

MEDIATION AND YOUNG PEOPLE: A LOOK AT HOW FAR WE'VE COME

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INTRODUCTION

Teaching mediation skills and other alternative conflict resolution techniques to our youth today may well be the crucial investment for our society's peaceable future. However, despite an increase in the acceptance and use of mediation, many attorneys, mental health providers, and other professionals express confusion as to the nature and purpose of mediation. This Article offers an introduction and overview of many of the current uses of youth mediation services. Further, this Article will offer readers a summary of the concerns and challenges associated with the process. This author hopes that readers will become familiar with youth mediation issues and the strengths and problems inherent in mediation and will acknowledge the usefulness of youth mediation after reading and thinking about the ideas and information contained in these pages.

Since the early 1980s, there has been a marked growth in the use of mediation to resolve disputes involving children and youth, especially in three areas — dealing with student conflicts in elementary or secondary school, assisting with the resolution of parent-child conflict, and providing options to the courts when interpersonal conflicts have led to complaints against juvenile offenders.¹ Proponents of mediation report that, among other advantages, this form of alternative dispute resolution can improve communication — especially when there is an ongoing relationship such as that of a family or family-like structure.²

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The author expresses her appreciation to Professor Catherine Brooks, Creighton University School of Law & Kathleen Severens for their invaluable assistance on this Article.

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1. KATHLEEN SERVENS, *MEDIATION TRAINING MANUAL, NEBRASKA OFFICE OF DISPUTE RESOLUTION*, 4 (1992) [hereinafter SERVENS].

2. Margaret L. Shaw, *Parent-Child Mediation: An Alternative That Works*, 39 *ARK. L. REV.* 25, 29 (1992).

Mediation often leads to agreements that satisfy all of the parties and are fair and acceptable over time.³

A DEFINITION OF MEDIATION

Mediation is "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction."⁴ As an interest based process, mediation focuses on the needs and concerns of each party participant. Rather than a win-lose paradigm, mediation attacks problems instead of people. Mediation may be summarized as "a systematic process that leads from issue identification to option generation" with the goal being a final agreement between the participants.⁵ Rather than imposing an agreement upon the parties, mediation seeks to empower individuals so that they may fashion agreements for themselves that will shape their future.⁶ Mediation promotes disputants' recognition of one another as human despite their conflicts.⁷ Feelings of competence and self-esteem are often cited as important by-products of mediation which helps to provide self-direction and lessen the need to continue the conflict.⁸ In contrast, litigation is more likely to reinforce hostilities and deepen the parties' anger into even more polarized positions.⁹

Mediation and arbitration are not the same. Arbitration is the process by which a third party is responsible for resolving a matter for the parties.¹⁰ Although mediation may sometimes have a psychotherapeutic effect, mediation is not counseling or psychotherapy.¹¹ Mediation is not in itself "an exploration or interpretation of deeply felt emotional issues and reactions."¹² Mediation is not designed to obtain historical insight into the cause of the conflict, nor is it designed to change the participants' personality patterns.¹³ Although past conduct may be important and relevant, generally, more time is

3. Ann Milne, *Mediation — A Promising Alternative For Family Courts*, 42, No. 2 JUV. AND FAM. CT. J. 61, 63 (1991).

4. LEONARD L. RISKIN AND JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 91 (1987) [hereinafter RISKIN & WESTBROOK].

5. SERVENS, *supra* note 1, at 1.

6. Michael Benjamin and Howard Irving, *Research in Family Mediation: Review and Implications*, 12 MEDIATION Q. 53, 58 (1995).

7. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 258 (1989).

8. Milne, 42, No. 2 JUV. AND FAM. CT. J. at 63.

9. *Id.*

10. *Id.*

11. RISKIN AND WESTBROOK, *supra* note 4, at 87.

12. *Id.* at 88 (citation omitted).

13. Milne, 42, No. 2 JUV. AND FAM. CT. J., at 63.

spent developing agreements and solutions for the future.¹⁴ Mediation emphasizes each party's responsibility for their own issues of the conflict as well as allowing participants to decide upon reasonable goals for the future.¹⁵ In some instances, mediation not only assists in resolving the current problems, but may also teach the participants methods of constructively resolving future conflicts.¹⁶

Mediation services vary due to the issues involved, the level of crisis, the orientation and identity of the participants, and other factors.¹⁷ Mediation programs differ with the community served, the sponsoring agency, the types of cases handled, the mediators' training and background, and the specific issues of the mediation process.¹⁸ For example, a mediation organization may be committed to children's rights and decriminalization of status offenders.¹⁹ However, all mediators hold in common such tasks as maintaining a neutral position, assisting in productive communication between participants, identifying participants' needs, and generating options for the participants' mutual gain.²⁰

The mediator helps the disputants identify their underlying conflicts, reduce misunderstanding, vent emotions, clarify priorities, find points of agreement, and explore areas of compromise.²¹ At a minimum, the mediation session offers each participant an opportunity to be heard by at least the mediator — and, it is hoped, the other party.²² Ideally, mediation provides the participants with an opportunity for self-determination as individuals and mutual acknowledgment as disputants.²³

THE SEVERAL STAGES OF MEDIATION

Participants in mediation sessions are usually self-referred, and/or a professional who is aware of the disputed problems may have en-

14. HUGH McISAAC, *MEDIATION IN JUVENILE DEPENDENCY COURT ASSEMBLY JUDICIARY COMMITTEE HEARINGS* 9 (Nov. 5, 1991) [hereinafter McISAAC].

15. SERVENS, *supra* note 1, at 1.

16. Margaret L. Shaw, *Parent-Child Mediation: A Challenge and a Promise*, 7 *MEDIATION Q.* 23, 28 (1985).

17. RISKIN AND WESTBROOK, *supra* note 4, at 87.

18. Albie Davis, *Law in the 80's, Justice Without Judges*, 8 *Update on Law-Related Education*, AMERICAN BAR ASSOCIATION, 35, 55 (1984) [hereinafter Davis].

19. Sally Engle Merry, *The Culture and Practice of Mediation in Parent-Child Conflicts*, 3 *NEGOTIATION J.* 411 (1987).

20. Charlene Saunders et al., *Mediation in the Los Angeles County Superior Court Juvenile Dependency Court, An Approach to Designing a Program That Meets the Interests and Concerns of All Parties*, 29 *FAM. AND CONCILIATION CTS. REV.* 259, 263 (1991).

21. Salvatore A. D'Amico, *The Development and Evaluation of a Court-Connected Juvenile Mediation Program*, 37, No. 5 *JUV. & FAM. CT. J.* 7, 8 (1986).

22. See generally SERVENS, *supra* note 1.

23. Bush, 41 *FLA. L. REV.* at 272.

couraged the parties to attend a mediation session. Also, someone involved in the parties' court process may have referred the participants.

Mediation performs at its best when it remains a voluntary and non-coercive process. If all of the participating parties agree to mediation, the mediator will attempt to create a non-threatening atmosphere to help put the parties at ease. Most mediators will ask that the participants abide by certain basic mediation ground rules (e.g., the use of respectful language, an agreement to hear other participants without interruption, appropriate time sharing), all of which help to promote communication.²⁴

The mediator must gain and maintain the trust of each participant. Obviously, this can prove to be a significant challenge in some cases. Despite the promise of the sessions' confidentiality, some participants may wish to hide their true needs or interests out of fear that they will be disadvantaged or exploited during or after the negotiation.²⁵ When the mediator is perceived as a neutral third party whom both sides can trust, the mediator helps "bridge the gap" created by the lack of trust between the disputants.²⁶

In mediation, each participant is encouraged to state his or her perception of the conflict and to indicate the outcome he or she seeks. Often, a strong exchange of emotions follows in which the parties communicate their preferences and present positions. This is not a time when the parties consider solutions, but rather is a time that emphasizes the participants' positions through the use of symbolic issues and party declarations.²⁷ During this phase in the mediation process, the mediator must exhibit active, empathic listening and must frame questions well in order to reduce defensive behavior, manage conflict, and encourage productive communication. To this end, the mediator will use clarification techniques that may enable each participant to better understand the interests and needs of each disputant.²⁸

In the next phase of the mediation process, the mediator must help the participants identify congruent interests and points of agreement.²⁹ Throughout the process, the mediator must be able to tease out the positive aspects of the session, to know when and how to trans-

24. Memorandum from Steve Baron to the Dependency Court Systems Task Force 6 (Dec. 31, 1993) (on file with the author).

25. RISKIN AND WESTBROOK, *supra* note 4, at 119.

26. Geraldine W.K. Zetzel, *In and Out of the Family Crucible: Reflections on Parent-Child Mediation*, 7 *MEDIATION Q.* 47, 57-58 (1985).

27. CHARLES H. HUBER ET AL., *Family Mediation: An Idea Whose Time Has Come*, reprinted in *COUNSELING THE ADOLESCENT: INDIVIDUAL, FAMILY & SOCIAL INTERVENTION*, 135, 141 (Jon Carlson & Judith Lewis eds., 1988) [hereinafter HUBER ET AL.].

28. Zetzel, 7 *MEDIATION Q.* at 58.

29. HUBER ET AL., *supra* note 27, at 141.

mit information and to generate options. Mediators must maintain neutrality and resist any temptation to express a personal opinion, patronize, moralize, become invested in one party's story, or do anything which shuts down communication and diminishes or destroys trust.³⁰ Whatever the mediator's background, education, and experience, the mediator must abide by the limits of the neutral role rather than serve as a mental health counselor or legal advisor.³¹

Throughout the mediation process, especially during an impasse, the mediator may decide to request a caucus, a brief separate meeting with each disputant. The mediator may use the caucus as an aid to build trust and rapport. Certainly, the mediator may also use the caucus to collect information that may later contribute to conflict resolution.³² In addition, individual time with each party may expose hidden agendas that could undermine the resolution process.³³ The mediator also has the opportunity to identify or eliminate issues inappropriate to mediation. Some mediators view the caucus as the best opportunity to challenge, probe, or "push" each participant without the other party witnessing the interaction or misinterpreting the interaction as a preference for one side over the other.³⁴

Mediators attempt to ensure that the parties act with complete information in making their decisions, because without full comprehension, autonomy is illusory.³⁵ The mediator has an ethical duty to terminate a mediation if the mediator believes that a party is not able to participate or lacks the capacity to make choices because of emotional, mental, or physical conditions.³⁶

Regarding the outcome of mediation, the mediator's job is not to ensure an equitable outcome or even an agreement between the parties.³⁷ However, if the parties do reach an agreement and the mediator believes the agreement is a poor response to the problems, the mediator may encourage the parties to engage in reality testing. That is, the participants must decide if the solution is actually workable rather than only wishful thinking. If significant pieces of information are missing, the mediator will urge the participants to carefully assess their individual situations, consider the available resources, and

30. Davis, *supra* note 18, at 37.

31. ROBERT A. BARUCH BUSH, *MEDIATION INVOLVING JUVENILES: ETHICAL DILEMMAS AND POLICY QUESTIONS* 11 (1991) [hereinafter BUSH].

32. Mark S. Umbreit, Ph.D. and Robert B. Coates, Ph.D., *The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States*, 43, No. 1 *JUV. & FAM. CT. J.* 21, 23 (1992).

33. D'Amico, 37, No. 5 *JUR. AND FAM. CT. J.* at 12.

34. Bush, 41 *FLA. L. REV.* at 285.

35. *Id.* at 278.

36. *Id.* at 284.

37. *Id.* at 272.

weigh their options as to whether coming to any agreement is possible. At any time, a mediator may withdraw for personal moral reasons.³⁸

If a full or partial agreement is reached by the parties, rather than using boilerplate language or obscure legal terms, the mediator will serve as a scribe writing the document in the exact words of the disputants. Proceeding in this fashion will hopefully remind the parties, when such a reminder is needed, of their commitment to resolve the conflict. After the final mediation session, the mediator destroys all notes other than the final agreement, if one is created. The courts view mediation as a good faith effort by the parties to settle a dispute. Usually, by statute or court agreement, mediators cannot be called to court to testify regarding any aspect of the mediation, including providing a statement as to whether, in the mediator's opinion, a party cooperated or failed to cooperate in the process.³⁹

MEDIATION AND YOUNG PEOPLE

MEDIATION IN SCHOOL

Parents and teachers do not usually teach children and youth negotiation skills and procedures in their homes or communities.⁴⁰ Because it is more difficult to learn conflict resolution skills when an individual is in the throes of an intense conflict, a calm classroom may be an especially effective setting for learning some of these skills.⁴¹ Schools continue to be the primary setting in which youth come into frequent contact with each other. Acting upon this premise, schools throughout the country provide mediation workshops and programs. Some states, such as Iowa, currently require conflict management classes beginning in elementary school.⁴²

Some school-based mediation programs only focus on the teaching of conflict resolution skills; others include the direct application of those skills by providing mediation as a non-adversarial means of resolving conflicts that may occur within the school, either among students or between students and teachers.⁴³ Initial studies indicate that there are many benefits of teaching mediation in the school setting. Such studies demonstrate that conflict management programs

38. *Id.* at 284.

39. National Council of Juvenile and Family Court Judges, *Resource Guidelines; Improving Court Practice in Child Abuse and Neglect Cases*, at 137 (Spring 1995) [hereinafter National Council].

40. David W. Johnson et al., *Effects of Peer Mediation Training on Elementary School Students*, 10 *MEDIATION Q.* 89, 96 (1992).

41. *Id.* at 98.

42. SERVENS, *supra* note 1, at 6.

43. Mark S. Umbreit, *Mediation of Youth Conflict: A Multi-System Perspective*, 8 *CHILD & ADOLESCENT SOC. WORK* 141, 145 (1991).

incorporated into a school's curriculum have reduced the need for disciplinary actions in those schools.⁴⁴ These studies also show that mediation decreases by as much as fifty percent the suspension rate for physical fighting in some schools.⁴⁵ Researchers report that school mediation programs serve a critical violence prevention role by creating new norms for social interaction. That is, students taught conflict resolution skills begin to view physical fighting and violence as socially unacceptable methods of resolving conflict.⁴⁶ One of the first studies conducted on conflict resolution in the early elementary grades (kindergarten through fourth grade) revealed a decrease in incidents involving physical aggression such as hitting, kicking, scratching, and pushing and verbal aggression such as name calling, insults, and threats.⁴⁷ Although the researchers indicated that the children in this latter study did not appear to demonstrate "the ability to create long-term and integrative solutions," the study suggests that, at least in the short-term, young children may benefit from being taught conflict resolution skills.⁴⁸

Another study conducted peer mediation training in three Midwestern middle-class elementary school classrooms.⁴⁹ Prior to the training program, the researchers noted that the students seemed conditioned to look to the classroom teacher for dispute resolution; the researchers hypothesized that this response was automatic because the students themselves lacked the interpersonal skills necessary to constructively manage conflicts. The researchers discovered that those students who were taught mediation skills often initiated attempts to communicate with the disputants as conflicts arose and then sought to resolve the problems underlying the conflicts with their newly acquired mediation skills. In contrast, the researchers found untrained students to be twice as likely than trained students to immediately seek the teacher's help when conflicts arose. In addition, it was noted that, when untrained students chose not to seek the teacher's assistance but rather to intervene in a conflict, the untrained students themselves tended to engage in destructive behaviors. These behaviors, such as physical aggressiveness, escalated the conflict and increased the likelihood of teacher intervention.⁵⁰

44. SERVENS, *supra* note 1, at 6.

45. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 146.

46. Melinda Smith, *Mediation in Juvenile Justice Settings*, 8, No. 1 J. JUV. JUST. & DETENTION SERVS. 51, 52-53 (1993).

47. David W. Johnson et al., *Using Conflict Managers to Mediate Conflicts in an Inner-City Elementary School*, 12 MEDIATION Q. 379, 385-86 (1995).

48. *Id.* at 388.

49. Johnson, 10 MEDIATION Q. at 89.

50. *Id.* at 95.

A community-based mediation program in San Francisco regularly trains fourth and fifth grade students to serve as "Conflict Managers."⁵¹ The program encourages teachers to refer any playground conflicts to one of the student conflict managers. When the conflict managers intervene in a specific dispute, the managers first ask the parties involved if they prefer to resolve the problem themselves or to take it to one of the teachers. If a decision is made to resolve the conflict without the aid of a teacher, the disputing students must agree to let others speak during the mediation without interruption, to work in good faith to solve the problem giving rise to the dispute, to tell the truth, and not to call each other names.⁵² Researchers examining this program suggest that students learn more socially acceptable methods for dealing with conflict. Indeed, such trained students may reset the peer norm for conflict resolution to the mediation method.

"Resolving Conflict Creatively," a program started in 1985 and now utilized in 189 elementary, junior high, and high schools in New York City, has instructed 3,000 teachers and 70,000 students to date in the components of the mediation process. The curricula for both elementary and secondary school students emphasize skills that include active listening, assertiveness (not aggression or passivity), expressing feelings, cooperation, and negotiation.⁵³ The objectives of the program include "modeling nonviolent alternatives for dealing with conflict as well as demonstrating to students that they can play a powerful role in creating a more peaceful world."⁵⁴ This approach assumes that children taught mediation skills and peaceful conflict resolution at each stage in their development have a greater potential for developing lifelong social and interpersonal skills.⁵⁵

These programs and the research investigating their success suggest that establishing a conflict resolution program in the school setting is not only desirable but is also easy. However, as is often the situation when one introduces change in any institution, there are problems in creating these programs. Any school-based mediator, student or adult, may experience difficulties that must be dealt with before those difficulties become obstacles.⁵⁶ In school programs involving trained students as designated peer mediators, some students

51. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 145.

52. *Id.*

53. William DeJang, Ph.D., *Preventing Interpersonal Violence Among Youth: An Introduction to School, Community, and Mass Media Strategies*, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE 19, 21 (Nov. 1994) [hereinafter DeJang].

54. *Id.* at 19.

55. Melinda Smith, *Mediation for Children, Youth, and Families: A Service Continuum*, 12 MEDIATION Q. 277, 278-79 (1995).

56. Smith, 8, No. 1 J. JUV. JUST. & DETENTION SERVS. at 53-54.

may tease the student mediators as each group adjusts to the notion of mediated disputes. This teasing may surface because of jealousy on the part of the students who perceive the student mediator as having gained favor or power from adults who previously had the responsibility to resolve disputes or because classmates mistakenly see the student mediators as their judges or law enforcers rather than helpers. In other cases, friends may expect the student mediator to take their side rather than serving as an impartial listener. Other strongly felt emotions might create experiences that make the new mediator uncomfortable in his or her new role. In other cases, the parties to the dispute might have trouble communicating openly with the student mediator and each other, and resolving the dispute may require extra efforts from the mediator to develop rapport and a willingness to participate fully.⁵⁷

Because mediation skills must be practiced and refined, many peer mediation programs stress the importance of ongoing training and contact with a faculty coordinator.⁵⁸ The expectation of the program administrators is that such contact and/or training will help prevent the young mediator from losing sight of the twin goals of mediation — allowing disputants to take responsibility for resolving their own conflicts with the assistance of a trained listener and allowing mediators to help without becoming the problem solver.

PARENT-CHILD MEDIATION FOR STATUS OFFENDERS

By the time parents have referred or have been referred to juvenile court for their child's actions which amount to status offenses, parents often are bewildered by their failures in improving family dynamics. The family members, who at times may feel despair and helplessness, view these problems as serious. For parents who have tried unsuccessfully to deal with serious contrary behaviors in which their child seems bent on indulging, feelings of hopelessness may become overwhelming. Children who repeatedly disregard rules of curfew, who run away from home, or who are truant from school may also see no way out of these behaviors. As a result of their frustration, parents may ask courts to label these children as uncontrollable or "incorrigible."

Some child law experts argue that, rather than traditional juvenile court proceedings, alternative methods of managing these children and their families are needed. Status offender cases are notorious for distracting courts and court personnel from more serious

57. DeJang, *supra* note 53, at 28.

58. *Id.*

and violent juvenile offenses.⁵⁹ Additionally, the adversarial nature of judicial proceedings when applied to status offense cases may have the undesired result of escalating rather than resolving the problems presented by the juvenile and his or her parents. The parents and the child may see themselves pitted against each other in the courtroom.⁶⁰ For some families, the further the family proceeds in the court system, the more difficult it becomes to improve the communication between and among the family members.⁶¹

Rather than the traditional adversarial proceedings available in court settings, parent-child mediation has been found to be appropriate for cases involving "stubborn and runaway children."⁶² In parent-child mediation, the mediator seeks to improve communication and enhance family functioning, thereby decreasing the need to place the difficult child in foster care.⁶³ Mediation, though, is not designed to provide the in-depth family counseling necessary to modify chronic behavior, heal emotional problems, or change personality patterns. Rather, mediation may be "helpful in assuaging family problems which are situational or transitional in nature."⁶⁴ It is in this area that mediation may provide a needed forum for resolving family communication and understanding malfunctions. In addition, because mediation is a flexible process, it can often accommodate the complexities of families with different needs.⁶⁵ Such different needs may encompass cultural and philosophical diversity.

Parent-child mediation encourages structured negotiations about concrete issues of family life. Mediators working with families can help family members break generalized, nonspecific grievances into specific complaints about behavior that is problematic but capable of change to more acceptable conduct.⁶⁶ Skilled mediators can help family members work toward agreements that all family members view as fair and realistic on such issues as attendance and performance in school, curfew violations, social life, privacy, and family interaction

59. Margaret L. Shaw, *Parent-Child Mediation: An Alternative That Works*, 39 *ARB. J.* 25 (1984).

60. D'Amico, 37, No. 5 *JUV. AND FAM. CT. J.* at 7.

61. Shaw, 39 *ARB. J.* at 29

62. Umbreit, 8 *CHILD & ADOLESCENT SOC. WORK* at 144.

63. Smith, 12 *MEDIATION Q.* at 279-80.

64. Memorandum from Steve Baron to the Dependency Court Systems Task Force 4 (March 6, 1995) (on file with the author) [hereinafter Baron].

65. Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 *S. CAL. L. REV.* 1993, 2027 (1993).

66. Merry, 3 *NEGOTIATION J.* at 417.

patterns.⁶⁷ Mediators can also help family members identify acceptable, but often not obvious, solutions.⁶⁸

Mediation may be most helpful when it is used with families that wish to remain intact but whose members are unable to find a way to do so on their own efforts.⁶⁹ Due to the nature and strength of bonds in a particular family, and despite serious conflict, family members may continue to have strong motivation to resolve their mutual problems.⁷⁰ Mediators note that, in such cases, family problems are resolved simply by effective communication and the exchange of needed information.⁷¹ In one parent-child mediation study covering families who were contacted several months after their mediation experience, nearly one-third of them noted that communication within the family improved as a result of mediation.⁷² Even in cases in which the participants reported a family member's failure to comply with the mediation agreement, many family members noted satisfaction with the mediation process and reported some positive changes in family functioning which they attributed to the mediation process itself.⁷³ For some families, mediation itself became an educational process and positively impacted the way those families handle conflict and crisis.⁷⁴

The most significant difference between parent-child mediation and other forms of mediation is the balancing of power between the parent and the child. At the time of the child's referral to the juvenile court, the parents may appear to possess both power and authority either by virtue of the parents' ability to refer their child to court for misbehavior or by the child's presence before the court instigated by another adult. In reality, the parents' power has actually diminished so much that they need an outside authority to apply sanctions and controls over their child's behavior.⁷⁵

The mediator does not provide the parents with training nor does the mediator give any evidence of being judgmental about the parents' inadequacies in managing their child's behavior. Competent parent-child mediators, however, often will recognize family patterns that tend to encourage conflict. One agency detected such conflict patterns

67. Smith, 12 *MEDIATION Q.* at 280.

68. Nancy Thoennes, *Child Protection Mediation in the Juvenile Court: A Significant Improvement Over Pretrial Approaches*, 33, No. 1 *JUDGES' J.* 14, 15 (1994).

69. Michael R. Van Slyck et al., *Parent-Child Mediation: An Empirical Assessment*, 10 *MEDIATION Q.* 75 (1992).

70. Michael R. Van Slyck et al., *Parent-Child Mediation: Integrating Theory, Research, and Practice*, 10 *MEDIATION Q.* 193, 204 (1992).

71. Baron, *supra* note 64, at 4.

72. Van Slyck et al., 10 *MEDIATION Q.* at 84.

73. *Id.*

74. Shaw, 39 *ARB. J.* at 29.

75. D'Amico, 37, No. 5 *JUV. & FAM. CT. J.* at 11.

in about half of its referred families. The parents were described as authoritarians who demanded their children's obedience based solely on the belief that all children owe such a duty to parents. As the children in such families develop through adolescence, they may become quite rebellious. A second pattern haunts families in which one parent may have been very lenient with the children while the children were younger and easier to physically control when necessary. Those parents later found themselves unable to control an increasingly independent and mobile teenager. Although these patterns of poor parenting may be readily apparent to a mediator as an outside observer, the mediator must be careful when questioning the parents and the child so as not to challenge the parents' authority or choices and thus reinforce the teen's rebellion.⁷⁶

Rather than focusing on either the parents' or the child's behavior, the mediator may need to redefine the conflict as a problem that the family shares. The mediator accomplishes this, not by characterizing the parents' rules and expectations as unreasonably strict or unrealistic, but rather by pointing out that the situation created by the parents and the child affects the relationship between and among the members of the family. Therefore, all of the family members must look for ways to change the situation.⁷⁷ Parents as well as children may need to realize that they will not be able to achieve their objectives on their own, nor will they do so without compromises or, at the very least, changes in their expectations of each other.⁷⁸ The task of mediation, therefore, is to point out and encourage the family's system of interaction and to help the family reorganize that system.⁷⁹

The mediator must take special care during the mediation process to accord the parents and the child equal dignity and equal input into resolving the conflict.⁸⁰ The mediator's job, therefore, focuses on the shared interests and common purpose of the family which in turn provides the foundation for the family's dynamic and effective functioning.⁸¹ The mediator's explicit goal is to obtain a balanced and specific agreement that the family members believe will meet their needs and to which each will be able to adhere.⁸² The essence of mediation is not

76. BUSH, *supra* note 31, at 17.

77. Shaw, 39 ARB. J. at 27.

78. HUBER ET AL., *supra* note 27, at 151.

79. Zetzel, 7 MEDIATION Q. at 66.

80. Shaw, 39 ARB. J. at 26.

81. Zetzel, 7 MEDIATION Q. at 53.

82. W. Patrick Phear, *Parent-Child Mediation: Four States, Four Models*, 7 MEDIATION Q. 35, 40 (1985).

its focus on power struggles within the family but its focus on the needs of the family members.⁸³

Prior to entering into mediation, the mediator must assure both the child and the parents of the mediator's neutrality and the neutrality of the process. Because the mediator in parent-child sessions is an adult, the mediator must be aware that, from the child's perspective, there may be an appearance of alliance between the mediator and the parents.⁸⁴ Research suggests that, if the child is distrustful or is not interested in the mediation process, the family is less likely to achieve a balanced written agreement and is less likely to complete the mediation process itself.⁸⁵ This result mirrors the ground rules of mediation. Specifically, if participants, especially children, view themselves in disadvantaged positions, participants may respond by accepting whatever terms seem thrust upon them while having no expectation of complying with those terms.⁸⁶

In addition, a child may attempt to manipulate the mediation process in order to end it.⁸⁷ If the child perceives the situation as threatening or overwhelming, the child may react to the mediation sessions with silence.⁸⁸ Rather than allowing the child to remain passive, as adults, the parents and mediator may attempt to solve the problems of the family. Youth mediation programs can offer an alternative and allow a child to become actively involved in resolving the conflicts. Active involvement in the decisionmaking process promotes positive and lasting results for the parents and children.⁸⁹

To promote the involvement of the child, the mediator must assess the communication and assertiveness skills of the young family member, who may be intimidated by the verbal skills and communicated assertiveness of the adults. Children may have good reasoning abilities and a healthy depth of feeling but may lack the vocabulary needed to express feelings and ideas; as well, children may not fully understand the often sophisticated language of adults.⁹⁰ If the mediator discerns that such issues are present, the mediator may need to assist the child during the initial caucus by providing an opportunity to rehearse ways that the child could express concerns or feelings or respond to various questions asked during the mediation session.⁹¹

83. Margaret L. Shaw, *Parent-Child Mediation: A Challenge and a Promise*, 7 *MEDIATION Q.* 23, 24 (1985).

84. BUSH, *supra* note 31, at 17.

85. Shaw, 7 *MEDIATION Q.* at 24.

86. HUBER ET AL., *supra* note 27, at 138.

87. BUSH, *supra* note 31, at 1.

88. D'Amico, 37, No. 5 *JUV. AND FAM. CT. J.* at 11.

89. *Id.* at 8.

90. *Id.* at 11.

91. Umbreit, 8 *CHILD & ADOLESCENT SOC. WORK* at 150.

Some mediators believe that, by allowing the child to experience a caucus before the parents' separate session, the child may feel encouraged to explore issues.⁹² Often, children will identify more discussion issues in private talks with the mediator than in the public sessions with their parents.⁹³

Depending upon the age and cognitive abilities of the child, the mediator must be careful to ensure that the child understands the terminology and issues addressed in the mediation session. Mediators who work with younger children must realize that children and adolescents may do better when they are asked to focus on a few issues rather than several at the same time.⁹⁴ The real likelihood that the child has less capacity and power than the parents may lead mediators, at a minimum, to feel obliged to carefully ascertain the child's level of understanding and capacity to consent at each stage of the mediation. However, showing special solicitude for the child may lead the parents to believe the mediator is biased in favor of the child.⁹⁵ Consequently, the mediator always risks losing the appearance of impartiality, alienating the parents or the child, or depriving the disputants of the opportunity to achieve a self-determined resolution.⁹⁶

Sometimes a family's problems are so profound that conducting a mediation session may be futile.⁹⁷ Mediation may uncover long standing problems, such as the need for drug or alcohol treatment, mental health treatment, or other medical services, or educational support, and the like. In particularly troubled families, mediation may be a good first step toward preparing family members to accept and benefit from such services. Mediation is a move toward change, not a final resolution to the problems encountered by families that need these support services.⁹⁸ The mediator may make the parent's or the child's agreement to obtain treatment a provision of the mediation. At one mediation center, the mediator raised the option of professional counseling in forty-two percent of the mediations and incorporated the option into twenty-seven percent of the agreements.⁹⁹

In a study of families participating in mediation, the families that initially reported that prior involvement in psychological counseling had not been helpful later reported that mediation had been helpful.

92. Merry, 3 NEGOTIATIONS J. at 420-21.

93. *Id.* at 420.

94. Shaw, 39 ARB. J. at 26.

95. BUSH, *supra* note 31, at 17.

96. *Id.* at 15.

97. Melton, 66 S. CAL. L. REV. at 1027.

98. Merry, 3 NEGOTIATION J. at 421.

99. *Id.* at 416.

In contrast, another researcher expressed a belief that families may be more amenable to mediation services after resolving issues in counseling.¹⁰⁰ In some mediation programs, the mediation process is divided into stages that allow families to receive informational counseling from intake and educational staff before commencing mediation. If necessary, professional therapeutic counseling is offered after the mediation process. In such a comprehensive program, the mediator is allowed to concentrate on the mediation itself, without experiencing conflict about the deeper issues the participants bring to the process.¹⁰¹

PARENT-CHILD MEDIATION IN ALLEGED CASES OF NEGLECT AND ABUSE

When alleged abuse and/or neglect is an issue, juvenile courts have utilized mediation services in various ways. Mediation programs may assist the court by facilitating exchange of current case information, clarifying the participants' roles and responsibilities, encouraging professional accountability, providing participants information about the court process, and reducing the family's sense of alienation from the state's child protective system and the family courts.¹⁰²

According to some authors, mediation may encourage and enable parents to face their familial and societal responsibilities.¹⁰³ Some research has indicated that "child protective mediation represents a significant improvement over the pre-trial approaches used in most of this country's juvenile courts."¹⁰⁴ Proponents of child protective mediation criticize court hearings for delaying service delivery, increasing the child's trauma, and failing to utilize the parent's willingness to seek help.¹⁰⁵ In some cases, mediation's non-adversarial, problem-solving approach allows the child and family to start drug and alcohol treatments and counseling at the earliest opportunity without removing the court's power to protect the child.¹⁰⁶

Mediation thus presents the option of promoting early intervention and family preservation. Rather than waiting until the pre-dispositional and dispositional stages of the court action, the mediation process may be used at earlier times to assist the family members with their particular needs.

100. Van Slyck et al., 10 *MEDIATION Q.* at 416.

101. BUSH, *supra* note 31, at 24.

102. National Council, *supra* note 39, at 134.

103. Thoennes, 33, No. 1 *JUDGES' J.* at 15.

104. *Id.* at 14.

105. *Id.* at 15-16.

106. Saunders et al., 29 *FAM. AND CONCILIATION CTS. REV.* at 259.

In conjunction with mediation, issues involving living arrangements and visitation must be addressed. Specifically decisions must be made concerning where the children will live pending disposition of the charges against the parents, if the children do not remain at home, the type of out-of-home placement to be used until the children are returned home; the burdens placed on the state to enable the children's return home; visitation rights among family members or between parents and children; whether visitation will require supervision; the frequency of such visits; and the possibilities of any other contacts. At intervals after the dispositional stage, issues relating to noncompliance, case review requirements, and changes in service providers must be addressed.¹⁰⁷

Researchers estimate that greater than seventy percent of child protection cases are resolved through some pre-trial negotiation.¹⁰⁸ In juvenile court, attorney negotiations about the petition can be made very informally — for example, whenever the attorneys see one another.¹⁰⁹ Given these points of practice, critics of the adversarial approach maintain that families are better served by improving the negotiation functions of the legal process and acknowledging negotiations as the means of augmenting the court's current inadequate approach to child protection cases. Because the mediation process brings all the relevant parties together, mediation may enhance the negotiation of jurisdictional matters even if these issues are not a formal topic of discussion before the court.

Different programs involved in child protective mediation vary according to the needs of the routine participants. At one end of the continuum, a mediator may lead one or more sessions in which only the parents and the child or the parents, child, and guardian ad litem are involved.¹¹⁰ Other mediation sessions may involve the parents and the state's child protective caseworker. Such an arrangement may be helpful because it can be difficult for the caseworker to play both the authoritative and conciliatory roles.¹¹¹ Some meditations create a forum for the caseworker, defense counsel, prosecuting attorney, and parents to develop mutually satisfactory case plans for use in court orders.¹¹² Occasionally, the mediator may ask an even wider range of participants including extended family members and professionals such as therapists and medical doctors to be involved in the

107. SERVENS, *supra* note 1, at 5.

108. Jessica Pearson, Ph.D., et al., *Mediation of Child Welfare Cases*, 20 FAM. L.Q. 303, 305 (1986).

109. Thoennes, 33, No. 1 JUDGES' J. at 42.

110. Pearson et al., 20 FAM. L.Q. at 309.

111. *Id.* at 305.

112. *Id.*

decisionmaking process.¹¹³ It is useful to note that, although the parents' attorneys are expected to be present, the mediator will encourage the parents, rather than their attorneys, to take an active role in the mediation process.

Yet another model of mediation primarily involves "bargaining only among professionals."¹¹⁴ Some scholars believe this system is advantageous because the mediator does not have to deal with the power imbalances between the professionals and the lay parents. The parents' legal counselors actively participate in the negotiations; this has the effect of balancing the parents' inability to bargain with representatives of the child protective system and the juvenile court.¹¹⁵

Drawbacks to this "professionals only" model are not unnoticed. Mediators have expressed frustration at their inability to spend what they believe to be a sufficient amount of time with the parents and children. Because parents do not actively participate in this form of mediation, they are unable to speak for themselves and cannot ascertain directly what is taking place during the mediation.¹¹⁶ Attorneys unfamiliar with the mediation process have expressed concerns that information shared during the process ultimately may hurt their clients¹¹⁷.

While these concerns continue, attorneys have discovered that their clients may benefit from mediation more than they experience harm from it. When all the parties are represented by attorneys, the mediation system may protect parents' rights more than the traditional adversary system.¹¹⁸ Courts have addressed lawyers' concerns about the risk of parents incriminating themselves by taking steps to ensure that the information shared by participants during mediation is confidential and not subject to discovery and use at trial. One important exception to this rule of confidentiality allows disclosure of any new allegations of child abuse or neglect arising out of and subject to the mandatory child abuse and neglect reporting laws of the state. Threats of harm to an individual are not privileged and must be appropriately reported to protect those who have been threatened.¹¹⁹

When the mediation is unsuccessful, the mediator should not be allowed or required to offer evidence against any party to the mediation, and the attorneys should not use the results in any way during court proceedings against the parents. Particularly, the mediator

113. Thoennes, 33, No. 1 JUDGES J. at 16.

114. *Id.*

115. *Id.* at 41.

116. *Id.* at 16.

117. *Id.* at 41.

118. McISAAC, *supra* note 14, at 13.

119. National Council, *supra* note 39, at 137.

must not be allowed or required to offer an opinion about whether any party cooperated or failed to cooperate in the mediation process.¹²⁰ It is important to remember that mediation is a voluntary process; thus, the defendant parents can choose not to participate at any time during the process.¹²¹ Additionally, the mediator is ethically obliged not to force parents or any other participants into agreements. Agreements are only valid when the parties have given their full consent to the terms of the agreement.¹²²

Mediators who deal with child protective cases must simultaneously safeguard the children and protect parents' rights.¹²³ These mediators must have a thorough understanding of the dynamics of child abuse and neglect and the affect those dynamics have on the individuals and the family system. Such issues include normal and abnormal child development, substance abuse, domestic violence, and psychopathology. Regardless of the mediator's formal background — for example, a therapist, attorney, social worker, or probation officer — the mediator should have significant experience in child abuse and neglect cases and should be well skilled in the practice of mediation.¹²⁴ Skilled mediators may help parents communicate to other professionals their personal, cultural, familial, and environmental stressors and behavior patterns and the relationship of those stressors or behaviors to neglect or abuse of a child.¹²⁵ If a parent minimizes responsibility or projects responsibility on the child, the child's school, the police, the state caseworker, the family court, or any other entity, the mediator should suspect that future abuse or neglect is possible.¹²⁶ During mediation, all parties must remain aware that the parents "have to undergo a series of traumatic insights and/or adjustments during a process that adjudicates them as child abusers or parents who have failed or have been unable to protect their children."¹²⁷ Mediators should accept a child protective case only when the child is not in imminent danger and all of the participants are viewed as sufficiently competent to negotiate.¹²⁸

Many mediators are more comfortable dealing with treatment issues rather than jurisdictional disputes which often entail detailed

120. *Id.*

121. McIsaac, *supra* note 14, at 13.

122. *Id.*

123. Thoennes, 33, No. 1 JUDGES' J. at 16.

124. National Council, *supra* note 39, at 135.

125. Julius Libow, *The Need for Standardization and Expansion of Nonadversary Proceedings in Juvenile Dependency Court with Special Emphasis as Mediation and Role of Counsel*, 44, No. 3 JUV. & FAM. CT. J. 3, 11 (1993).

126. *Id.* at 8.

127. *Id.* at 9.

128. Pearson et. al, 20 FAM. L.Q. at 306.

legal principles.¹²⁹ Indeed, in one study, researchers found that guardians ad litem expressed concern that mediators needed additional information regarding the child welfare system in which their child-clients were involved.¹³⁰

Sexual abuse cases must be carefully evaluated on a case-by-case basis. In general, mediators consider these cases to be especially difficult. If the parents' attorneys know that the evidence of sexual abuse is clearly present but that their clients are in a state of psychological denial, a consultation between the accused parents, their attorneys, and the mediator may be helpful to examine options and educate the clients. On occasion, when prosecutors have filed charges against parents on limited information, only mediation may bring forth evidence that the defense attorneys believe will mitigate the clients' role or exonerate the clients altogether. In such cases, the mediation process provides a forum for the parties to satisfactorily and promptly resolve the allegations. Such mediation sessions include the attorneys representing the state, the accused parents, and the child. In other cases, after the court has ruled that sexual abuse has occurred, mediation may help facilitate the cooperation of the parents in the child's treatment plan.¹³¹

In addition to its use in cases of abuse, mediation has been considered controversial when the issue concerns terminating the rights of parents and children to each other. For example, Los Angeles and Orange County, California, will not mediate termination cases. The most frequent explanation offered for not mediating such terminations is that it is "too late" in the legal process and in the child's life to seek an alternative outcome.¹³²

VICTIM-JUVENILE OFFENDER CONFERENCES

The initial efforts to bring crime victims and their offenders face-to-face can be traced back to the 1960s when a few probation departments recognized the value in such a confrontation.¹³³ Although "confrontations" do not technically fit the actual definition of mediation, the process approximates that which is currently referred to as victim-offender mediation.¹³⁴

In 1974, two intoxicated teens in Kitchener, Ontario, admitted to vandalizing the property of twenty-two people. Instead of paying res-

129. Thoennes, 33, No. 1 JUDGES' J. at 42.

130. Pearson et. al, 20 FAM. L.Q. at 314.

131. Thoennes, 33, No. 1 JUDGES J. at 19.

132. *Id.*

133. Mark S. Umbreit, *The Development and Impact of Victim-Offender Mediation in the United States*, 12 MEDIATION Q. 263, 265 (1995).

134. *Id.*

titution to the court, the youth were involved in an experimental program, jointly administered by the local probation department's volunteer program and the Mennonite Central Committee. The two young offenders were ordered to meet with each victim in an attempt to demonstrate to the teens that restitution payments were not a fine but rather compensation to real people. The compensation was for the direct losses each victim had suffered. Within six months, the young men had fulfilled their restitution obligations in full.¹³⁵

In the United States, commentators acknowledge that the first victim-offender mediation reconciliation program was created in Indiana in 1978.¹³⁶ Indiana's program was a joint effort of the Mennonite Central Committee and Prisoner And Community Together (PACT) and has served as the model for many of today's victim-offender reconciliation programs.¹³⁷ The practice of victim-offender mediation today, however, has expanded throughout North America and Europe; in the United States, there are over one hundred victim-offender programs.¹³⁸

Mediation is not meant for every victim and offender. However, there is growing evidence that a large number of cases are suitable for victim-offender mediation, specifically if the offense involves property damage and minor personal assaults.¹³⁹ The traditional retributive process increases the victim's and the offender's anger, frustration, and conflict.¹⁴⁰ In the context of retributive justice, the state acts as the primary victim and attention is focused upon the offender who violated the state's interests. Typically, the criminal prosecution process affords little, if any, right to participate or be heard.¹⁴¹ Research suggests that, for those involved in victim-offender mediation, both the victims and the offenders claimed higher satisfaction levels, not only for the program but also for the justice system as a whole.¹⁴² Because mediation attempts to address the interests of both parties, victim-offender mediation represents a unique process within the larger American justice system.¹⁴³

135. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1257 (1994).

136. Umbreit, 12 MEDIATION Q. at 264.

137. Mark S. Umbreit, *Juvenile Offenders Meet Their Victims: The Impact of Mediation in Albuquerque, New Mexico*, 31 FAM. AND CONCILIATION CTS. REV. 90, 91 (1993).

138. Umbreit, 12 MEDIATION Q. at 264.

139. Mark S. Umbreit, Ph.D., *Victim Empowerment Through Mediation: The Impact of Victim Offender Mediation in Four Cities*, PERSP. 25 at 28 (Special Issue 1994) [hereinafter Umbreit].

140. Umbreit, 12 MEDIATION Q. at 267.

141. *Id.* at 266.

142. SERVENS, *supra* note 1, at 6.

143. Umbreit, 12 MEDIATION Q. at 267.

The mediator separately contacts the victim and the offender to discuss the offense and its aftermath. The mediator describes the mediation program at the first contact meeting. If the victim and the offender separately agree to meet with each other, the mediator schedules and facilitates a meeting. During the joint meeting, the mediator gives both persons an opportunity to discuss the facts and feelings related to the crime and to negotiate a mutually acceptable agreement.¹⁴⁴ Restitution agreements generally focus on financial restitution by the offender to the victim. However, agreements may also include personal service to the victim or community, both of which are derived from the conversion of a specific dollar amount of loss into hours of work.¹⁴⁵ Some restitution agreements result only in an apology from the offender to the victim.¹⁴⁶ Evidence reveals that offenders are more likely to compensate crime if the victim and the offender personally negotiate the restitution plan.¹⁴⁷

While restitution is important, the emotional needs of victims and offenders are increasingly recognized as more important.¹⁴⁸ The offender learns that the victim is not a nameless, faceless object whose property he or she has affected in some way. This face-to-face meeting will hopefully help instill a sense of empathy for the victim, thus making it more difficult for the offender to repeat his or her crime.¹⁴⁹

Victim-offender mediation attempts to hold youths personally accountable for their behavior and gives juvenile offenders an opportunity to portray the more human dimension of their character.¹⁵⁰ The process often helps young people understand the impact of their actions on another human being, the emotional violation of their acts, and the damage to or loss of property that the offense usually causes.¹⁵¹ Mediation gives the offender an opportunity to express remorse in a very personal way.¹⁵² In the open discussion of feelings, both parties are given the chance to deal with one another as people, rather than as stereotypical beings without humanity.¹⁵³

Because the process allows the parties to discuss and even resolve the conflict between them, mediation conferences may enable both the young offender and the victim to act with more power in the world

144. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 148.

145. Umbreit, 43, No. 1 JUV. & FAM. CT. J., at 24.

146. DeJang, *supra* note 53 at 28.

147. Umbreit, 43, No. 1 JUV. & FAM. CT. J. at 26.

148. Umbreit, 31 FAM. AND CONCILIATION CTS. REV. at 99.

149. William R. Nugent & Jeffrey B. Paddock, *The Effect of Victim-Offender Mediation on Severity of Reoffense*, 12 MEDIATION Q. 353, 355 (1995).

150. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 148.

151. Smith, 12 MEDIATION Q. at 280.

152. Umbreit, 43, No. 1 JUV. & FAM. CT. J. at 23.

153. *Id.*

around them. For the victim, mediation provides an opportunity to receive answers from the offender about the actual event.¹⁵⁴ Victims are able to learn the answers to many lingering questions, such as "Why me?" or "How did you get into my home?"¹⁵⁵ Mediation also provides persons who have been victimized the opportunity to tell offenders the affects the crime has had on them and to express their frustration, if not outright anger, in a safe environment.¹⁵⁶ Some studies suggest that victims were measurably less upset after meeting their offenders in mediation.¹⁵⁷ Other studies conclude that, although crime victims were still quite upset about the crime after mediation, they were far less fearful of being victimized by the same offender after the mediation process.¹⁵⁸ There is strong evidence that direct contact with the offender in the safety of a mediation session can mitigate a victim's sense of vulnerability and anxiety.¹⁵⁹ For the victim, mediation may bring healing and closure to the violation.¹⁶⁰

The context in which victim-offender mediation operates distinguishes it from the typical applications of mediation.¹⁶¹ The issue of a power imbalance, a constant concern for mediators, may be especially complex in victim-offender conferences. Many feel that, precisely because there is an identified victim and offender, a large disparity of power exists.¹⁶² The mediator must give the victim special attention to prevent re-victimization in the mediation process.¹⁶³ For example, the victim's participation must be totally voluntary and accepted by the victim as his or her affirmative choice.¹⁶⁴ In some cases, for the victim's convenience, the mediator may need to schedule meetings on weekends or evenings. Once the victim agrees to attend the conference, the mediator should reassure the victim that the victim can request a caucus, a brief break, or a timeout at any time the victim begins to experience any discomfort or confusion, and, if desired, the victim may choose to end the conference.

Other writers caution mediators to be particularly sensitive to the young offender, who may be seen as the less powerful participant.¹⁶⁵ There is a concern that, unless the mediator is able to gain the young

154. *Id.* at 25.

155. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 148.

156. Umbreit, 12 MEDIATION Q. at 263.

157. Umbreit, 43, No. 1 JUV. & FAM. CT. J. at 24.

158. Umbreit, 31 FAM. AND CONCILIATION CTS. REV. at 95.

159. Umbreit, *supra* note 134, at 26.

160. Umbreit, 31 FAM. AND CONCILIATION CTS. REV. at 98.

161. Umbreit, 12 MEDIATION Q. at 270.

162. *Id.*

163. *Id.*

164. Umbreit, 31 FAM. AND CONCILIATION CTS. REV. at 91.

165. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 150.

offender's confidence, the youth may see the mediation process as a setup — two adults against one “kid” — rather than as a fair process for both participants.¹⁶⁶ If the young offender is inarticulate, it is sometimes important for the mediator to prepare, or even coach, the offender in a caucus. An opportunity to role-play may provide assistance and allow the youth to think through some of the possible questions the victim may ask and, therefore, allow the youth to express his or her thoughts in a less threatening situation than the actual victim-offender meeting.¹⁶⁷ If the juvenile offender lacks experience and knowledge of the justice system, the offender may feel threatened and thus agree to a victim's demands.

An offender may want to reject mediation, but the fears of indirect legal consequences for a refusal to mediate may constrain the offender's freedom to reject mediation.¹⁶⁸ If the victim-offender reconciliation program is going to succeed in reaching its goals, safeguards must be built into the program to protect the youth's rights. For example, when a judge refers an offender to a victim-offender mediation program, some programs refer the case back to the court after the initial interview and the mediator determines that the offender is unwilling to participate or does not admit complicity in the offense.¹⁶⁹ If the offender desires, supportive individuals, including the defense attorney, should be present or nearby during the mediation. Again, both the victim and the offender must view participation as non-coercive.¹⁷⁰ The mediator should also clarify the parents' role in a mediation involving juvenile offenders.¹⁷¹ Some youth may feel inhibited if required to speak in the presence of parents, and some parents will show protectiveness in non-constructive ways, such as withdrawing their child from the mediation.

Research regarding juvenile recidivism rates after mediation conferences with earlier victims is mixed. According to one commentator, victim-offender mediation has not proven an adequate preventative of later delinquency as measured by decreased recidivism.¹⁷² However, in a 1994 study of 241 juvenile offender cases, the authors found that, after controlling several variables related to antisocial behavior including age, gender, education, number of children in the family, family structure, and the like, the victim-offender conference participants

166. *Id.*

167. Umbreit, 12 *MEDIATION Q.* at 270-71.

168. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 *EMORY L.J.* 1247, 1264 (1994).

169. Umbreit, 8 *CHILD & ADOLESCENT SOC. WORK* at 150.

170. Umbreit, 31 *FAM. AND CONCILIATION CTS. REV.* at 91.

171. Umbreit, *supra* note 134, at 27.

172. Smith, 12 *MEDIATION Q.* at 281.

had lower offense rates than nonparticipants one year after their involvement with the legal system.¹⁷³ Other research, which took into consideration 3,142 juvenile offenders and their victims, concluded that the juvenile offender who participated in victim-offender mediation programs committed fewer offenses in a one-year period when compared to similar offenders who did not participate in mediation programs.¹⁷⁴

While some scholars believe that encounters between the victim and the offender are potentially filled with conflict and may be emotionally violent, experience has consistently found this is not so in most meditations. However, when working with crimes of violence including common assault, the conference process may be quite intense. As a result, mediators must be highly skilled and sensitive. They should understand the emotions involved in the grief process that accompanies personal loss and should be aware of complications such as post-traumatic stress disorders that may be associated with victimization. In the event that the mediator becomes the personalized object toward whom one of the parties vents anger, frustration, despair, and a multitude of other emotions, the mediator must be alert and not become personally threatened.¹⁷⁵ Mediators should ensure that their training includes an appropriate non-directive style of mediation. This style includes the ability to make use of silence during mediation sessions and to use opportunities to encourage either the victim or the offender to address important emotional issues.¹⁷⁶

The mediator must resist the temptation to stereotype victims and offenders. Rushing to judgment about victims and their needs could lead the mediator to make poor policy choices, choices that could cause victims potential harm.¹⁷⁷ Unless the atmosphere of the mediation is sufficiently normative to allow fault identification and allocation to the offender, the victim may never receive the opportunity to forgive the offender. If the victim/offender dialogue does not include a shared acknowledgment that the offender requires forgiveness, an opportunity to heal both the victim and the offender may be lost.¹⁷⁸ However, it may be inappropriate or even dangerous for the mediator to assume that a victim necessarily wants to or can forgive an offender. It may be very unrealistic for the mediator to assume that the

173. Nugent et al., 12 *MEDIATION Q.* at 356.

174. Umbreit, *supra* note 134, at 26.

175. Libow, 44, No. 3 *JUV. & FAM. CT. J.* at 10.

176. Umbreit, *supra* note 134, at 26.

177. Brown, 43 *EMORY L.J.* at 1276.

178. *Id.*

victim's outrage and loss can be adequately expressed and resolved in the course of a few hours with the offender.¹⁷⁹

Some controversy exists about the appropriate time to present the option of a mediation. Many mediators and program participants would like to explore the mediation option and move forward with a mediation session at an early stage. The intent of such a policy is the removal of selected offenders involved in relatively minor offenses from the formal process of the juvenile court.¹⁸⁰ Alternatively, some programs assert that the mediation should occur only after the system has determined the offender's guilt and sentence. Timing the mediation to occur later in the court process lowers the emotional or psychological pressure the offender may feel. The later timing still affords the victim the opportunity to negotiate restitution and to experience some healing. However, lengthy delays in the court process and the resulting postponement of mediation might create additional emotional difficulties for some victims.¹⁸¹

The juvenile court judge should carefully review the terms of any agreement and make certain the parties understand and voluntarily consent to its terms. A close review will ensure that the judge is familiar with case developments, that the nature of the agreement is appropriate in view of the likely court proceedings, and that the parties are reminded that a judge remains the ultimate decision maker. Despite a party's mediation, the court should also have the discretion to decline mediation if the judge believes that mediation would not serve the rehabilitation or other interests of the child. The judge should also reserve the right to adjust the restitution plan if the judge views the plan as unfair to either the victim or the offender.¹⁸²

OTHER APPLICATIONS OF MEDIATING WITH YOUNG PEOPLE

Mediation is a creative and flexible process that can be used in a variety of settings, including use for youth incarcerated in correctional facilities. One such program, the Youth Correction Mediation Program, is currently available in New Mexico and was designed to consist of three components — a conflict resolution curriculum for the resident students, a training program for staff and residents, and a reintegration program. The training program attempts to teach the staff and resident students to mediate conflicts at the facility before such conflicts escalate into events that carry sanctions for the resi-

179. *Id.* at 1250.

180. Umbreit, 8 CHILD & ADOLESCENT SOC. WORK at 147.

181. Brown, 43 EMORY L.J. at 1303.

182. Martin Wright, *The Impact of Victim/Offender Mediation on the Victim*, 10 VICTIMOLOGY: AN INT'L J. 631, 639 (1985).

dents and loss of persuasive power for the staff members. The reintegration program is available for mediating family disputes and creates agreements for daily living after the student resident's return home.

In those cases where several adolescents are in conflict, mediation may be time consuming and profoundly difficult. However, the results may be very rewarding. After a 1993 Boston high school riot, mediation services helped to reestablish accepted norms of nonviolence and respectful communication between disputing groups. The violence called these norms into question. Mediation helped to clarify misinformation, dispel rumors, and demonstrate to students that their welfare was important to adults in positions of authority. Mediation also gave some students the opportunity to tell their stories and to express their anger and sadness over what had happened. The students recognized that the mediators' work facilitated a process through which students could eventually put the incident behind them, emotionally and socially.¹⁸³

Another innovative program, the New Mexico Center for Dispute Resolution, offers a wide variety of mediation services and has been successful in applying the mediation process to the resolution of multi-party gang disputes. After three months of negotiations, three rival gangs signed and committed themselves to an agreement that each has honored for four years. Ongoing conflicts among the gangs, as they arise, are handled through a mediation program at the local middle school.¹⁸⁴

CONCERNS AND CHALLENGES IN THE FUTURE OF MEDIATION SERVICES

While youth conflict mediation cannot easily be applied in all cases, evidence indicates substantial satisfaction and effectiveness in conflict resolution.¹⁸⁵ The benefits arising from this form of alternative dispute resolution in actual and potential cases of juvenile offenses are multiple. First, mediation improves the resolution of a case by exploring and resolving underlying problems and causal factors. Second, mediation involves the parties themselves in fashioning solutions to their disputes. Third, mediation encourages the participation of those who would not otherwise involve themselves. Fourth, mediation relieves the court of minor issues, which allows more attention to cases that require adjudication. Lastly, mediation provides cost-effec-

183. Daniel Lieberfeld, *Mediation and Postcrisis Intervention in an Urban High School*, 11 *MEDIATION Q.* 377, 381 (1994).

184. Smith, 12 *MEDIATION Q.* at 282.

185. Umbreit, 8 *CHILD & ADOLESCENT SOC. WORK* at 152.

tive alternatives to encourage case resolutions without the delays inherent in the formal adversarial process.¹⁸⁶

A fundamental criticism of mediation concerns the relatively limited amount of research that has examined the process of mediating parent-child conflicts. The true impact and long term effectiveness of such mediation efforts has yet to be expored.¹⁸⁷ Research is also needed to explore the perceived efficiency and fairness of a variety of dispute mechanisms, particularly among different ethnic populations.¹⁸⁸ Other questions remain unanswered, including whether mediation itself rests on values antithetical to some families' cultural background, and if so, whether the use of mediation is equivalent to the imposition of foreign values on those families.¹⁸⁹

Furthermore, one of mediation's greatest strengths, informality, is also a potential debilitating weakness. The essence of procedural or substantive process review, especially one conducted without direct public scrutiny, is the safeguard it offers the participants from the harm caused by inept or unethical practitioners. In mediation, the quality of the process depends heavily upon the quality of the practitioner. Therefore, special attention must be paid to the mediation practitioner's qualifications, training, and standards of practice.¹⁹⁰ Given the loss of oversight inherent in a process without a written or audio- or videotape record, mediators must meet the highest standards of training, experience, and skill. Only professionals who have earned credibility with the local courts and with other law professionals should be allowed to engage in mediation practice.

Mediators must be aware of their own emotional or psychological baggage.¹⁹¹ For example, mediators could react to one party's position in such a way that may lead to antipathy or bias toward a party.¹⁹² It may be impossible for a mediator who has been physically abused to remain neutral in mediation sessions in which allegations have been made or evidence exists that a child is suffering from physical abuse. If the mediator recognizes that his or her own experiences (or values) may endanger neutrality, measures must be taken to insure that the process is not influenced by the mediator's personal philosophy.

The mediator might not need to withdraw. In some cases, co-mediation may be an answer. Because of the large number of individuals participating in mediation and the gender issues inherent in many

186. SERVENS, *supra* note 1, at 2-3.

187. Van Slyck et al., 10 *MEDIATION Q.* at 76.

188. Melton, 66 *S. CAL. L. REV.* at 2025.

189. BUSH, *supra* note 31, at 21.

190. *Id.* at 5.

191. Zetzel, 7 *MEDIATION Q.* at 50.

192. BUSH, *supra* note 31, at 16.

child abuse and neglect cases, there are significant advantages to male-female co-mediation teams in which at least one of the mediators is a skilled therapist. Working with a co-mediator has a number of advantages. It is useful to have the countering presence of two people on the other side of the discussion table. To the participants, the situation may appear more balanced and thus provide the framework that will allow the mediators and the family a safe environment to accomplish the hard work of dispute resolution.¹⁹³

Mediators should be required to maintain continuing educational experiences, including both classroom learning and direct supervision. Although it may be difficult to measure, emphasis should be placed on the demonstration of competency rather than on logging a fixed number of training hours.¹⁹⁴ Even though ongoing training is rare, such lifelong training should afford mediators with specific ethical dilemmas designed to help mediators' recognize why each situation is problematic.¹⁹⁵

Because mediators are faced with ethical quandaries from time to time, mediators should have an active mentor or a local ethics board to whom ethical questions may be addressed. Objective, trained persons who can provide answers, or at least guide the mediator's self-examination can be of great value to the mediation professional who is seeking to provide good service and abide by the highest ethical standards. One research report cited herein concludes with the observation that many practicing mediators are already aware of the kinds of problems they face and the kinds of guidance they need. The report further concludes that mediation has developed to the point where it is advisable for policy makers to pay more attention to the dilemmas mediators face and to provide the help and guidance needed.¹⁹⁶ Another commentator has indicated that there is a distressing lack of public standards, a fact which limits the effectiveness of mediation.¹⁹⁷

Mediators need guidance which must come from policy makers at the program, state, and national levels.¹⁹⁸ Programs could benefit from adhering to the standards of practice for family mediators developed by organizations such as the Association of Family and Conciliation Courts.¹⁹⁹ However, the real cause for concern is not what mediators are doing, but what policy makers are NOT doing.²⁰⁰ Stan-

193. Zetzel, 7 *MEDIATION Q.* at 62.

194. Umbreit, *supra* note 134, at 26, 27.

195. BUSH, *supra* note 31, at 25.

196. *Id.* at 26.

197. Umbreit, 8 *CHILD & ADOLESCENT SOC. WORK* at 143.

198. BUSH, *supra* note 31, at 24.

199. W. Patrick Phear, *Parent-Child Mediation: Four States, Four Models*, 7 *MEDIATION Q.* 35, 44 (1985).

200. BUSH, *supra* note 31, at 24.

dards for mediators will be important as the process is used increasingly to intervene in complex cases, including cases involving individuals for whom violence is the primary issue.²⁰¹ Persons who have been the victims of crimes of violence — such as aggravated assault, armed robbery, sexual assault, and attempted homicide — are also asking for victim-offender mediation. The effect of these requests, when granted, is to extend mediation to encompass meetings between victims and seriously violent criminals. If it is to be used properly in such cases, mediation must be adapted with great care to serve the more intense needs of these parties.²⁰²

CONCLUSION

Mediation can be a valuable tool to the juvenile court and can offer significant improvements over the traditional approaches in most courts, but mediation can never completely replace the traditional legal system.²⁰³ After all, mediation is only a brief intervention that cannot compensate for other gaps in the juvenile court system.²⁰⁴ A short-term intervention cannot produce changes in the basic economic and psychological realities. Families with serious psychological pathologies and economic predicaments require interventions designed to effect changes in underlying lifestyles and behavior. Nor does mediation preclude the need for enforcement mechanisms and supervision.

However, when mediation is valued by its participants and the professionals who refer disputants, the process can be a useful addition to the existing system.²⁰⁵ For young people and their families who are moving towards litigation, mediation may be a superior forum in gaining compliance, cost efficiency, and stability of the agreements made. For many youth, it is the best option for resolving conflicts and moving forward in life.

201. Melton, 66 S. CAL. L. REV. at 2025.

202. Umbreit, 12 MEDIATION Q. at 273.

203. Davis, *supra* note 18, at 56.

204. Thoennes, 33, No. 1 JUDGES' J. at 43.

205. Pearson et. al, 20 FAM. L.Q. at 320.

