



Mediation: Child Protection Mediation

Knowledge & Information Services

By [John Lande](#)

Mediation has long been used in many types of litigation, including small claims, divorce, child custody, employment, commercial, tort, and environmental disputes. In recent years, mediation has been used to help resolve issues in cases of child abuse or neglect. This type of mediation is often referred to as child protection or dependency mediation. Mediation is used at virtually every stage of litigation in these cases, including prior to adjudication, review, permanency planning, and termination of parental rights hearings. (Note that terminology varies tremendously between jurisdictions.) Mediation is used sometimes to remedy problems to avoid the need for litigation.

Most child protection mediation programs started in the 1990s, although a few started earlier. Child protection mediation programs operate in **Arizona, Arkansas, California, Colorado, Connecticut, Florida, Iowa, Michigan, Ohio, and Texas.**^[1] **California, Connecticut, Florida, and Ohio** are national leaders in this field.

Definitions Used in Child Protection Mediation

In general, mediation is a process of assisted negotiation in which a neutral person (or pair of co-mediators) helps people try to reach agreement. Unlike arbitrators, mediators do not have the power to make a decision if the parties do not agree. In child protection mediation, the mediators are usually engaged by the juvenile court as employees or contractors. Mediators are typically attorneys or professionals in the behavioral sciences. There generally are no licensing or certification systems for child protection mediators.^[2]

The child protection mediation process is often used after the child welfare agency has removed children from their homes. Mediation helps develop a case plan to “reunify” the family as soon as it is safe to do so or, if that is not possible, to find the most suitable permanent placement within the time periods established by federal and state law^[3]. The parties may discuss problems in implementing case plans and court orders. Parties may reach agreement to modify the case plans, or jointly recommend that the court modify the court orders. Mediation allows the parents to participate in decision-making and can make sure that they understand what they are required to do.

“Family group conferencing” is a similar process in which a facilitator helps members of a family identify family strengths and needs and develop a case plan to propose to the child welfare agency and the court. Typically, a family group conference is held at the beginning of a case, and only

family members and the facilitator participate. (For a list of potential participants in child protection mediations, see below.)

Child protection mediation and family group conferencing are sometimes used to do “concurrent planning.” In general, concurrent planning involves simultaneously developing one plan for reunification and an alternate plan for another arrangement in case the family is not reunified. This term is used to mean different things. Sometimes concurrent planning simply means collecting information so that children can be placed promptly for adoption if parental rights are terminated. Sometimes concurrent planning involves specifying who would adopt or have custody of a child (often a relative) if parental rights are terminated. A third approach involves “foster/adopt” programs in which children are initially placed with foster parents who would adopt the child if parental rights are terminated.

Potential Benefits of Child Protection Mediation

The goals of child protection mediation programs are typically to:

- Expedite permanency for children
- Improve case plans and the case planning process
- Increase the effectiveness of court hearings
- Engender mediation participants’ satisfaction
- Increase compliance with court orders
- Reduce state costs connected with dependency-neglect cases

Evaluations of five child protection mediation programs in **California**^[4] and five such programs in **Texas**^[5] produced the following results:

- Mediations result in full or partial agreement in at least 70% of cases
- Participants strongly believe that mediation saves time and money^[6]
- Although mediation is effective at all stages of litigation, it is especially productive earlier in the litigation
- Mediated case plans are more creative than litigated case plans, often producing more detailed service and visitation plans and addressing communication problems (**California**)
- Participants are generally quite satisfied with mediation, generally preferring it to judicial hearings
- Parents find that mediation gives them an opportunity to be heard and understand what is expected of them
- Mediation programs generally meet with resistance from professionals involved, although resistance is typically short-lived and professionals generally support continued use of mediation

Who Attends Mediation Sessions?

Child protection mediation programs have different practices about who is invited to mediation. Mediation participants may include:

- Parents
- Children, if they are mature enough and their participation would be helpful
- Other family members
- Foster parents
- Child welfare agency workers
- Court appointed special advocates (CASAs)
- Therapists, school counselors, and service providers
- Attorneys for parents
- Attorneys for children
- Attorneys for the child welfare agency

Some programs work primarily with family members and the child welfare agency and do not routinely include attorneys or other professionals in the mediations. The number of people attending a mediation probably ranges from four to twenty people, though most commonly six to twelve people attend.

How Does Child Protection Mediation Work?

The following steps are generally used in mediations, although there may be considerable variation. All steps are not always used and they are not necessarily used in a strict, linear order.

- Intake process, including screening for appropriateness and domestic violence, and education of the participants about what to expect
- Mediator's opening statement or introduction
- Opening statements from parties or attorneys
- Mediators help set an agenda, implicitly or explicitly
- Participants discuss issues, typically one at a time
- Mediators sometimes have private meetings ("caucuses") with a few of the participants
- Parties typically reach agreement one issue at a time, though sometimes issues are linked
- The agreement is written up by the mediators or attorneys and presented to court (in child protection mediation, the court has the authority to accept, reject, or modify agreements)

Issues that participants may discuss include:

- Whether the complaint of abuse or neglect is well-founded or should be dismissed
- Children's problems (e.g., behavioral, educational, medical, psychological)
- Services for children (e.g., counseling, medical services, mentoring)
- Services for parents (e.g., counseling, drug or alcohol assessment and treatment, parenting classes, employment and housing referrals, financial assistance, transportation)
- Temporary and permanent placement of the children
- Visitation by parents, siblings, and other relatives and arrangements for supervision and transportation
- Goals for children (e.g., reunification, adoption, independence)

Mediation sessions generally are scheduled for two to three hours, although some programs schedule longer or shorter times.

Confidentiality

Many states have their own mediation confidentiality statutes, which are quite diverse. The National Conference of Commissioners on Uniform State Laws and the American Bar Association have jointly drafted a Uniform Mediation Act^[7] which would generally establish a privilege for mediation communications. These statutes generally provide that mediation communications cannot be used as evidence in court or be subject to discovery. However, information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because it is used in mediation.

Many mediation confidentiality statutes provide an exception to confidentiality for mediation communications providing reasonable suspicion of child abuse or neglect. Since by definition, child protection cases deal with child abuse or neglect, the exception to confidentiality is typically interpreted to refer only to *previously unreported allegations* of child abuse or neglect.

Confidentiality is especially an issue in child protection mediation. Mediation is often just one event in an ongoing child protection case in which many of the participants frequently communicate with each other. In particular, the adverse legal parties (typically the parents and child welfare agency) are usually required to work together on a regular basis. Thus, it may be hard to separate communications made in mediation from those made elsewhere. Moreover, one of the purposes of mediation is to share information to help prepare for court hearings, and hearings may be necessary even if the parties reach agreement. Even if information is not used directly in discovery or court hearings to impeach testimony, interactions in mediation may have a significant effect on the attitudes, behavior, and recommendations of the parties as well as help to shape questions in court hearings. Understanding the intricacies of confidentiality rules is difficult for most people and may be especially difficult for the often less-educated and/or low-functioning family members who are often involved in child protection cases.

Need for Planning and Oversight Body

Child protection mediation programs generally need a body to plan and oversee the programs. These bodies are composed of representatives from key local agencies that are involved regularly in these cases. The participation of the juvenile judges is critical for the success of these programs. These bodies also typically include child welfare agency officials, attorneys who regularly represent parties in these cases, and key service providers. In addition to monitoring and evaluating programs, these bodies decide

- Which types of cases to include or exclude (e.g., sexual abuse)
- At what stage(s) of the litigation cases should be mediated
- Qualifications of mediators
- Training needed by mediators
- The orientation process for mediation participants
- Logistics of scheduling the mediations, contacting participants, etc.
- Program policies and procedures

Resources

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[1] Jan Shaw and Nancy Thoennes, *Child Protection and Dependency Mediation Program Profiles* (Madison, WI: Association of Family and Conciliation Courts 1998).

[2][2] Florida is apparently the only state that certifies dependency mediators. See Florida Rules for Certified and Court •Appointed Mediators, Rule 10.010(d). (Click on “judicial administration” and then “alternative dispute resolution.”)

[3] See the federal Adoption and Safe Families Act of 1997, Public Law 105-89, especially § 302, amending 42 U.S.C. § 675(5)(C).

[4] Nancy Thoennes and Jessica Pearson, *Mediation in Five California Dependency Courts: A Cross-Site Comparison* (Denver, CO: Center for Policy Research November 1995).

[5] Andy Bowman and Carol Nasworthy, *Evaluation of the Children’s Justice Act Child Protective Services Mediation Pilot Projects* (Austin, TX: Texas Department of Protective and Regulatory Services November 1998).

[6] A study of the program in San Francisco found that, “Given the settlement rate during the study, sending one case to mediation every working day would present a total annual savings of \$545,225 if we combine immediate savings with the avoided costs of subsequent contested review hearings.” *Dependency Mediation in the San Francisco Courts* (Denver, CO: Center for Policy Research March 1998), p. 32.

[7] The drafts of the UMA are found at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.