touching by another child.

Sexual abuse by the babysitter was “verified” by the CAS and charges may be laid by the police. In no case did a report cause an elevation in the intrusiveness of the intervention. Community referrals, as they are termed by the CAS, can form a pattern over time. Most reports made in the follow-up period pertained to open cases and did not alter the agency’s assessment of the family (often being confirmatory of the existing concerns rather than providing new information).

Several other reports of harm by commission were received after the one-year follow-up period that are not listed here, including two where criminal charges were laid.

Other Reports

There were also 15 reports that pertain to other matters. There were four reports about four families in the comparison group: two police reports about domestic violence, one community report about drug use by a parent, and one police report about inadequate supervision. The latter case resulted in the apprehension of the children and their placement with a relative.

In the mediation group, there were 11 reports about seven families: two reports about disturbing alcohol use of two parents (one from the police and one from the community), four reports about two families related to unhygienic home and persistent head lice, two reports of domestic violence pertaining to one family, one report from school about child not attending because of child care responsibilities at home, one report from a community agency worried in a general sense about a parent’s capacity to parent, and one report about inadequate supervision.

Change in Residence

Once the children’s living situations were decided (if it was an issue), did they have to change residence to live with a different caretaker? This was true of five children in the comparison group, two in the unsuccessful mediation group, and none in the successful mediation group. In the comparison group, four children in one family moved to live with a relative and one child was in foster care. In the mediation group, one child moved to a residential treatment program and one moved to live with a relative.

Compliance with Mediated Agreements

We are to not able to conclude that mediation was followed by compliance of parties with agreed-to measures agreed.

Among the 10 cases that reached an agreement, case outcomes in terms of compliance are as follows:

- one party repudiated agreement after three weeks
- parties complied with measures and file closed
- party did not comply with measures defined in mediated agreement or plan of care
- party repudiated agreement because of delays in court process
- party did not comply with measures outlined in mediated agreement
- party did not comply with measures outlined in mediated agreement
- family left the jurisdiction and could not be tracked
- party did not follow through on measures designed in mediation to facilitate return of child to her custody. Status quo continued
- one party complied with plan of care; party who was the focus of the mediated measures left the family before supervision order expired
- parties complied with measures and file closed

In other words, among 10 cases where a mediated agreement was achieved, only three could be characterized by the term “compliance” and one family could not be tracked.

Generally, mediation tended to create a paring back of CAS involvement (fewer conditions to the supervision order, etc.). If enough proposed measures could be jettisoned to suit the family parties, and the result did not compromise the CAS “bottom line” for child safety, then an agreement ensued. Perhaps this process was too focussed on the outcome. Child protection mediation, as envisioned by its proponents, would involve perhaps a greater emphasis on building mutual understanding and defining realistic plans that were reasonable expectations given the family’s resources (emotional, financial, social support). The process is as important as the outcome. This and related observations are presented in Chapter 9.

Chapter 8

Stakeholder Views

In this chapter, these topics are discussed:

- input from advocacy groups
- results from a survey of Ontario CASs
- results of an opinion survey of CAS staff (administered after mediation started)
- reform suggestions from family parties

Observations made from the information in this chapter are:

- specialized training is crucial to ensure mediators understand the unique contingencies of child welfare and the needs of child-welfare clients
- efforts to bring mediation into a community should be accompanied by training of other involved professionals, such as judges and other potential referral agents
- family group conferencing or family group decision making are used successfully in a growing number of jurisdictions
- experience and further research will help us identify cases most amenable to mediation and cases which are better served by other dispute resolution techniques such as family group conferencing
- several Ontario CASs are contemplating or actively planning the introduction of mediation, prompted mostly by the desire to improve relationships with clients and to reduce legal costs
- the most commonly voiced barrier to using mediation in Ontario is the lack of trained mediators and the lack of funding
- 60% of current staff at the CAS of London/Middlesex recommend their agency continue using mediation, although less than a third feel it would be appropriate for wardship cases
- CAS staff in London/Middlesex are not generally supportive of mediation being mandatory
- the greatest benefit seen by CAS staff is that families will be less intimidated in mediation than in court
- the greatest concern of CAS staff is that there are benefits to the court process that mediation does not offer and that the power imbalance cannot be evened enough to facilitate true mediation
- the predominant view of family parties is that CASs have too much power and can act without scrutiny or accountability

Two recommendations are offered:

Recommendation 16: A child protection mediation training curriculum should incorporate information such as child welfare law, the child welfare system, augmented screening techniques, addressing the power imbalance, and sample agreements using plain language. The Ontario Association for Family Mediation and/or Family Mediation Canada may consider developing a mediator certification program and/or standards for the position of accredited child protection mediator.

Recommendation 17: Family group conferencing, family group decision making, and other ADR techniques can co-exist with a mediation program to provide a range of ADR options from which it is possible to select the best method for each case.

If pending amendments to the *Child & Family Services Act* find their way into law – and maybe even if they don't – child protection mediation is likely to be rolled out across Ontario. What thoughts do stakeholder groups have?

Stakeholder Survey of Advocacy Groups

An informal review of provincial and national advocacy bodies conducted via letters and telephone confirmed that interest in alternative dispute resolution is high.

Training

Training is a salient issue among people thinking about child protection mediation. The lack of a systematic training scheme may well be the greatest obstacle to implementation at this point in time. It is clear that even experienced family law mediators require a good deal of specialized knowledge about the child welfare system, the needs of its client population, and the dynamics of child maltreatment. At the same time, social service or mental health professionals, who may be well experienced in the child welfare system and the needs of its clients, require training in the techniques of mediation. We outlined the desired qualifications and experience in the draft job description (Appendix C). Until a training scheme is developed, communities in many parts of the province may be hard pressed to find people with mediation credentials *and* child welfare experience.

It was also suggested that introduction of child protection mediation into a jurisdiction should be accompanied by training opportunities for all involved professionals such as judges.

Recommendation 16: A child protection mediation training curriculum should incorporate information such as child welfare law, the child welfare system, augmented screening techniques, addressing the power imbalance, and sample agreements using plain language. The Ontario Association for Family Mediation and/or Family Mediation Canada may consider developing a mediator certification program and/or standards for the position of accredited child protection mediator.

Family Group Conferencing

Another salient observation emerging from this component of the stakeholder review is that interest in family-group conferencing is growing quickly in the child welfare field. This technique is viewed as most relevant in Aboriginal communities, being in harmony with traditional decision-making styles such as group problem solving. However, interest is clearly high in mainstream services as well. Several pilot projects are underway, including two funded by the Centre of Excellence for Child Welfare: one in Toronto (at the George Hull Centre for Children & Families) and one in Nova Scotia (at the Mi'kmaw Family & Child Services). The CAS of Brant County has used family group decision making for two years and is assisting the London CAS as they develop a pilot here. This list is just a sampling of initiatives underway.

Stakeholders are clearly supportive of the application of ADR techniques to conflicts in the child welfare system but there is no clear consensus on which techniques work best under what conditions. Ideally, several ADR techniques would be available so cases could be matched to the most appropriate. However, we do not yet understand which types of cases are best suited to which ADR techniques. Put another way, we need better evidence on the relative effectiveness of the various ADR techniques with various types of cases. Some observers may also be interested in assessments of relative cost effectiveness.

Recommendation 17: Family group conferencing, family group decision making, and other ADR techniques can co-exist with a mediation program to provide a range of ADR options from which it is possible to select the best method for each case.

Adaptation of Mediation to Child Protection Clients

It was also suggested that child-welfare clients have unique needs and vulnerabilities that must be accommodated. Training and experience is important in this regard, as is careful screening and efforts to maximize the likelihood that parties access legal advice. Other efforts might include having informational material available in multiple modalities (written, video, verbal explanations) and several languages, using plain language in all documents, speaking slowly and clearly, clarifying definitions of key terms, and working slowly rather than trying to rush to a conclusion. Again, this observation highlights the need to augment traditional mediation skills with experience of working with child welfare clients. It will be important to get independent feedback from the clients, and a draft survey for such a purpose is made available in Appendix F.

Survey of Ontario CASs

Early in 2005, a survey was distributed to 51 children's aid societies in Ontario (all except London and Middlesex). Responses were requested from executive directors, senior managers, or heads of legal departments. Twenty-two completed surveys were returned. Among the 22 agencies, four were using mediation, four were planning the use of mediation, eight were contemplating the use of mediation, and six had no plans to start using mediation.

Reasons for Not Using Mediation

Agencies not using mediation were asked why. The two most common reasons were the lack of trained mediators and the lack of funding. Also important was a lack of familiarity with child protection mediation. Less common reasons included a belief there would not be many cases, a concern over how to implement mediation in remote and rural parts of the province, and a belief that mediation would duplicate existing resolution strategies now successfully used. Importantly, there was little suggestion that staff resistance, ethical concerns, or previous unsuccessful experience with mediation were barriers.

No Trained Mediators Available

It is well recognized that even experienced family mediators will require a different set of knowledge and skills before undertaking child protection mediation. There is at present no training curriculum for Ontario, no train-the-trainer curriculum, and no pool of child protection mediation trainers. Having no trained mediators was by far the most commonly expressed reason for not using mediation. Significantly, this view was not limited to small or remote agencies. Some of the largest agencies in Ontario expressed this view.

There are no trained child protection mediators in this [large metropolitan] region, although there are interested mediators.

We have always intended to begin using mediation and that is still our plan – we need to identify and develop a working relationship with a qualified mediator and experience some success with using mediation – thus far, that has not happened.

It was also noted that CAS staff should undergo the training as well.

Funding

Funding was the second most commonly voiced reason for not using mediation.

There may be cases or parts of cases that may be suitable for child protection mediation. There is some interest by the court, community counsel, family court clinic and CAS to explore the viability of mediation. There is currently no specific funding for mediation or legal services. The Ministry would need to fund child protection mediation projects.

Mediation is certainly not viewed as an inexpensive solution.

The principles of mediation dictate that mediation be conducted in a manner that ensures an equality of the participants, and an unbiased mediator. As such, the location of the mediation should be in a neutral location, not a CAS office and the payment for such mediation should be provided by a (neutral) Ministry or cost shared by the participants, legal aid, and the CAS. This is not currently available in this region.

One respondent noted that funding must also be made available to train CAS staff.

Lack of Familiarity

Half of agencies not using mediation acknowledged a lack of familiarity with the issue.

Duplication of Other Resolution Strategies

Many agencies successfully use strategies such as family group conferencing and legal case conferencing and some of them believed that mediation would not be “valued added.”

This Society does not engage in formal mediation through a contracted mediation service. The agency does mediate/negotiate informally in an extensive manner in relation to most of its court-involved cases. This agency uses a “legal case conference” approach – cases are negotiated in all-party conferences outside of the court mandated conference regime. Conferences generally occur in relation to the issue of “finding in need of protection,” variations of interim orders, assessments and final disposition orders.

This agency has structured its practice in relation to court involved cases in a manner which seems to promote relatively early resolution of most court proceedings.

Mediation as a process would follow the clinical decision process and is not viewed as an aid to that process.

For the past two years, our agency has had a Family Group Conferencing program so we have tended to use that process to develop case plans and resolve contentious issues. Some of the cases referred to the [FGC] program have been active court (CFSA) cases where we had reached some sort of impasse. ... Our experience to date has been very positive and we have achieved some very hopeful case outcomes and lasting, effective case plans.

Not sure of its effectiveness in child protection cases. [We believe] that case conferences with all parties and lawyers present can be just as effective in resolving cases and getting to settlements.

Some agencies indicated that court backlog and delay were not issues in their jurisdictions, indicating that current techniques of dispute resolution were working well.

Logistics of Implementation

There is an enormous range of CASs in Ontario in terms of size and geographic scope. In some parts of the province, particularly remote and rural areas, the logistics of arranging mediation may be challenging:

Costs and logistics are the main factors [why we do not use mediation]. There is no public transit in this large, rural county.

There certainly could be a role for mediation in this jurisdiction, however, factors such as the geographical size of the county, the nature of the population distribution, the socio-economic status of our population, the limited resources in the jurisdiction and the small size of the local bar (we have limited number of lawyers in this jurisdiction) present a number of significant initial challenges to such an initiative.

Awaiting CFSA Amendments

A few respondents mentioned the desirability or impending nature of amendments to the CFSA:

Research has indicated that, to be effective, mediation as an option in child protection must be supported by legislation.

[We are contemplating mediation because of] proposed amendments to the CFSA regarding contact orders and/or mediated contact agreements for Crown wards placed for adoption.

Disagreement with the Concept

While not a common view, there was also evidence that some agencies have rejected the concept of mediation as a viable option for their clients.

The research generally has not supported mediation. As a concept, it presupposes the necessity of compromise/deal between conflicted parties. Mediation often best meets the needs of adults or organizations and generally assumes short-term solution to problems. Interesting, mediation has not been a successful experiment in domestic conflict, therefore why would we be prepared to resolve basic protection problems with vulnerable children?

Reasons for Contemplating Mediation

No one reason predominated but it is clear that reducing legal costs is not the main factor driving interest in child protection mediation. Agencies in Ontario seem primarily interested in mediation as a means of enhancing client service and improving relations with families.

This agency does not have backlog or delay in the majority of its court cases. This agency also has low legal court costs for the [large] population it serves and the court cases it has. As a result, this agency is not contemplating mediation for monetary reasons but is interested in mediation as a further “tool” to be used to assist families. This approach is consistent with the other “tools” and approaches employed by this agency, such as concurrent planning, family group conferencing, and case conferencing.

There is significant volume of cases before the courts often in protracted processes. Legal costs are high and there needs to be efforts to manage legal costs as well as to facilitate court processes. Mediation may, in selected child protection cases, have positive results and enhance relationships with clients. Stakeholders [in this jurisdiction] are exploring the viability of mediation in child protection cases.

Mediation skills can mirror good clinical skills. We want to continue to develop these skills in our staff.

This agency has no current plans to engage in a formal mediation initiative in the near future. That being said, we are certainly interested in considering the results of the research that the London Child Protection Mediation Project has undertaken. This agency is committed to providing the best possible services to our clients and if there appears to be some benefit, from a client service perspective, to using mediation in child protection matters, we would consider such as program.

We may look at the use of mediation in the future if research shows that it has more positive outcomes for children and families compared with our current model.

Reducing legal costs/monetary savings, reducing backlog/delay and improved client relations are all potential benefits that might, according to most of the current research, result from the use of mediation in child protection proceedings – obviously a child protection agency would be interested in realizing some or all of those benefits. If the results of the research that the London Child Protection Mediation Project has undertaken indicate that such benefits can be realized through the mediation approach that the Project employed, this agency would certainly take a closer look at how mediation might be implemented in this jurisdiction. There may be a number of variables, some of which have been identified already by the Project, which impair the effectiveness of a mediation approach in child protection proceedings (e.g., case attrition factors, geography, consent issues) and which would have a significant impact in this jurisdiction. We will likely take a “wait and see” approach to the issue of mediation until further data have been collected, analysed and reviewed.

Other reasons endorsed were to reduce legal costs, reduce court backlog, hearing about research results, staff interest in the technique, and having local mediators who were interested.

Follow-up Opinion Survey of CAS Staff

As described in Chapter 2, an opinion survey was administered to front-line staff of the London/Middlesex CAS early in 2003, immediately before mediation became available. It was readministered in 2004, to measure any changes in prevailing beliefs and attitudes. The goal of the survey was two-fold. First, the cooperation of CAS staff is crucial to the success of mediation, both in making referrals and in agreeing to be involved in mediation sessions. Understanding their views will help allay any concerns about mediation that might act as a barrier to referrals or involvement. Second, re-administering the survey after the mediation has been in use will determine if experience with mediation changed prevailing attitudes. Would staff have more favourable opinions of mediation and what specific reservations do they still harbour?

Sixty-six staff members completed the second survey, most of whom were front-line child protection staff (74%). In total, 44% had made at least one referral to the mediation project, although not all of the referrals had been vetted as appropriate. The same proportion (44%) had heard about a mediation from colleagues who had participated in a mediation. Thirty-three percent of respondents had worked at the agency for one year or less.

Overall, the opinions about the strengths and weakness of child protection mediation did not change from the time of first administration. Moreover, the most salient issues have not

changed. The most commonly endorsed advantages of mediation continue to be that families will be less intimidated (87% agreed with this statement) and that mediation can help improve worker/client communication (81%). Key concerns were that it is impossible to equalize the power imbalance (63%) and 74% continued to believe that there are benefits to the court process that mediation does not offer.

What about the use of mediation in the future?

- 60% of respondents recommend that the CAS in London/Middlesex continue using mediation (Figure 8.1)
- a third thought it should be mandatory when a case is heading to trial (Figure 8.2)
- 27% thought it should be mandatory once it apparent that all parties are not consenting to the Society’s court application (Figure 8.3)
- 32% of respondents believe mediation would be appropriate for Crown and Society wardship cases (Figure 8.4)
- 68% believe a supervisor should attend mediation along with the worker (Figure 8.5)
- 54% believe a Society lawyer should attend mediation along with the worker (Figure 8.6)

Figure 8.1: **I recommend that the London CAS continue to use mediation**

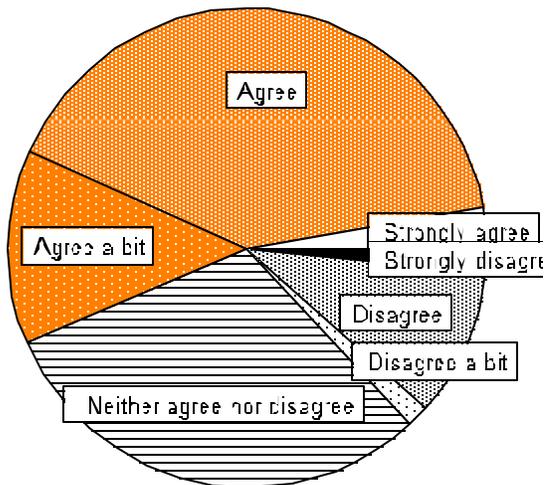


Figure 8.2: **Mediation should be mandatory in all cases heading to trial**

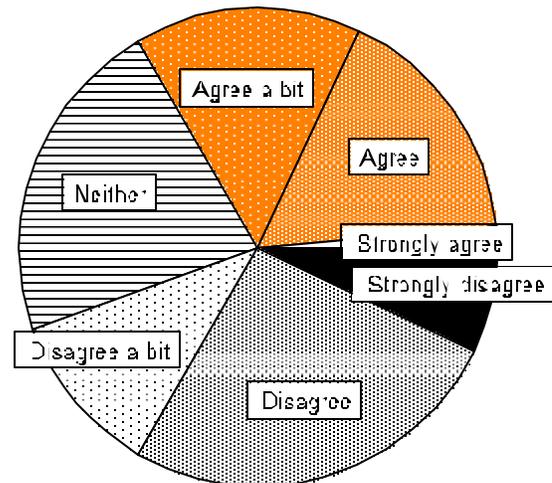


Figure 8.3: **Mediation should be mandatory once it is apparent that are parties are not consenting to the application**

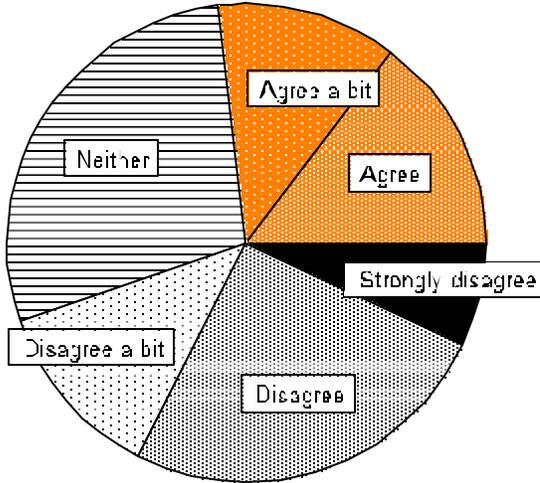


Figure 8.4: **Mediation is appropriate for Crown and Society wardship cases**

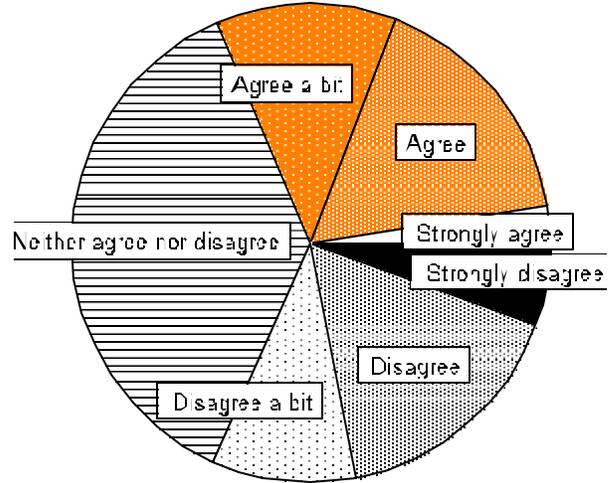


Figure 8.5: **A supervisor should attend mediation along with the CPW**

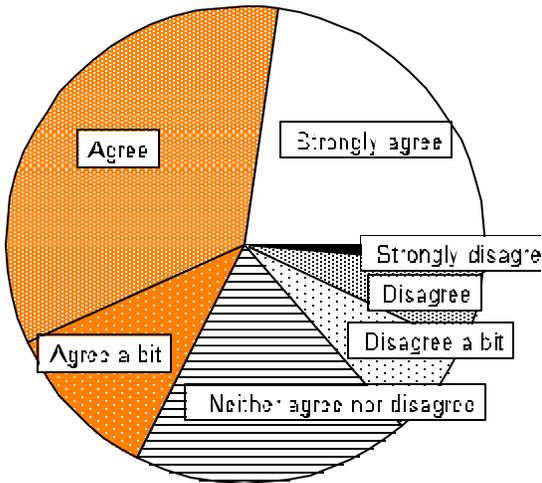


Figure 8.6: **A Society lawyer should attend mediation along with the CPW**

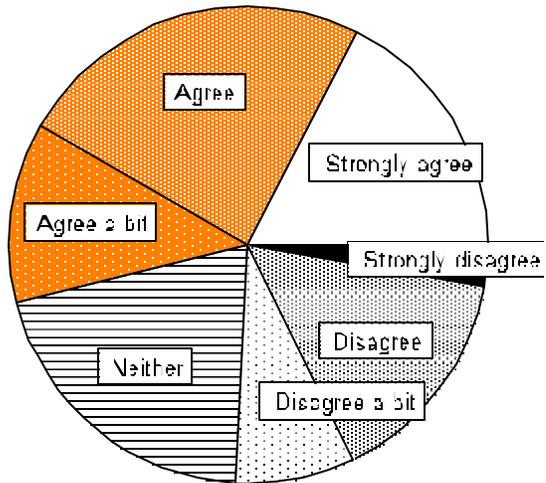


Figure 8.7: **This mediation project is a waste of time**

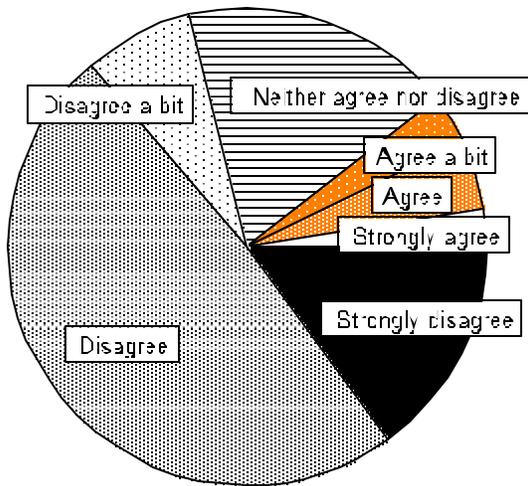
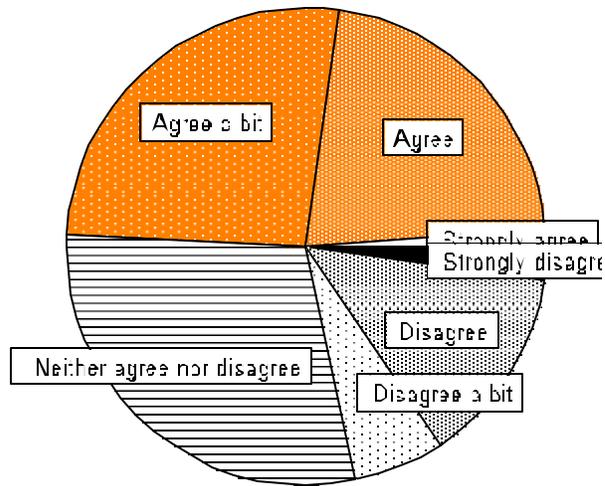


Figure 8.8: **The availability of mediation will greatly improve the quality of child protection services**



Reform Suggestions Offered by Family Parties

Finally, as part of the stakeholder review, the parties who participated in this study were asked their opinions on why so many applications are opposed by family parties. Some were surprised that anyone consented to court applications and some were unaware they had the option to consent. The majority of people spoken with were actively contesting a court application, meaning they disputed the plan proposed by the CAS. Indeed, this sample was drawn purposefully to create a group of highly contested and conflictual cases. As already discussed in Chapter 5, family parties in our study cases were rarely aligned with the plan outlined, did not feel they needed the intervention or assistance of the CAS, and did not feel understood or listened to.

Why were there so many cases caught up in the court system? Principally, family parties felt that the CAS has too much power and this power is exercised outside the public's scrutiny or knowledge. It was suggested by some that the capacity for public scrutiny might decrease the rate at which court applications are sought. Generally, they felt that people like them contested court applications to fight the power of the CAS to make decisions and demands on families that were unnecessary, or were once necessary but not anymore. Comments and frustrations frequently voiced include these points:

- their history is held against them and they get no credit for recent improvements or having overcome past problems

- emphasis is placed on the negatives with little praise or recognition for the positives
- it is common view that many workers are young and inexperienced and have unrealistic expectations because they are not themselves parents
- the “goal posts” move: the family meets defined expectations and then more expectations are defined
- clients are judged and scrutinized but not helped or assisted to solve their problems
- the intent of court applications is to make people “look bad” to the judge and applications may contain distortions and inaccuracies
- view that poor families are discriminated against for being poor or poor parents are expected to be bad parents
- view that poor families are subject to more intrusive interventions because they do not have the financial capacity to fight the case in court like rich families do
- a CAS history (e.g., as a ward) is used against them to suggest they will inevitably be bad parents
- the number of expectations such as programming is so onerous that it is unrealistic to complete them all
- being the victim of domestic violence is used against mothers even when their children were never exposed to it or if the violence was in the past
- different workers have different demands and expectations
- programs are recommended more because they are available rather than they match the needs of the client

It is also a fairly common view that the CAS profits from apprehending children and placing them in care.

The issue of community resources was also raised. Clients may be told to get counselling and do programs, but the counselling can cost money and the programs are often not available. Clients have expectations that CAS workers are counsellors and can help their children with emotional or other problems. They wish the CAS were better able to provide the counselling to help to their children rather than having to find another place for counselling. They feel judged because

their children have problems but do not believe their children get sufficient assistance with those problems. In other words, unless they are able to access community resources, the problems do not get addressed.

Finally, the presence in the sample of two parties affected by complete deafness afforded an opportunity to see the challenges faced by deaf families who are involved with the CAS. Even among people raised in Canada, English is a second language to those who speak American Sign Language. Writing notes back and forth is not substitute for trained interpreters. In one family, a toddler was apprehended because of a misunderstanding in translation. A deaf family who attended mediation completely misunderstood what they had “agreed” to. A common problem was the difficulty of securing sign-language interpreters in a timely manner, because there are so few in this area. Communication disabilities is only one category of vulnerability to be accommodated in the specialized area of child protection mediation.

Chapter 9

Overall Reflections

The intent of this project was never to give “thumbs up” or “thumbs down” to the concept of child protection mediation. Over the next few years, it is likely to become available in many if not most parts of Canada. We set out to examine mediation from the perspective of many stakeholders, including the children. Some proposed benefits of mediation were confirmed, while our experience suggests that some proposed benefits may be more challenging to attain. Overall, mediation is one of several alternative dispute resolution strategies that can give parties a “third option” when they disagree with a proposed plan of a child welfare agency. We present findings in the context of “lessons learned,” so communities can realistically assess the benefits of mediation and approach its implementation in a planned way involving all local stakeholders. These 10 observations comprise our overall reflections on London’s experience using mediation.

1. Mediation is not the panacea to cure court backlog

Efforts to address the backlog of CFSA cases in the family courts could profitably include mediation. However, mediation on its own is unlikely to make an enormous difference. Our experience suggests that the majority of court applications will not be amenable to mediation. Indeed, it is largely for this reason that we recommend strongly against enshrining mediation – in the form tested here – as a mandatory requirement for all court applications. Moreover, as stressed in several places already, efforts must be taken to maximize the likelihood of success for mediated cases.

2. Funding must be addressed

Funding for mediation is a salient issue. Lack of funding was cited by many CASs we surveyed as a barrier to using mediation today. Who pays? The neutrality of mediators could be questioned by family parties if the CAS were to fund mediation. Moreover, if the CAS paid for mediation, the financial savings gained by reduced worker time would evaporate. Another option is to have legal aid provide the funding. In nine of our 40 cases, none of the parties would qualify for legal aid, suggesting that up to one quarter of cases might be disqualified from mediation if Legal Aid Ontario is the funding source. Moreover, much of the legal-aid cost savings would also be lost if the cost of mediation were added to the legal aid “tab.” This issue is likely to be the focus of much discussion in the coming months.

3. Training for prospective mediators will be crucial

It would be a mistake to assume that the qualifications, training, screening protocols, and other procedures from general family law mediation can be transferred without modification to this area. The legal context is entirely different, as are the issues under dispute and the client profile. By definition, the children may need the “protection” of the state to keep them safe. Designing and implementing a training regime for prospective child-protection mediators will be a crucial first step in rolling out the availability of mediation.

4. The vulnerabilities of some CAS clients should be safeguarded

Many of the same issues bringing parents to the attention of child welfare agencies – substance abuse, mental health challenges, difficulties with emotional regulation, cognitive impairments, problem solving and social skills deficits – can leave them vulnerable in a process requiring high levels of literacy and the ability to follow and participate in fast-paced verbal discussion of sometimes complex issues. While this is not universally true of all CAS clients, safeguards should be routinely incorporated into the screening, consent and agreement phases.

First, screening can ensure people are not subject to the challenging process of mediation if they are cognitively delayed or experiencing mental health issues that compromise their appreciation of the world around them. Second, precautions can be integrated into the consent process to accommodate literacy deficits and perceptual/auditory learning disabilities by conveying the same information in written, verbal and visual form. A carefully designed video is one option, as we recommend here.

Third, care can be taken in the mediation process to use plain language, in both the verbal and written forms of the agreement. Visual aids like flip charts may be helpful to summarize abstract discussions. Clarifying the meaning of legal terms and social-work jargon can ensure everyone shares the same definitions at the outset. The word “agreement,” for example, sounds friendly and conciliatory. Implicit in the word “agreement,” however, may be the party’s unwitting consent to the very order he or she is opposing. Moreover, it can entail a tacit agreement that the child is in need of protection. The finding of “child in need of protection” was the most common issue being contested by the opposing parties in our study. All these features of the word “agreement” should be clearly explained.

In this study, several people were unable to read the agreement and relied on their memories (sometimes incorrect) of what had been agreed to. Conversely, one couple read the agreement only to learn they had misunderstood what they “agreed” to in the discussion. Predictably, these scenarios are commonly followed by the “agreements” breaking down. As with most members of the general public, the legalistic tone of agreements can reduce comprehensibility. Plain language templates would benefit all parties and decrease the misunderstandings that can lead to agreement break-down.

5. Process is just as important as the outcome

Some goals of mediation may be in contradiction with each other. On the one hand, mediation is touted as being fast and cheaper. On the other hand, it is supposed to increase buy in, build trust, and forge better relationships. Overall, we believe – to maximize the potential benefits of the exercise -- that mediation should not be rushed. The process itself is not just important, it is a key feature of mediation’s appeal as a resolution technique. Focus on haste may leave parties feeling pressured and misunderstood. In short, it may obviate the benefits of mediation by reproducing at least some troubling features of court processing.

6. We need to help people understand the legal process better

Currently, parties who oppose the actions of the CAS have only one avenue available: the courts. Yet, a disturbing proportion of them do not want to be involved with the court and a significant percentage are navigating that process without legal counsel. So here is the paradox. Parties must use the courts to further their immediate goals – getting their kids back, deleting a proposed condition perceived as unfair or pejorative, correcting an error in the statement of facts, etc. – but a disturbing proportion of parties receive no legal advice. For some, this is their choice (because they could qualify for legal aid) while others may feel sufficiently knowledgeable based on past experience. Generally, however, the level of confusion and misunderstanding among the study participants was concerning. Most parties are not seeking their “day in court,” often because they see the courts as biased, primed to side with the CAS against “people like them.” The court process is long and expensive. Few hold out for a trial. At least some of the delay in resolving cases can be related to the time it takes people to figure out what they are supposed to do. Any effort to address court backlog would profitably address the need for information material that help parties understand their options and how to exercise them.

7. The finding of “need of protection” should be discussed beforehand

In Ontario, under current legislation, courts are required to make two simultaneous decisions in response to a CFSA protection application. Before a court can create the order requested, it must be satisfied that the child is in need of protection. This is an important issue to consider for three reasons. First, not every party is aware of the implications of the finding and our experience shows that people who use mediation may be less likely to seek legal advice. Second, some parties who sign mediated agreements are not aware that their signature involves acquiescence to the finding. Third, a feature shared by many of the unsuccessful mediation cases was that the family parties and the workers were out of sync on this issue. The workers were assuming that the child was in need of protection and the mediation would focus on the finer points of wording, conditions, length of order and the like. Some families, on the other hand, were there to question the need for CAS involvement. Highlighting this issue early in the process will have benefits in the long run.

8. The power imbalance is not easily evened

Most of the family parties who attended mediation were aware of the power imbalance between themselves and their CAS workers. Indeed, this stance is a realistic one, because the power imbalance is stark and real. They would be foolish to believe otherwise. At the same time, families who went through the court process were also aware of the power imbalance and did not always see the judge as a person who levelled the playing field for them. A power imbalance is endemic to the situation. It may be unrealistic to expect that mediation can achieve a balance, even temporarily. Sensitivity to this issue would be an important focus of any training designed for prospective child-protection mediators.

9. We need to learn when mediation is the best approach

There is wide-spread support for the concept of alternative dispute resolution as an antidote to the adversarial, lengthy and expensive courts processing. However, mediation is only one of several ADR strategies being promoted and used today. Family group conferencing/decision making, for example, is gaining popularity in child welfare. At the same time, there are some cases in which court processing will be necessary and desirable. Over time, with experience, we will collectively gain a better understanding of what ADR technique is most appropriate for what type of case.

10. Conditions of implementation are important

Like any other intervention, mediation is not inherently good or bad, effective or harmful. What is important is HOW we do mediation. Clearly, based on our findings, mediation can work extremely well and leave everyone satisfied with both process and outcome. That is not the inevitable result, however. We also saw cases where mediation lengthened time to resolution, triggered a deterioration in the worker/client relationship, and drained more resources from the CAS. At a system level, experience in other jurisdictions has shown that mediation can take off and be successful, or it can fizzle. What is the difference? Attention to the who, what, where, when and why of mediation – at the outset – may pay off in the long run with a mediation strategy that meets local needs. Ultimately, we cannot recommend one model of mediation as superior to another. Instead, we end this report by presenting the following checklist as a tool for communities contemplating the adoption of mediation. It can facilitate a group discussion, or perhaps many discussions, on how mediation can add the greatest value to existing services and resources.

London Child Protection Mediation Project

COMMUNITY CHECKLIST²⁴

Child protection mediation can take many forms and its operation will ideally accommodate local needs and access to resources. There is no “one-size-fits-all” strategy. Each community planning the use of child protection mediation is encouraged to review the key decision-making points outlined below. The result will be a mediation plan tailored to local contingencies with the input and endorsement of all stakeholders. Maybe the program will change over time, but starting this way will ensure everyone has the same goals and expectations at the outset.

Who participates in this process?

All stakeholders can/should have representation, including but not limited to these groups:

- the judiciary
- Legal Aid Ontario
- CAS senior management
- CAS front line
- Ministry of Children & Youth Services
- a Children’s Lawyer
- parent’s counsel / member of the family bar
- family-law duty counsel
- mediators
- Band representatives
- advocacy agency for abused women
- mental health / community living agencies
- addictions services
- any funder(s) not included above
- other: _____
- other: _____

Background: Study after study talks about the importance of outreach and buy-in. In this report, we recommend that each community form an advisory committee to guide and monitor operational issues. Mediation programs in some jurisdictions have not been sustained over time, so getting off on the right foot – with shared expectations and assumptions – will maximize chances for long-term success. In a successful pilot in Surrey, British Columbia, local stakeholders spent one year in the planning process.

²⁴ The checklist is also available in a separate document: A. Cunningham & J. VanLeeuwen (2005). *Discussion Guide for Communities Implementing Child Protection Mediation: The Community Checklist from the London Child Protection Mediation Project*. London ON: Centre for Children & Families in the Justice System.

The questions below are organized as **who, what, where, when** and **why** but we begin by suggesting that stakeholders articulate and discuss their assumptions and expectations.

ASSUMPTIONS

To what extent do local stakeholders share assumptions about why mediation should be introduced here? To what extent do local stakeholders share expectations about what mediation can accomplish? Here are some examples of issues for discussion.

- delay / backlog in CFSA court cases is problematic here
- mediation is not a panacea to resolve court backlog and spiraling legal costs
- mediation is not a panacea to reduce worker/client conflict
- not all cases are amenable nor appropriate for mediation
- process is as important as outcome
- ADR techniques are viable alternatives to adversarial court proceedings
- mediation is one method of ADR and it can co-exist with others
- mediation is a voluntary process
- training is important
- outreach is important
- mediation is not appropriate for all cases
- access to legal counsel continues to be necessary in mediation
- some CAS clients have vulnerabilities that need to be accommodated
- the legal process outlined in the CFSA is difficult for many people to understand
- the power imbalance between a CAS and a client is dramatic and extremely difficult to level
- safety of children is the paramount concern
- the child(ren)'s voice should be heard in the process
- other: _____
- other: _____

Consensus may not be required because different people can endorse mediation for different reasons. However, stakeholders should probably be in agreement that there is a problem needing to be addressed (e.g., court backlog, spiraling legal costs, overly litigious mentality, high rates of worker/client conflict, etc.) and that mediation might be “value-added” for your community and its pursuit of solutions.



Just a thought: before you work through WHO, WHAT, WHERE and WHEN, jump ahead to WHY, to discuss which of the many goals of mediation are shared and/or endorsed by stakeholders.

WHO?

These issues address role clarification and division of responsibilities.

Who refers?

Who will identify cases which might be appropriate for mediation?

- judges
- child protection workers
- CAS supervisors
- legal counsel representing CAS clients
- CAS legal staff / department
- CAS clients /self-referral
- Children's Lawyers
- Band representatives
- mediation project staff / coordinator
- other: _____
- other: _____
- other: _____

Background: Many (or most) mediation projects are under-subscribed in that referrals tend to be low. In part, that reflects the fact that not all cases are appropriate for mediation. It is also true, however, that all people in a position to refer cases should understand the referral process, feel empowered to make referrals, and know how to initiate a referral. Also, be aware of how some “referrals” can look like “mandatory requirements” to parties, as when a judge suggests mediation. In two provinces, mediation is overseen by program staff – employees of the provincial justice ministry – who review all court applications and seek the participation of parties in appropriate cases. They may be housed at the courthouse and some will themselves undertake the mediation.

Who qualifies?

Who among CAS clients will qualify or be disqualified from mediation?

Potential inclusionary criteria:

- all parties agree voluntarily
- all parties understand the mediation process
- there is an issue under dispute by at least one party
- there is at least one issue that is amenable to mediation
- no settlement is on the horizon
- all parties have the capacity to participate
- mediation will not jeopardize child safety
- the time to mediate is available vis-à-vis time limits in the CFSA
- no other available avenue is more appropriate (e.g., other ADR technique)
- other: _____
- other: _____

Background: In some U.S. jurisdictions, mediation is mandatory. This may violate the premise that mediation participants have greater ownership over the process and outcome. Also, the likelihood of reaching a viable settlement and gaining compliance with its terms may be lower if participants feel coerced. It can be argued that CAS clients are never entirely free to decline so efforts to secure voluntary consent must ensure parties believe there is no penalty for declining to use mediation. Experience over time will help us understand which cases are amenable to mediation and which are better served by other ADR techniques such as family group conferencing (and which need to be processed through court).

Potential exclusionary criteria:

- developmental delay
- unmedicated psychotic illness
- other mental disorder / disability affecting capacity
- active addiction / untreated addiction
- outstanding / pending criminal charge(s) for offences related to the children
- family violence
- learning disabilities that impair ability to track verbal discussions
- parenting capacity assessment currently under way
- clinical depression / suicide risk
- legal counsel recommends against mediation
- “difficult personalities” unlikely to come to an agreement
- cases that do not have a reasonable probability of agreement
- parents who are minors
- other: _____

Background: The success of a mediation program depends upon selecting appropriate cases and screening out those with low probability of success, in which participants are not “free to bargain,” and in which participants may be vulnerable (e.g., to woman abuse). Parties must have the cognitive capacity to participate in a discussion often involving legal issues, capacity to understand the implications and consequences of an agreement (e.g., when a mediated agreement assumes an admission that a child is in need of protection, when an agreement will form the basis of a court order), and capacity to understand their responsibilities in following through. Ideally (but not inevitably), participants should be able to propose a plan and be able to articulate their opinions and reasons for opposing the CAS plan. Certain forms of mental illness (but not all) can mitigate against capacity to participate. New English speakers will require interpreters and also extra care in explanation of the mediation process and legal implications. For some issues, it is not capacity *per se* but concerns over compliance and follow through with agreed upon conditions (e.g., serious addictions, clinical depression). While support for the idea of screening is near universal, some worry that guidelines could be applied too rigidly. For example, it may not be necessary to routinely disqualifying all cases with domestic violence, if a woman’s safety and interests can be protected (e.g., mediate in separate rooms, permit victim to have advocate in the room). Nevertheless, processing inappropriate cases with low likelihood of success or in which clients are ill-suited to the technique will waste time and resources and potentially delay the process. Indeed, failed mediation *can* damage the worker/client relationship and increase system costs. Some observers argue that everyone should qualify because special protections can be used where capacity is an issue (e.g., lawyers attend mediation) and also because vigorous screening will circumscribe the total number of mediated cases. The skill and experience of a mediator will be an important factor in deciding to include participants whose capacity or vulnerability auger against mediation.

Who screens?

Once criteria are chosen, who applies those criteria to disqualify cases if necessary?

- judge
- mediation coordinator / project staff
- mediator at intake
- CAS child protection worker
- other: _____

Background: Not all referral agents will have enough information to judge if a case is appropriate. The next step in the referral process, therefore, is to screen cases against the eligibility criteria. The person who screens cases must have access to relevant information (such as that which might be contained in a CAS protection file) or access to people who have that information. Another issue is the professional qualifications and experience of the person who does the screening. Should that person have a social work background, because screening requires the application of clinical judgment? At this point in the referral process, it is also possible to consider if another type of ADR (e.g., family group conferencing) is more suitable for the case, so this person should be familiar with those options, if available.

Who coordinates?

Once a case is selected for mediation, who organizes the logistics?

- mediator
- mediation coordinator / project staff
- child protection worker
- CAS administrative staff
- other: _____

Background: In London, each case selected for mediation required an average of 11 hours to contact parties, explain the process, secure consent, assign mediators, organize transportation, serve as the contact person for questions, and process bills related to the expenses incurred. Each case required on average five letters, 23 telephone calls, three faxes to parties including lawyers, seven e-mails and, in some cases, home visits. In addition, the mediators themselves spent time contacting parties, coordinating attendance by multiple parties at intake and mediation, re-scheduling missed meetings, and other administrative tasks not directly involving mediation. These responsibilities should not be off-loaded to child protection workers. Their time with clients is already limited and they may be reluctant to recommend mediation if expected to absorb these administrative tasks. It should be noted that these tasks are distinct from the screening tasks, which require an intimate knowledge of the child welfare system and the needs of child welfare clients. Deciding who undertakes the coordination may have cost implications.

Who mediates?

Who will undertake the mediation?

- private practice mediators (of various professional backgrounds)
- private practice lawyers with mediation training
- mental health professionals with mediation training
- staff mediators (e.g., employees of MAG or MCYS)
- staff mediators in the employ of the CAS
- Legal Aid Ontario official
- judges
- respected community member or elder
- other: _____
- other: _____

Background: Two issues predominate here: training and neutrality. There are few trained child-protection mediators in Ontario, especially outside the metropolitan areas. Even experienced family mediators need specialized training in and knowledge of the child welfare system and the needs of its clients. (Training is discussed in greater depth later.) The low rate of referrals expected in most areas suggests that gaining experience through practice may be a slow process. Some Canadian jurisdictions have staff mediators, employees of the provincial justice ministry. Such a model would permit centralized training and

standards and even, potentially, the idea of mediators traveling through remote areas on a circuit. Mediators must be not only independent and neutral, but must appear to be independent and neutral. Lawyers who represent CAS clients or who work for the CAS on a fee-for-service basis may not be seen as independent. In some areas, such as New Zealand, judges oversee the mediation.

Who attends?

Who should be at the mediation table?

- Mediator
- CAS client(s)
- child protection worker
- Band representative (if applicable)
- interpreter (if required for language or communication disabilities)
- CAS supervisor of the worker
- CAS staff member assigned to attend mediations and approve agreements
- client's legal counsel
- duty counsel
- CAS legal counsel
- foster parents
- child(ren)
- Children's Lawyer
- other family members (e.g., extended family)
- advocate for family parties (e.g., therapist, woman abuse advocate)
- other: _____
- other: _____

Background: At the table should be all parties whose input and agreement is required, both to make an agreement and to support the agreed-upon conditions over time. The Children's Lawyer could bring the child's voice to the table. Older children might themselves attend, in certain types of cases. Also, some CAS clients may require an advocate or extra support, such as a therapist or woman abuse advocate. The CAS supervisor must be consulted anyway so his or her presence may speed the process. In B.C., a "Court Work Supervisor" is a senior CAS staff member who attends all mediation sessions and has the authority to approve agreements. Clients should consult legal counsel before agreeing so again their presence may speed the process. On the other hand, too many people at the table makes the mediation unworkable and some worry that the presence of lawyers will detract from the ability of family parties to derive the full benefits of the mediation process. Also, mediation needs to be different than a settlement conference. Key players such as legal counsel and CAS supervisors can be available by telephone during the mediation or another session can be scheduled to give time for consultation as required. Some of these decisions have cost implications.

Who pays?

Who will fund the mediation sessions and/or administration?

- CAS (_____%)
- Legal Aid Ontario (_____%)
- Ministry of Children & Youth Services (_____%)
- Ministry of the Attorney General (_____%)
- clients (sliding scale)
- other: _____

Background: Our data suggest that mediation might average 9 hours of time for the mediator and 11 hours for screening, coordination and administration. Other costs can include transportation and child care. Many CAS clients either do not qualify for legal aid or choose not to apply. If at least one party must be legally aided, many cases would be disqualified from mediation. Clients need to feel that the mediator is independent, a feeling which may be compromised when the CAS pays mediators. While mediation may save system costs in the long run, it is necessary to identify a funding source for today.

Who oversees?

Who will be ultimately responsible for keeping the mediation project process on track?

- chair of local advisory committee (or designate)
- a mediator
- project staff / coordinator
- CAS senior manager
- Representative of funder
- other: _____

Background: Role diffusion might derail a mediation project if no one is “in charge” or is known as the “go to” person to answer questions and take referrals. The inevitable turnover of representatives of the key stakeholder agencies means that outreach and education is an on-going process. Vest in one person (or role) the ultimate responsibility for daily operational matters and tasks such as outreach.

Who monitors?

Who will monitor how mediation is meeting our shared goals and expectations?

- chair of local advisory committee (or designate)
- a mediator

- project staff / coordinator
- independent consultant
- representative of funder
- no one
- other: _____

Background: Especially in the start-up phase, monitoring both process and outcome will generate feedback for stakeholders, identify problems, and generally facilitate transparency. It may be possible (subject to privacy laws) to provide feedback to referral agents about outcome and feedback to mediators about how cases progressed after the agreement. Such feedback helps refine practice. Monitoring tasks might include recording various performance indicators (key dates, number of mediation sessions, outcome of mediation, outcome in court), seeking feedback from participants, or follow-up on case developments. The person who monitors these operational matters would ideally be independent of the service delivery component. For example, it might be problematic if mediators were to collect client satisfaction feedback. This role may be filled by the same person who oversees the project in general.

WHAT?

What barriers?

Do any of these factors impede our ability to introduce mediation to this community?

- no funding
- no sustainable funding
- lack of trained mediators
- dealing with transportation and extending access to remote areas
- lack of cooperation of judges to adjourn cases pending mediation
- lack of cooperation of family bar to agree to adjournments
- lack of support / interest by key parties required for participation
- privacy laws re: disclosure of third-party information by CAS (e.g., assessments)
- high rate of unrepresented parties
- a paucity of appropriate cases
- power struggles over ownership
- other: _____
- other: _____
- other: _____
- other: _____

Background: Both prior research and our own experience suggest that implementing mediation can be plagued with problems such as low referrals, lack of buy-in, in or even outright opposition. Problems to avoid include role confusion, role diffusion, off-loading tasks inappropriately, and under-resourcing the administrative / coordination functions. Identifying and addressing barriers at the outset will help the mediation project avoid these and other pitfalls.

What worries?

Are there any concerns that need to be voiced and discussed?

- the voice of the child may get lost
- agreements might be compromised that jeopardize child safety
- the power imbalance between a CAS and its client is too stark for mediation
- neutrality / experience / skills of mediators
- time limits under the CFSA for children in care
- time limits under court rules
- duplication of other avenues of resolution such as settlement conferences
- potential to coerce CAS clients to participate
- extension of time to case resolution if mediation is not successful
- privacy laws may be compromised
- not having enough cases to make a mediation project viable
- non-compliance / follow-through by clients / plans breaking down
- most cases will be screened out as inappropriate
- clients who are not “high functioning” or well educated or are disadvantaged in a process that requires the ability to follow verbal debate
- potential to undermine a worker’s professional role with family
- potential to use mediation as a delaying tactic
- not enough protection of worker from exposure to liability
- other: _____
- other: _____
- other: _____

Background: The introduction of any new technique will inevitably be met with reticence in some quarters. Most stakeholders will have at least a few concerns. Putting them on the table permits open discussion and dialogue. Concerns identified at this point can be incorporated into any monitoring scheme (as discussed later). Also, strategies can be developed to address or avoid any of the potential problems identified.

What disputes?

Which type of disputes will be mediated?

- contested court applications
- client complaints (e.g., request for change of worker)
- adoption-related issues
- contested aspects of plans of care
- conditions of special needs agreements
- conditions of visitation and access
- conditions of voluntary service agreements
- kinship care arrangements
- other: _____
- other: _____
- other: _____

Background: Mediation is amenable to resolving a variety of “disputes” beyond those associated with court applications. Depending upon the shared goals and terms of funding, however, some communities may limit the use of mediation to contested court applications, particularly when mediation is adopted to address court backlog and reduce legal costs. In addition, clients can seek legal aid only if there is an active court application. The input of Children’s Lawyers requires a court order (although this may change if Bill C-210 passes) . Some client complaints may not be amenable, such as disagreements over the findings of an investigation. However, mediation could be added as an option to the hierarchy of complaint resolution strategies, perhaps between the review by a senior manager and review by the CAS Board of Directors.

What applications?

Which type of court applications will be considered for mediation?

- all applications / no restrictions
- new or status review applications for supervision orders
- Society wardship applications
- Crown wardship applications with no access / contact contemplated
- Crown wardship application with access provisions
- adoption applications
- other: _____

Background: Supporters of child protection mediation posit that it can be used in all types of applications, even those which contemplate the termination of parental rights.

What issues?

- physical harm by commission (e.g., physical abuse, inappropriate discipline)
- sexual abuse
- harm by omission (e.g., inadequate supervision, neglect)
- emotional harm
- abandonment / separation
- caregiver incapacity
- finding of child in need of protection
- parent / child conflict
- serious / sadistic physical abuse
- homicide
- other: _____

Background: In some jurisdictions, cases with certain issues are screened out or mediated only with great care, such as sexual abuse, serious physical abuse, or homicide. Only very experienced mediators, ideally with a clinical mental health background, should attempt mediation in such cases. Some also worry that clients with a history of neglect and low parenting capacity may have difficulty following through on conditions. It is widely acknowledged that mediation is not an appropriate venue to determine if a child is in need of protection. In the London pilot, this issue was often brought to the table because clients contested the court application primarily for this reason. Where a mediated agreement involves a tacit finding that the child is in need of protection, the clients must fully appreciate that fact.

What confidentiality?

How will confidentiality be dealt with?

- open mediation
- closed mediation
- semi-open mediation

Background: Family mediation is typically open or closed. In closed mediation, everything said at any point is confidential and cannot be used later in court. While some observers see this as the desirable option, child protection agencies are unlikely to endorse closed mediation because they may hear information that reflects upon child safety. In open mediation, anything said at any point is fair game for later use. The model that predominates in child protection mediation in Ontario is that of semi-open mediation. Anything said to the mediator in prior discussions is confidential (subject to reporting requirements under the CFSA) while anything said during mediation sessions can later be used in court. This is often, but not inevitably, linked to an understanding that the mediator him or herself cannot be called as a court witness by any party. The confidentiality provisions are typically spelled out in a pre-mediation “contract.” Use of plain language in both written and verbal explanations is highly recommended, especially in light of research finding that participants in child protection mediation often fail to understand the confidentiality agreement.

What features?

Which of these common features of mediation models will be adopted here?

- mediation as a voluntary process
- mediator as a neutral facilitator of discussion
- neutral location for mediation sessions
- neutral funding source
- opportunity for clients to meet with mediator prior to mediation
- pre-mediation contract spelling out confidentiality, etc.
- "ground rules" clearly spelled out
- agreed-upon measures provided to all parties in written form
- no agreement is binding until parties can review with counsel
- opportunity to consult legal counsel prior to signing agreement
- mediator not to be called as witness
- other: _____
- other: _____
- other: _____

Background: There are various components to the mediation process, many of which are spelled out here. An important issue overlaying the process is that of informed consent: participants must be free to decline, understand the implications of participating (and declining), know their rights, and believe they can terminate the process at any point with no penalty. Plain language is desirable for all informational material, contracts, and in the agreement itself. In addition, all written material should be relayed verbally. We found in London that many mediation participants had literacy deficits and/or learning disabilities. Cultural interpreters should be used whenever necessary.

What information?

What information will be provided by the CAS to the mediator?

- nothing
- the application before the court
- the respondent's answer to the application
- the respondent's proposed plan of care
- most recent CAS plan of care
- results of any pertinent investigation
- access to the full CAS file
- other: _____

Background: To maintain neutrality in the process, the mediator need not be apprised of the entire case history. However, it is helpful to understand the issues immediately under dispute. An important consideration here is that of privacy, especially as it relates to disclosure of information about people who are not parties to the mediation. Parties at the mediation table will also want to preserve their privacy as far as possible. Some material in a CAS file will contain information about third parties or assessments provided with the understanding that the report will not be passed along. It may be logistically difficult for the CAS to provide the client's answer to the application, because it is contained in the court file. Clients might be asked to provide their answers or other documents directly to the mediator (if desired).

What qualifications?

What credentials and education will the mediators possess?

- a professional degree or equivalent experience
- a graduate degree or equivalent experience
- accreditation designation with the Ontario Association of Family Mediation
- 40 hours of training in family mediation
- 20 hours of family mediation skills training
- completion of 5 family cases under supervision to the point of agreement
- completion of 20 family cases to the point of agreement
- professional liability insurance
- access to a neutral and convenient location to conduct mediation
- other: _____

Background: There are core skills required for family mediation, including screening, setting the agenda, prioritizing issues, helping parties identify their positions and interests, focussing discussion on the child's best interests, managing family conflict, conflict resolution, understanding models of negotiation, addressing power imbalances, appreciating the psychological factors in divorce and separation, communication skills (clarifying, re-framing, probing, etc.), and recognizing domestic violence. Accreditation is now available through the Ontario Association of Family Mediation, and attainment of this accreditation could be the principal criterion to select mediators. Or, the equivalency of the accreditation standards could be the criterion (core training, skills training, number of supervised cases, number of completed cases). Setting the requirements too high will exclude many good candidates, such as people who are respected in cultural communities. In rural and remote areas, finding mediators may be difficult. Setting the bar too high may increase that difficulty. On the other hand, it is desirable that people undertaking mediation have a base set of core skills and knowledge and conform to a code of ethical conduct such as that defined by the Ontario Association of Family Mediation.

What knowledge?

What specialized training and knowledge should be required for child protection mediators?

- skills in recognizing and addressing power imbalances in the CAS context
- knowledge of local resources for children and families
- knowledge of the CFSA and the legal processes it defines
- thorough understanding of the duty to report child abuse
- knowledge of the court rules pertaining to child welfare matters
- understanding of the mandate of the CAS
- knowledge of child development and the needs of children of different ages
- knowledge of the profile and needs of maltreated children
- knowledge of the dynamics of family violence and its effects on children
- knowledge of the dynamics of sexual offending and child sexual abuse
- knowledge of the dynamics of physical abuse
- knowledge of the dynamics of child neglect
- knowledge of addictions and mental illness and their effects on families
- cultural issues important in our community
- other: _____

Background: Even people well experienced in family mediation will need specialized knowledge of the child protection context. Accordingly, after defining the basic expectations and qualifications, the next step is to define the specialized knowledge and skill areas. It may be helpful to contemplate where training might be acquired, especially at this early juncture in the evolution of child protection mediation. Work experience might be the best indicator. Florida has a certification program for child protection mediators. Perhaps such a system will develop in Ontario over time.

What protections?

What protections will be available to safeguard the interests of vulnerable parties?

- cultural interpreters
- use of plain language in written material including contracts
- use of plain language when writing up the agreement
- conveying information in multiple modalities (e.g., written, verbal, graphically)
- matching specialized training or expertise of mediator to case
- reimbursement of clients for expenses (e.g., transportation)
- assistance with transportation in remote or rural areas
- accompaniment by advocate (e.g., support worker)
- home visits for intake
- clarifying definitions of key terms at the outset

- attention to process and pace over outcome and haste
- other: _____
- other: _____

Background: The exercise of mediation pre-supposes that all parties understand and can participate in verbal discussions and negotiations. Primary among the tasks of a child protection mediator is attention to the stark power imbalance. Expect that some parties will be also challenged by factors such as youth, perceptual learning disabilities, attention deficits, English as a second language, cultural factors, the effects of psychotropic medication, borderline cognitive functioning, health problems, or limited financial means. Efforts to attend to such vulnerabilities will involve careful screening, effective intake, attending to process, and potentially some special accommodations.

What outcomes?

What variables should be measured to facilitate effective monitoring of mediation?

- referral rate
- proportion of referrals disqualified
- reasons cases disqualified
- proportion of referrals in which clients decline mediation
- reasons clients decline mediation
- settlement rate
- compliance with conditions
- satisfaction of parties
- perception of parties about the power imbalance
- length of time to resolution
- costs
- number of trials
- other: _____
- other: _____
- other: _____

Background: There are many reasons to collect feedback on desired outcomes, including transparency and accountability. Refinement and improvement to the process can also be facilitated. Refer to the goals you define for mediation (see "WHY?" below) and outline a measurable indicator for each goal that is important in your community. Also, refer to any concerns stakeholders voiced in an earlier section. As suggested above, identify who is responsible for collecting this information.

WHERE?

Where mediate?

At what location will mediation take place?

- mediator's office
- courthouse
- CAS offices
- other local agency with space
- other: _____

Background: The most crucial factor in choosing a venue for mediation is neutrality. For this reason, try and avoid holding mediations at the CAS or, arguably, at the courthouse. In rural or remote areas, the choice of venues could be limited and participants may be travelling from far afield to a central location. Find a location that is mutually convenient. A venue should be accessible to the handicapped and conveniently located vis-à-vis public transportation. In the London pilot, the facilities of a hotel were sometimes used as well as an office of a community agency.

Where locate?

Especially if a staff model is chosen, where should the project staff be housed?

- courthouse
- CAS premises
- independent location
- other: _____

Background: Neutrality is important here but there are also logistical concerns. In some areas, project staff have an office at the courthouse and also can spend time at the child protection office. Convenient access to CAS workers and information that aids case screening is also helpful.

Where train?

- CAS child protection curriculum
- professional development at agencies
- law schools
- college and university diploma and degree programs
- continuing education programs
- other: _____

Background: Access to relevant training may well be one of the most salient barriers as child protection mediation is rolled-out across the province. Most of these issues will be beyond the scope and reach of a local advisory committee, but some thought can be given to how best to encourage availability of this specialized training in all parts of the province.

WHEN?

When refer?

At what point(s) in the court-application process can mediation be contemplated?

- prior to application being launched
- after application is launched
- after parties indicate they are not consenting to application
- only after a finding of child in need of protection
- after respondent(s) files an answer
- only after settlement conference does not end in agreement
- only after case scheduled for trial
- any point: no restrictions
- other: _____

Background: Generally, it is believed that the earlier the better. A timely mediation at an early point in the proceedings will speed resolution and avoid the entrenchment of positions that can occur as court drags on. Mediate too early and you spend time and money on cases that were going to settle anyway. Also, it can be helpful to have at least a draft court application as a basis for discussion. Currently, parties will not qualify for legal aid until an application has been launched and Children's lawyers cannot be involved until there is a court order for children's representation.

WHY?

Which goals are important in your decision to make mediation available?

- improving worker / client relationships and communication
- reducing CAS legal costs
- reducing the backlog of CFSA cases in the family courts
- reducing legal aid expenditures
- shortening the time to case resolution
- giving clients space to air their perspectives
- increasing compliance by clients with conditions
- reducing the number of trials
- increasing satisfaction of client with process and outcome
- other: _____
- other: _____
- other: _____

Background: Proponents of child protection mediation posit many benefits, but research shows that mediation may be better suited to meeting some goals than others. Some goals may be in contradiction (e.g., being quicker and giving clients as space to be heard). Be realistic in selecting goals and find ways to measure your success in meeting them. Identifying goals is the first step in any evaluation scheme. The second is to re-state them to be measurable. Next, integrate into daily operations the ability to collect data on the measurable indicators of your goals.

APPENDIX A

Methodology

The research component was designed to answer the process and outcome questions defined during project development. We compared case outcomes, safety of children, satisfaction of parties, time lines, and costs of mediated cases against a group of similar cases processed over the months immediately preceding the availability of mediation. We also captured the opinions of involved parties and broader stakeholder groups. Throughout, the ethical protections used by the Centre for Children and Families in the Justice System were applied.²⁵

Data Sources

Information was collected from a variety of sources:

- survey of CAS staff (front-line and supervisors) to ascertain views of mediation before it was available and again after a period of its use
- review of CAS computerized data base (IFFRS) for demographic data on each child, Eligibility Spectrum ratings of the Ontario Risk Assessment Model, etc.
- review of CAS court files for data on the court application, dates of key junctures in the process (e.g., first appearance), number of appearances, history of involvement with CAS, and other court process information
- review of CPW files for post-mediation/court for follow-up to measure subsequent allegations, decisions made at expiry of supervision order, etc.
- interviews with adult parties before court/mediation and after court/mediation
- logs of time spent by CAS legal staff (lawyers and administration staff), CPWs, and process servers to measure court-related costs incurred by the CAS and also bills for outside counsel used for trial preparation and trials

²⁵ For information on the ethical protections used by the Centre for Children & Families in the Justice System, see A. Cunningham (2003). *Ethical Practice: Principles and Guidelines for Research with Vulnerable Individuals and Families*. London ON: Centre for Children & Families in the Justice System. This document is available at www.lfcc.on.ca

- case-specific feedback from parties involved with mediation from CAS worker
- collection of costing data provided by Legal Aid Ontario, Duty Counsel, and the Office of the Children's Lawyer
- general feedback from stakeholder groups about mediation

In addition, a literature review was conducted with a particular focus on previous evaluations.

Choice of Methodologies

A number of factors shaped selection of the research strategies used here. For utility of the results, it was necessary to have a base of comparison against which to judge mediation, to track cases over time to measure agreement compliance and durability, and to move beyond settlement rates and cost as outcomes to measure impact on children and any compromise to their best interests. Parameters at work included an expected small number of appropriate cases (and hence a slow pace of appropriate referrals being made), the typically lengthy period between first appearance and final disposal of contested court applications, the desire for a one-year follow-up, and the need to study cases prospectively for the time study. This last parameter obviated the possibility of using a retroactive file review to craft a comparison group. The other parameters collectively determined the time lines of the project. It became apparent that the pace of appropriate referrals was slower than originally anticipated, and the length of court processing was greater.

Comparison and Mediation Groups

A key component of the study involved a contrast of mediated cases with a similar group of cases processed through the court in the usual way, called here the comparison group. All cases, true of either group, were studied prospectively to collect time-usage data from CAS staff and opinion feedback from families. It was desirable that the mediated and comparison cases be drawn from a similar time period to reflect the same legal and policy context.

Comparison vs Control

A control group is created when the researcher can control who is assigned to which group in a way that ensures the groups are equal in every way except the intervention received. The best way to make a control group is to use random assignment (like flipping a coin). The law of probability will ensure that, over the long run, half the group members will be male and half will be female (assuming the groups are intended to reflect a larger pool with a 50:50 sex breakdown). All the other variables, even those not recognized as important in influencing outcome, will likewise even out between the two groups, if the groups are big enough. In this

way, any differences between groups on outcome variables can be unambiguously attributed to the intervention.

While use of a *control* group is the gold standard in outcome evaluations, it was decided not to use random assignment to shape the two study groups. With such small numbers – each group expected to be no larger than 25 cases – random assignment could not create two groups equal in every way. Using random assignment would have created no benefit while possibly creating resentment among some members of our stakeholder groups. The other common technique to craft a control group – matching cases on key variables – is not possible in a study with so few appropriate cases. To use matching, you need to know what variables are important to match, and you need to have a large flow of cases from which to pick and potentially reject cases.

In consequence, it was decided that a *comparison* group would be used. The key difference of a comparison group, vis-à-vis a control group, is that the researcher is not able to manipulate group membership to ensure precise comparability between the groups. Identical eligibility criteria were applied to both groups, all comparison group parties who were interviewed indicated a willingness to use mediation (had it been available), and the cases were processed in a similar time period. Nevertheless, the two groups are unlikely to be identical. Observed differences between the two groups are discussed in Chapter 5.

Comparison Group

All eligible cases were directed into the comparison group beginning in October of 2002, until January of 2003. We started the project by identifying cases for the comparison group because, with a one-year follow-up on the horizon, it was expected that the comparison cases would take longer to conclude than the mediated cases. The size of the comparison group is 20 cases.

Mediation Group

Beginning in February of 2003, all appropriate cases were inducted into the mediation group until a sample of 20 was achieved. At that point, it was necessary to end intake into mediation because of project time lines, already extended by one year to accommodate the slow pace of referrals.

Intake Interviews

At initial referral, true of cases in either the comparison or mediation group, the parties were interviewed by the Research Coordinator. A total of 58 parties were interviewed, almost all of them at home.²⁶ The purpose of this initial interview was two-fold: 1) to explain the study and

²⁶ An additional two parties were interviewed in a case that was later disqualified, but their information is not being included in the study.

secure consent to participate; and, 2) to ascertain views on the disputed issue before the courts. Interviews usually lasted between one and two hours but did stretch to 3.5 hours when parties expressed a desire to discuss their opinions at length. Parties are provided with an honorarium of \$25 to compensate for their time.

Securing Consent to Participate

During this initial interview, the research project was explained to the parties. While the Project Coordinator had previously secured consent to be contacted by a researcher, they were free to decline participation at this or any subsequent point. Before consenting to participate, they had to fully understand what the study entailed, their expected roles, and the measures used to protect their rights. They must also have understood the concept of mediation and be willing to consider it as an option to resolve their disagreement with the CAS. Members of the comparison group were told that mediation was not yet available but they were free to use that option in the future should they find themselves contesting an application before the project ends. Members of the mediation group were given a more detailed description which highlights the voluntariness of the measure, the impartiality of the mediator, the role of legal counsel, and the process that unfolds after an agreement is reached or if an agreement is not reached. They were told that the mediator would answer any questions before the mediation.

All these topics were explained verbally and in a five-page summary document which the parties kept. To accommodate for literacy deficits and learning disabilities, reliance was never made on written material alone. The process of explanation and consent seeking was designed to address both routine ethical concerns and those inherent in a study of this vulnerable group. Routine issues are informed consent, voluntariness, anonymity, confidentiality (within the limits of the *Child and Family Services Act*), clearly articulated expectations, and protections from harm. Special issues given the nature of this project were the need to highlight the independence of the research team from the CAS (acknowledging the role of the Project Coordinator who had an office at the CAS), assurances that opinions and information would not be reported to the CAS (absent concerns that a child is at risk), a clear understanding that declining involvement would not be viewed negatively or hurt their case with the CAS, and a clear understanding that participating would not help their case with the CAS. Everyone was asked to sign a consent form.

Family View of the Matter Before the Court

Once consent had been secured – occupying at least half the time spent with the family — the interview turned to the court application. They were asked about their current status with the CAS and their understanding of the material in the court application. They were then asked for their views of the CAS position and what position they would argue for if the case proceeded to trial. The next questions focussed on their feelings and opinions about the case being processed through the courts, whether they had legal representation, and the nature of the relationship with their CAS worker, including helpfulness and communication. Finally, a questionnaire was administered to measure opinions about their understanding of the issue before the court,

various aspects of their communication with the CAS (clarity, active listening, trust, etc.), and views of the court system as a means of resolving the dispute. This questionnaire was also used for members of the mediation sample with the additions of three questions pertaining specifically to mediation. Some of these questions were asked again at case resolution.

Post-resolution Feedback

Cases were tracked by the Project Coordinator until a final order was reached, either as a result of settlement, trial or after mediation. At that point, the feedback from involved parties was sought.

Post-Settlement or Post-Trial Interviews with Families

After conclusion of cases in the comparison sample, the families were again interviewed. Questions focussed on the costs they incurred, the role of legal counsel, their opinions about the outcome, and hopes for the future. To measure pre/post changes in opinions and attitudes, a survey was completed which included some of the same questions as in the intake survey.

Post-Mediation Interview with Families

Once cases in the mediation group concluded with a final court disposition, parties present at the mediation were again interviewed, asked many of the same questions just listed for the comparison group. Additional questions were designed to solicit opinions specifically about the mediation. They were also asked for a prediction about compliance by all parties, to identify the most helpful and unsatisfactory aspects of the mediation, to identify anything for which they had not been prepared, and whether they would recommend mediation to a friend.

Post-Mediation Survey of CAS Workers

At the same point in time, a survey was administered to the CPW who attended the mediation. As the families are re-assured at the outset, worker feedback focuses on views of the process rather than views of the family. Their opinions were sought on such issues as the appropriateness of the case for mediation (in retrospect). They were also asked about their perceptions of any power imbalance, whether the child's voice got lost in the process, the greatest obstacles to getting an agreement, reasons posited if no agreement was reached, predictions about compliance with the agreement, and their willingness to use mediation in the future or recommend it to a colleague.

CAS Staff Survey

Another source of information came from surveying CAS staff to gauge their opinions about mediation within the context of child protection. The survey was distributed through

supervisors during the early weeks of 2003. The topics addressed in the 26 items were selected based largely upon a literature review and discussions with CAS staff about what might be seen as strengths and weaknesses of the concept of child protection mediation from the view point of a CAS worker. Completed forms were received from 76 staff including 14 supervisors/managers. Most of them (62%) had attended a half-day information session about the mediation project. However, aggregate responses did not vary between attendees and those who did not attend. This is attributed to many staff presentations made by the Project Coordinator in a variety of contexts in the project development phase.

The goal of this survey was two-fold. First, the cooperation of CAS staff is crucial to the success of mediation, both in making referrals and in agreeing to be involved in mediation sessions. Understanding their views will help allay any concerns about mediation that might act as a barrier to referrals or involvement. Second, this survey was re-administered after the mediation had been in use for a period, to determine if experience with mediation changed prevailing attitudes.

File Review

Background information was collected from CAS files about the issues that form the basis of the court application and about key aspects of the court processing. Three file sources of information were used: the on-line IFFRS data base; the court file compiled by the legal department; and, the case file maintained by the child protection worker. Key dates were noted to aid in measuring time lines.

Tracking of Costs

In relation to cases in both the comparison and mediated groups, the following information was collected. Costs borne by the CAS were measured in these ways:

- child protection workers tracked court-related time on each case (and time specifically related to the mediation if applicable)
- the CAS legal department logged time spent by staff lawyers and legal secretaries
- the costs of out-side legal counsel were measured by accessing the bills submitted by these lawyers
- process servers logged time on the cases identified to them as part of the research

Other legal costs which were measured were:

- the Office of the Children's lawyer provided the costs of the children's lawyers on each case
- Legal Aid Ontario provided the costs of legal aid certificates on cases under study (and therefore not including the costs of administration and case processing)
- duty counsel files were accessed to measure the rate of usage and permit an estimate of cost

In the end, it proved unfeasible to track the number and type of court appearances because so many of the comparison cases were handled by outside counsel.

Costs borne by the parties were measured by asking them for estimates of what they paid or lost on:

- privately retained lawyers (if applicable)
- out-of-pocket expenses such as missed work, transportation costs, child care, etc.

For the mediated cases, the cost of the mediation is factored in, as well as the cost of managing the case from referral, case vetting, contacting parties, arranging mediations, and payment of associated bills.

Feedback from Stakeholder Groups

As already noted, we ascertained the views of CAS staff by repeating a survey first administered early in 2003. In addition, feedback was sought from provincial bodies such as Office of Child and Family Service Advocate, the Ontario the First Nations Child and Family Caring Society of Canada, and the Child Welfare League of Canada. Finally, a survey was conducted of children's aid societies in Ontario about current and anticipated use of mediation.

Follow-up of Cases

Information was again collected six and 12 months following case resolution. Specifically:

- current status of CAS file (open or closed)
- changes in custodial arrangements/residence for children
- any new allegations/referrals

- any new substantiated events of abuse
- need to apprehend any child
- changes (up or down) in intrusiveness of CAS intervention

The information collected in the follow-up was designed to address the research questions addressing durability of agreements and on-going safety of children.

APPENDIX B

Factors Potentially Driving Increases in Contested Court Applications

Decision-making to Reduce Exposure to Liability

The 1997 *Report of Child Mortality Task Force*, numerous inquests into child deaths in Ontario, and the criminal prosecution of a child protection worker in Toronto, have dramatically impacted CASs and their staff. The message clearly communicated by these developments is that the community expects greater vigilance in protecting children. As CAS staff become more concerned for personal legal liability, so have we seen an increased use of legal consultation and court processes to manage risk.

Fewer Support Resources for Families outside the CAS

Government social and economic policies in recent years have reduced the access for families to support and counselling services in the community. Reductions in financial support to families through Ontario Works and Family Benefits have left families with fewer resources to meet their needs. When problems cannot be prevented through timely and early intervention, deep-end services such as child protection may eventually be required.

Increased Seriousness and Complexity of Family Needs

Children's Aid Societies are reporting more substance addiction, mental health problems and family violence among its clientele. A substantial portion of cases have multi-problem families which require sophisticated interventions.

New Court Rules

The 1999 changes to the Court Rules considerably increased the complexity of the court process and the volume of legal documentation for all parties. One consequence has been a downloading of administrative tasks to Children's Aid Societies in the preparing of court materials, tasks that were previously managed by the Court. The Society is responsible for the management and continuous update of the court record before the Court and the drawing up of court orders.

Extensive information is required by the court on each application, usually in the form of an affidavit outlining historical and current concerns, and plans of care. The rules introduced more forms and longer forms. The introduction of replies or "answers" from parties under the Court Rules has contributed to delays in cases. Many people do not realize they must make an answer or do not know how to go about doing so. Numerous affidavits must typically be prepared on

each case. Briefs are normally required on all contested matters. In addition, motions may be brought forward by parties that require attendance at court and prepared material. The preparation of these documents consumes a great deal of time.

Amendments to the Child & Family Services Act

In 2002, the threshold for intervention by a CAS was lowered and the definition of “child in need of protection” was broadened. The time that can elapse before a case must move to Crown wardship application for children under six was shortened, perhaps contributing to more trials and an increase in the number of Crown wards in care. The amendments limited the use of Temporary Care Agreements for working with families, as time in care under a TCA is part of the accrued time toward Society wardship. This may be resulting in more or earlier court interventions. Amendments also expanded the circumstances for mandatory reporting by professionals, to include all situations of children in need of protection and not just abused children. This change may have triggered increased referrals.

Ontario Risk Assessment Model

Beginning in 2000, the standardized use of the Ontario Risk Assessment Model was introduced and all child protection workers are assessing and re-assessing risks in family situations within specific time-frames and implementing actions to reduce risks for children. The application to individuals of a risk model developed from data at the aggregate level will result in over-prediction and hence an overall increase in the number of files opened and the time they stay open.

New Protection Standards

The 2000 Protection Standards have resulted in more standardized steps and compressed time-frames for actions within child protection investigations. This may be resulting in more direct communication with parents about child protection issues and contributing to earlier and more court applications.

Changes in Availability of Special Needs Agreements

Ministry policy limiting the use of Special Needs Agreements in working with families resulted in more court interventions for children with special needs.

Increased Requests for Independent Assessment

We have seen an increase in judicial requests for “independent” assessments in contested cases. This has resulted in a significant increase in legal costs to the Societies and also caused delays in case resolution.

Case Backlog and Delays

Shortage of lawyers willing to represent parents, limited court time, and the high workloads of Society lawyers can delay disposal of cases before the Court, extending time in care for some children. This of course impacts legal and other costs.

Paper Burden of Disclosure

File disclosure requirements for the court create heavy demands on CASs. A case file may be extensive as recording requirements see the amassing of enormous files over time. Disclosure is often required in matters such as criminal proceedings, custody proceedings, expunction hearings, criminal injury compensation applications, to name a few, in addition to the child-protection applications made by the Society itself.

APPENDIX C

Job Description for Mediators

GENERAL

Mediators will work at arms length from a Children's Aid Society. The mediation sessions will take place on neutral ground away from the office of the Children's Aid Society and the courthouse. Mediators will be expected to provide a location for the mediation. Mediators will be paid \$ __.00 per hour²⁷ and it is expected that a mediation including the report will not take longer than ___ hours in total.

QUALIFICATIONS

Mediators shall have qualifications comparable to those of a "practising mediator" as set out by the Ontario Association for Family Mediation (OAFM):

- A professional degree or equivalent (significant directly related experience);
- A minimum of 40 hours of training in family mediation plus a minimum of 20 hours skill training;
- A minimum of 20 family law cases mediated to the point of agreement.

Mediators shall have knowledge of:

- The Child and Family Services Act, processes in child protection applications and proceedings before the Court;
- Stages of child development and family dynamics;
- Knowledge of indicators of abuse, both for domestic violence and child abuse;
- Negotiation, conciliation, conflict management and the mediation process;
- The indicators of power imbalances and an ability to recognize power imbalances in parties engaged in mediation;
- Multicultural issues in dispute resolution;
- The law pertaining to child protection proceedings;
- Alternative conflict resolution options;
- Community resources available to assist families and children.

²⁷ To be determined locally.

Mediators shall possess the following skills:

- Advanced communication and relationship competence
- Advanced interviewing and assessment expertise
- Capacity to assess the degree of power imbalance to determine whether mediation is an appropriate option
- Ability to use techniques to redress power imbalances

RESPONSIBILITIES

- Make initial contact and meet with parties to the mediation in a timely way
- Use the agreed upon format for the mediation contract with clients.
- Determine the views of the child as needed from appropriate sources.
- Inform the coordinator in writing of the outcome of mediation.
- Write up any agreement reached at mediation and provide a copy to all parties to the mediation.
- Communicate with lawyers for parties regarding any agreement reached at mediation, as required.
- Abide by the Code of conduct of the OAFM.
- Maintain professional liability insurance coverage of not less than \$1,000,000.00.
- Participate in any required training.

APPENDIX D

Template for Mediation Contract

BETWEEN:

The Children's Aid Society of London & Middlesex
1680 Oxford Street East
London, Ontario N5Y 5R8 CANADA
Tel: (519) 455-9000
Fax: (519) 455-5920

AND

[insert name of Party No. 1]

[insert name of Party No. 2]

In conjunction with the London Child Protection Mediation Project.

1. The people named above want to try and settle the dispute between them through mediation with *[insert name of mediator]*.

The issues to be talked about are:

- | | |
|---|--|
| <input type="checkbox"/> Protection finding | <input type="checkbox"/> All requested supervision terms |
| <input type="checkbox"/> Some supervision terms | <input type="checkbox"/> Length of order |
| <input type="checkbox"/> Other | |

2. **Role of Mediator**

Each person understands that the mediator does not represent any of the parties and is not acting as a lawyer for any of them. The mediator's job is to help the parties to come to an agreement which they think is fair and reasonable and in the best interests of the child(ren).

3. **Independent Legal Representation**

The parties understand that the mediator will not give them legal advice or a legal opinion. The parties understand that they can and should speak to a lawyer about their situation, and that they can do so at any time.

4. **Confidentiality**

The parties agree that the mediation will be only partly confidential. The mediator will not voluntarily tell anyone who is not a party to the mediation anything said or give to anyone any written materials from the mediation, EXCEPT:

- a. The mediator can speak or write to lawyers for the parties or for the child(ren), to tell them what went on in the mediation;
- b. The mediator can talk or write about the case without using anyone's name, for research or educational purposes;
- c. The mediator must reveal information when ordered to do so by a judge or when required to do so by law;
- d. The mediator must tell the appropriate authorities when information is received that suggests a real or possible threat to any person's life or safety.

The parties agree that the mediator will not be called by anyone as a witness to give evidence or make any report in any legal proceedings that are ongoing or that may be started in the future.

The parties understand that there is no confidentiality between them in the mediation. Any party can repeat the statements of any other party in any legal proceedings that are ongoing or that may be started in the future.

5. **Bringing Other People into the Mediation**

The mediator or one of the parties may have another person participate in the mediation if all the parties agree and if the person is also prepared to sign the mediation contract.

6. **Disclosure of Information**

The parties agree that they will each make available any information that may help to resolve the dispute.

7. **Mediation Sessions**

The mediator will schedule the time and place of the mediation sessions with the parties. The Parties agree to give the mediator 24 hours notice if the session has to be cancelled.

The mediator may meet with the parties together or individually. When the mediator meets with one of the parties alone, the mediator has the right to tell the other parties any information that the individual party tells to the mediator.

8. **Conclusion of Mediation**

Any party has the right to withdraw from the mediation at any time. The mediator has the right to end or suspend the mediation where continuing the process could harm or prejudice one or more of the parties or

the child(ren).

The parties acknowledge that this is an agreement based on mutual trust, which they intend to honour, but that it is not legally binding nor enforceable. If a resolution is reached, the parties can expect that the mediated resolution may give rise to:

- a) a finding of protection;
- b) a Statement of Agreed Facts to be filed with the court;
- c) a Court Order;
- d) a Voluntary Service Agreement; or
- e) other terms and conditions as agreed upon.

The mediator will write up a list of any agreements in principle reached by the parties and provide this to each party and to counsel for review. The parties are each encouraged to discuss the list of agreements with their lawyer / duty counsel and to seek legal advice before proceeding.

Once a resolution is reached at mediation, a final meeting will be scheduled by the mediator. During this meeting all parties and counsel will review and sign the Statement of Agreed Facts or other documentation resulting from the mediation.

9. **Further Agreements**

In any court actions already started, the parties will request an adjournment until the mediation ends.

10. The parties agree that they have read this contract, understand it, and agree to take part in the mediation on the basis of the contract.

DATED THIS	DAY OF	20
DATED THIS	DAY OF	20
DATED THIS	DAY OF	20
DATED THIS	DAY OF	20
DATED THIS	DAY OF	20

APPENDIX E

Draft Job Description: Coordinator of Child Protection Mediation Services

GENERAL

The coordinator will provide leadership and coordination for the day-to-day administration of the child protection mediation services. The coordinator will report to_____.

QUALIFICATIONS

The Coordinator must have a university degree and preferably experience in a Children's Aid Society. Preference will be given to a candidate with the following skills:

- Knowledge of the *Child & Family Services Act*, child protection issues, child protection applications and proceedings before the Court
- Knowledge of the child protection systems and procedures of a Children's Aid Society
- Ability to establish rapport and effective, cooperative relationships with various people including parents/ respondents involved in child protection applications, CAS staff, CAS managers, CAS lawyers and legal support staff, family lawyers, Children's lawyers, Legal Aid Bar, mediators, interpreters, trainer/s, etc.
- Leadership and initiative
- Strong organizational skills and attention to detail
- Ability to develop systems and processes to accomplish goals
- Ability to work within time schedules and to meet deadlines
- Ability to problem solve among systems and a variety of people
- Good writing skills
- Good verbal communication skills and ability to make presentations
- Ability to think and work fairly independently
- Some basic computer skills in keyboarding and word processing

RESPONSIBILITIES

1. Initiate outreach to Judges, Family Legal Aid Bar, Children's Lawyer Panel, Children's Aid Society staff, and other relevant associations to familiarize them with the available

mediation services and processes, discuss linkages with their work, and motivate parties to participate in and use the services where appropriate.

2. Develop and provide information about child protection mediation, and in some cases arrange the training, for persons who may become involved in the child protection mediation services including parents/respondents in a child protection application, family lawyers, children's panel lawyers, CAS staff, and mediators.
3. Develop systems to identify potential cases that meet the criteria for child protection mediation and where parties could consider the child protection mediation service.
4. Establish referral procedures and facilitate the referral process.
5. Contact potential parties to a mediation including their lawyers to determine the suitability of the situation for the services.
6. Assign suitable cases to mediators.
7. Manage day to day activities of the program/service and respond to issues that arise and require problem solving
8. Arrange for interpreters for mediations, if required.
9. Approve costs for transportation and babysitting required by parents to attend mediation sessions within the parameters of the designated budget. Assist parents in accessing community services available for child-care, if parents do not have their own resources.
10. Arrange and attend meetings of the program's Community Advisory Committee and any working committee of the program.
11. Approve expenditures for interpreters, training, and mediations within the parameters of the budget.
12. Report expenditures to established business accounts.
13. Obtain office equipment and supplies as required and within established budgets.
14. Other duties as assigned.

APPENDIX F

Post-mediation Survey

This survey has many of the same questions used in the London Child Protection Mediation Project. It is offered here as an example for use in any community, to determine if mediation is meeting the goals envisioned. Use it in its entirety or modify to suit local needs and to reflect the goals chosen locally for the mediation service.

Some suggestions...

- the mediators should not administer and collect the survey, nor should the CAS worker: choose a neutral person for this task
- it can be useful to start by asking people (verbally) an open-ended question or two about their overall experiences
- frame the survey as a client satisfaction instrument your community is using to ensure participants are satisfied and the mediation service meets their needs and expectations
- stress that answers are confidential and anonymous
- offer to sit and go through the survey with the person, especially for the first few questions, to check for literacy deficits
- give them an envelope in which to seal the survey before handing it back to you
- if you cannot find an occasion for a neutral person to administer the survey, give people a stamped self-addressed envelope in which to return the completed survey (this method will result in a lower return rate)
- thank the respondents for helping to improve the mediation service

When do you administer the survey?

Some questions are appropriate for any time after the mediation and some questions address goals of subsequent change. These include questions that address post-mediation changes in the worker/client relationship. Keep this in mind when choosing the questions and when choosing the timing of the survey. In this project, we waited until the matter before the court was concluded before approaching participants for participants.

Post-Mediation Questionnaire

This questionnaire has several statements which may or may not match *your opinions*. You will probably agree with some of them and disagree with some of them. Circle the one that most closely matches your opinion about the statement. There are no right or wrong answers. Also remember that **your CAS worker will never see your answers**. We ask everyone the same questions.

The first topic we ask you about is why you were willing to try mediation.

1. I agreed to mediation because I wanted this case to end faster

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

2. I agreed to mediation because I hate the thought of going to court

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

3. I agreed to mediation because I wanted the mediator to hear my side of the issue

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

4. I felt pressured into doing the mediation

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

The second topic we will ask you about is your experience during the mediation.

5. I felt the mediator understood my point of view

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

6. The pre-mediation discussion helped me understand what to expect at the mediation

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

7. I felt like an equal party with the others at the table

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

8. I felt comfortable saying what I really thought

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

9. My worker described my case fairly

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

10. I was treated with respect by the mediator

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

11. My worker was willing to change the position he or she started with

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

12. I felt pressured into accepting the agreement

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

13. I left the mediation with a good feeling about my future relationship with the CAS

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

14. This mediation has been a complete waste of time

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

15. The mediator favoured the CAS position

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

16. I would agree to another mediation if this agreement breaks down

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

Now there are some questions about your relationship with the CAS. If you don't have a worker anymore, do not answer the questions about your worker.

17. Since the mediation, I get along with my worker a lot better

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

18. Since the mediation, my worker understands my point of view a lot better

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

19. I am afraid to say what I really think to my worker

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

20. The CAS always gets its way in cases like this

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

21. What was the most helpful part of the mediation for you?

22. What was the most unsatisfactory part of the mediation for you?

23. Did anything happen that you did not expect or were not prepared for?

24. I would recommend mediation to a friend in the same situation with the CAS

strongly agree	agree	agree but just a bit	neither agree nor disagree	disagree but just a bit	disagree	strongly disagree
1	2	3	4	5	6	7

25. Do you have any other comments or suggestions for how we could improve the mediation service?



The Centre is a non-profit organization dedicated to helping children and families involved with the justice system, as young offenders, victims of crime or abuse, the subjects of custody/access disputes, the subjects of child welfare proceedings, parties in civil litigation, or as residents of treatment or custody facilities.

We seek to help children thrive and achieve their full potentials in life, through professional training, resource development, applied research, public education, community collaboration, expert testimony to the courts, mentoring students, and by providing informed and sensitive clinical services. Most of our resources and research reports are available at no cost on our web site.



Centre for
Children & Families
in the Justice System

(formerly the London Family Court Clinic)
200 - 254 Pall Mall St., London ON, Canada, N6A 5P6
info@lfcc.on.ca www.lfcc.on.ca

Revenue Canada Charitable Registration No. 12991 5153 RR0001