

Embracing the Strengths and Overcoming the Weaknesses of Child Protection Mediation

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Introduction

Across the nation, an increasing number of juvenile and family courts have started to refer their child welfare cases to the process of mediation.¹ Indeed, many of mediation's finest qualities meet the core values of child welfare law. Both the process of mediation and the child welfare system work with all parties to increase mutual understanding, to achieve child and family empowerment, to ensure future safety, and to make informed decisions leading toward an agreement which is in the child's best interest. However, the synthesis of the child welfare system and mediation—resulting in “child protection mediation” or “CPM”—is much more complex than it may seem at first. As more courts, child advocacy organizations, attorneys, and families become introduced to the relatively new concept of CPM and begin to consider implementing or participating in the process, it is important that all of these stakeholders are aware of CPM's unique dynamics. This paper presents a practical and critical analysis of the strengths and weaknesses of CPM so that all stakeholders will better understand the process. The intention is that the more stakeholders know about CPM, the better the process will run, and consequently, the children's interests will best be met.

To understand the utility of CPM, it is essential to understand how a child protection case arises and the process that follows. Children first become involved in their state's child welfare system after there has been an allegation of abuse or neglect which, after investigation by local child protective services (CPS), will be declared “indicated” or “substantiated.”² After assessing the investigation results,

¹ See Leonard Edwards, *Mediation In Child Protection Cases*, 63 J. CENTER FOR FAM., CHILD., & CTS. 57 (2004) [hereinafter Edwards, *Mediation*].

² Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106(a) (1988). The efficiency of and increasing in reporting is largely due to the passage of CAPTA in 1974, which provided states with funding for the investigation and prevention of child maltreatment upon the condition that the states adopt mandatory reporting laws. All states now

along with the family risks and strengths, the CPS worker will decide whether to refer the family to voluntary services (if the situation does not pose an immediate danger to the child), to enter into a voluntary agreement with the family for services and/or placement, or to pursue court action, thereby allowing the state to intervene.³

If state intervention is necessary, CPS will either immediately place the child in emergency protective custody, with a shelter hearing to follow shortly thereafter, or CPS may choose to leave the child in his/her current home and file the necessary legal petition to start the process within the juvenile dependency court.⁴ Next, an adjudicatory hearing must be held to determine whether or not the alleged facts “have been proven true by a preponderance of the evidence and whether the case meets the statutory requirements for a dependency

have mandatory reporting laws which obligate persons in specified positions (day care workers, teachers, counselors, doctors, etc.) to report “any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act which presents an imminent risk of harm.”

³ Susan Badeau, Ann M. Haralambie & Donald N. Duquette, *A Child's Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 341, 359 (Donald M. Duquette & Ann M. Haralambie eds., 2nd ed. 2010).

⁴ CAPTA § 5106(a). If the child is taken into emergency protective custody, the child can be held for the duration of an investigatory period, in some states, without the parents' consent or a court order. However, the parents must be notified immediately. Then, within 24 to 96 hours of the removal of the child (hours depending on the jurisdiction), a “shelter care” hearing must be held so that there may be a judicial review of the state's removal. The hearing will address the child's health and safety, temporary placement of the child, the parents' access/visitation if the child is not returned to them, initial services for the family, notification of relatives, as well as financial responsibility for the child. If it is necessary for the child to remain outside of parental care, the CPS agency must develop a case plan for the child while “mak[ing] reasonable efforts to maintain the family unit and mak[ing] it possible for the child to return home safely as long as the child's health and safety is assured.” Badeau, Haralambie, & Duquette, *supra* note 4, at 350.

adjudication under state law.”⁵ If the court finds the child abuse and neglect allegation to be founded, a dispositional hearing will be held to determine what action needs to be taken with regard to the children.⁶ Namely, the issues to be determined at the dispositional hearing are: the custodial placement of the child, the “terms of contact” between the child and his/her parents if the child is not placed with them, and the services that will be provided for the child and parents.⁷ As long as the child remains removed from the parental home, review hearings must be held at least every twelve months to assess how well the child’s placement is working for them and how much progress the parents are making with regard to their specific plan.⁸ Finally, there will

⁵ Badeau, Haralambie, & Duquette, *supra* note 4, at 354. Depending on the applicable state law and the circumstances of the case, the adjudicatory hearing must be held within a certain amount of time (60 days, for example) after the removal of the child or filing of the petition. As mandated by CAPTA, the child must be provided an attorney, guardian ad litem, or court appointed special advocate to represent him/her at the trial. Furthermore, although there is no federal mandate, indigent parents are also appointed attorneys in most states.

⁶ *Id.*

⁷ *Id.* In some cases, the child may be permitted to remain in the parents’ custody at home with supervision by an agency or court; however, in many other cases, the children may be placed outside of the home, with a relative, in a foster home, or in a group home. If the child does need to stay removed from the home, the child’s case plan will need to be reevaluated with the input of the state, CPS agency, the family, and possibly the child. Furthermore, “[t]he goals and objectives of the case plan and the services provided should always be permanency oriented.” An ideal case plan is very thorough, covering the child’s needs (physically, mentally, educationally, culturally, etc.) and the parent’s deficits (services necessary, personal goals, etc.); this way, the court will more easily be able to evaluate, at a later date, the parent’s compliance and fitness to have their child returned. *Id.* at 356.

⁸ *Id.* at 358. At a review hearing, the court will seek to determine “whether the child is safe, whether additional or different steps must be made to ensure the child’s safety, or whether the child may not be safely returned to the parent.” If the parent has complied with the case plan and achieved the goals set forth within the plan, the court should consider altering, as appropriate, the child’s placement, visitation with the parent, or the services provided. Along with evaluating the child’s status and the parent’s progress, the court will also assess the CPS agency’s effectiveness

be a permanency hearing in which the courts will adopt a permanent care plan for the child.⁹

As Badeau, Haralambie, and Duquette write, “Achieving safe, legal permanence for every child is a primary responsibility of the State, and the child’s journey is not complete until he or she [h]as a safe, stable, loving, and permanent family.”¹⁰ Yet, how long should one have to wait for permanency? Is this lengthy, impersonal process the best that states can provide children and families?

While it is the individual states’ burden to establish their own child protection systems (laws and regulations, included), a majority of the funding that these systems rely on comes from the federal government; further, the funding is often contingent on federal acts. In 1980, the Adoption Assistance and Child Welfare Act (AACWA) set forth a legal responsibility for all state child welfare agencies: “reasonable efforts shall be made to preserve and reunify families”—a duty which state juvenile courts must enforce.¹¹ As Judge

and efficiency with regard to the timeliness and appropriateness of the family services. Ultimately, at these hearings, the parties should set a “target date” for the permanency of the child—whether a return home, adoption, or other placement.

⁹ *Id.*; Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997). According to ASFA, the permanency hearing must occur within twelve months from the date the child enters foster care. Permanency outcomes could be any of the following: reunification with parent/primary caretaker, living with other relative(s), adoption, guardianship, emancipation, or transfer to another agency.

¹⁰ *Id.* at 362.

¹¹ 42 U.S.C. § 671(a)(15)(B) (2000 & Supp. 2004) “(15) provides that--
(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern;
(B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families--
(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and
(ii) to make it possible for a child to safely return to the child’s home;
(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a

Leonard Edwards explains, this Act not only forced a new relationship between state child welfare agencies and juvenile courts, but also asked them to provide a higher standard of services.¹² Considering states' responses to the Act, Edwards asserts that the courts that have been most successful at achieving the mandates of the Act have identified best practices and implemented model programs—i.e., mediation.¹³

With the financial support of the National Institute for Dispute Resolution and the National Center of Child Abuse and Neglect, the first two CPM pilot projects were conducted with ultimately mixed reviews—one in Washington, DC, and the other in Denver, CO.¹⁴ Despite initial hesitations, the mediators and stakeholders in the pilot projects had an impressive start: “all programs reported settlement rates of over 70%.”¹⁵ Although the success of a mediation should not be determined by whether or not the parties reach a settlement, this indicator is almost the only quantitative factor available; other factors fundamental to the purpose of mediation such as open communication, healed relationships, and better

timely manner in accordance with the permanency plan (including, if appropriate, through an interstate placement), and to complete whatever steps are necessary to finalize the permanent placement of the child;...” It then provides exceptions for needing to make reasonable efforts.

¹² Edwards, *Mediation*, *supra* note 2, at 58-61.

¹³ *Id.*

¹⁴ Leonard Edwards, *Child Protection Mediation: A 25-Year Perspective*, 47 FAM. CT. REV. 69, 70 (2009) [hereinafter Edwards, *Child Protection Mediation*]. Funding was also provided by the District of Columbia Department of Social Services for the Washington, DC, project. Also, in 1980, California set precedent by mandating mediation in child *custody* proceedings. The state soon began buzzing with the success of mediation for family issues as supported by trainings, more court rules, and more research pilot projects—including five for CPM. Recognizing the success of the CPM pilot projects, in 1994 the California legislature passed a statute “encouraging the creation of CPM programs in every county and, in that same statute, encouraging parties to engage in nonadversarial procedures, such as mediation, with a goal of ascertaining maximum cooperation from all parties.”

¹⁵ *Id.* at 71.

understanding simply cannot be as easily quantified.¹⁶ Thankfully, word of these less-quantifiable benefits has spread due to communication between judges and the attention of national publications and organizations that began to focus on mediation.¹⁷ This national discourse is largely responsible for the rapid and geographically expansive growth of CPM that is still in progress today. As of 2009, most CPM programs were still very young: “Only 18 percent have been in operation since 1995. . . . more than half of the programs operating were less than 5 years old.”¹⁸ Today, there are at least 100 CPM programs spread throughout at least 25 states.¹⁹

Every day, more courts and child advocacy organizations confront the idea of starting CPM programs, while more attorneys and families are invited to participate in CPM for the first time. Now that the earliest CPM programs have existed for more than a decade and have had their experiences researched and reported, it is possible to look back on the successes, hardships, and solutions found in the

¹⁶ See Nancy Thoennes, *What We Know Now: Findings From Dependency Mediation Research*, 47 FAM. CT. REV. 21, 29 (2009). See also Gregory Firestone, *Empowering Parents in Child Protection Mediation: Challenges and Opportunities*, 47 FAM. CT. REV. 98, 111 (2009); Kelly Browe Olson, *The Importance of Using Alternative Dispute Resolution Techniques and Processes in the Ethical Representation of Children*, 6 NEV. L.J. 1333, 1343 (2005-2006) [hereinafter Olson, *Importance*].

¹⁷ *Id.*; NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES app. B (1995). The “Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases” featured a discussion of mediation in the appendix of the important publication. Also, the Model Courts Project at the NCJFCJ, which continues to work almost as a national think tank regarding how to improve how courts handle child abuse and neglect court cases, drew much attention to the new process.

¹⁸ Thoennes, *supra* note 17, at 23, 26. Her research consisted of an overview of 15 years worth of other mediation studies as well as a survey responded to by around 30 mediation programs throughout the nation. Today, the older programs are mediating many more cases than the younger ones, while increasing the amount of cases each year. According to a study done by Thoennes, on average of all old and new mediation programs, 211 referrals are received per year and 171 cases are mediated per year.

¹⁹ *Id.* at 23.

development of the practice of CPM. This paper will proceed in three parts to provide a thorough analysis of the potential promise of CPM in all of its strengths and weaknesses. Part I lays the foundation of CPM by discussing how the process is defined, both substantively and procedurally. Part II champions eight of the unique strengths of CPM which contribute to the great value of the process. Part III cautions against five of the potential weaknesses of CPM. These vulnerabilities constitute the most frequently asserted critiques of CPM, which can result in substantial detrimental effects on the parties as well as the process. For each weakness discussed, there is also a discussion of the practices mediation programs and scholars have developed in an effort to mitigate these weaknesses. The paper closes with a call to action for CPM programs, stakeholders, and parties to apply this knowledge of the dynamics of CPM as they remodel an existing CPM program, start a new program, work in mediations, or participate as a party.

I. The Nature of CPM

Mediation is generally defined as “bring[ing] people in conflict together with a neutral third person who assists them in reaching a voluntary agreement. The mediator helps them clarify the issues, consider options, and reach a workable settlement that fits their needs.”²⁰ Some of mediation’s prime directives are: mediator neutrality, the self-determination and empowerment of the parties, creating mutual understanding, ethical behavior, informed decision-making, and the safety of participants.²¹ CPM is a specific type of mediation which uses the advantages of the non-adversarial mediation process to help the various parties involved in child protection cases

²⁰ ABA, Division for Public Education, *How Courts Work, Mediation: What is Mediation*,

http://www.americanbar.org/groups/public_education/resources/law_relatd_education_network/how_courts_work/mediation_what.html.

²¹ See ABA, Division for Public Education, *How Courts Work, Mediation*, http://www.americanbar.org/groups/public_education/resources/law_relatd_education_network/how_courts_work/mediation.html [hereinafter ABA, *Mediation*].

work together to plan for the future of the child at issue.²² The California Rules of Court provide one of the most thorough definitions of CPM:

a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power. Dependency mediation provides a non[-]adversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child's safety and best interest and the safety of all family members. Dependency mediation is concerned with any an [sic] all issues related to child protection.²³

CPM brings all of the necessary parties together to discuss the issues at hand—particularly, how to move forward and provide the best for the child in the future. This process does not focus on past events, but instead, it plans for the future health and safety of the child. As Allen Barsky writes, “[t]he object of mediation is not to determine whether the mistreatment of the child has occurred but rather to work out an arrangement that can satisfy the advocates’ and family’s concerns about the child’s welfare.”²⁴

The parties who are most frequently present in CPMs are the mediator(s), the parents, the child’s attorney/guardian *ad litem* (GAL), a state child protection system caseworker, and possibly the parent’s attorneys.²⁵ As discussed later in this paper, several other interested parties may also be invited

²² Edwards, *Child Protection Mediation*, *supra* note 15, at 57, 58.

²³ *Id.* at 70 n.18 (citing CAL. R. CT. 5.518(b)(1)). Note that the California Rules of Court refer to CPM as “dependency mediation.” The mediation process referred to is the same, although the names differ.

²⁴ Allen E. Barsky, *Why Parties Agree to Mediate: The Case of Child Protection*, 35 FAM. & CONCILIATION CTS. REV. 164 (1997).

²⁵ Joan Kathol, *Trends in Child Protection Mediation: Results of the Think Tank Survey and Interviews*, 47 FAM. CT. REV. 116, 120 (2009).

for specific purposes.²⁶ Logistically, most mediations are held in a conference-like room either at the local (possibly juvenile) courthouse or the office of the local social service agency involved.²⁷ The timeframe for “an average mediation” is a session lasting “2.9 hours, and cases receive an average of 1.2 sessions.”²⁸

One of the most prevalent procedural differences among various CPM programs is at which stage in the child welfare case process they will conduct mediations. In some instances, this hinges on when the program believes mediation is most appropriate; for others, it is a matter of efficiency and the timeline/joint process technicalities with the local court system.²⁹ Some scholars and programs believe that CPM is appropriate for and works at nearly all stages of the child protection process.³⁰ Generally, however, CPM programs prefer to use mediation at one or all of the following stages of the child welfare process: the shelter care/temporary custody stage, the adjudication/dispositional stage, and the permanency stage.³¹

²⁶ *Id.*

²⁷ See Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice*, 47 FAM. CT. REV. 38, 40 (2009). See also Edwards, *Child Protection Mediation*, *supra* note 15, at 25, 76.

²⁸ Thoennes, *supra* note 17, at 27.

²⁹ See generally Bernie Mayer, *Reflections on the State of Consensus-Based Decision Making in Child Welfare*, 47 FAM. CT. REV. 10, 14 (2009). Along with his own experience as one of the founders of CPM in the 1980s, Mayer includes in this paper a meta-analysis of numerous studies completed by others on CPM.

³⁰ Edwards, *Child Protection Mediation*, *supra* note 15, at 75. Furthermore, according to Thoennes’ research, “Most programs [represented in her studies]. . . mediate at all stages of the legal process.” Thoennes, *supra* note 17, at 27.

³¹ Mayer, *supra* note 30, at 14. Some programs choose to mediate at the shelter care/temporary custody stage. At this stage, the report of maltreatment has been made, the child has been removed and placed in emergency/temporary care, and the legal petition will have been filed. Early mediation is often considered “very effective” according to Leonard Edwards because “there is information that has not yet been exchanged among the parties, the parties have not become entrenched in an

Cases end up in mediation in one of the following ways: by the court's mandatory referral, the court's offered referral, the social service agency's referral, or by the parties' (parents') request.³² If there is no *mandatory* mediation program, at some point, a decision will have to be made whether or not a child protection case is appropriate for mediation. Generally, mediation is appropriate "when there are issues to be discussed between parents and professionals about services or treatment plans for parents, the capacity of the parents to provide a safe home, and what approach to permanency needs to be pursued" and when "there are important conflicts within the family system that should be

adversarial stance, and there is an urgency to start working on rehabilitative plans so that children can be safely returned to their parents." Leonard Edwards, *Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process*, 58 JUV. & FAM. CT. J. 1, 12 (2007) [hereinafter Edwards, *Achieving Timely Permanency*]. When mediation occurs at the adjudication/dispositional stage, it generally serves the purpose of resolving factual disputes. Functionally, some jurisdictions use mediation at this stage as a replacement of adjudication, while others use it at the same time as the litigation as a way in which to keep the family engaged, informed, and in communication about how well the child's placement and parent's services are going. Yet, not everyone is content with the use of mediation as a fact-finding process to determine whether child abuse or neglect is taking place. Alicia Hehr more critically states, "If this issue is still in dispute, it may be necessary for a court order validating the child protection services allegations." Then, Hehr asserts, mediation may be appropriate "once all parties recognize there is a valid concern for the child's welfare and the issue of abuse or neglect is no longer in dispute." Alicia M. Hehr, *A Child Shall Lead Them: Developing and Utilizing Child Protection Mediation to Better Serve the Interests of the Child*, 22 OHIO ST. J. ON DISP. RESOL. 443, 454 n.74 (2006-2007) (citing HOWARD H. IRVING & MICHAEL BENJAMIN, *FAMILY MEDIATION* 385 (2005)). Otherwise, mediations may also be conducted at the permanency stage. At this stage, the adjudication/disposition is over, and the child has been in temporary custody with occasional review hearings. The focus of this mediation will be determining the permanent placement of the child and any issues that may be related.

³² See Giovannucci & Largent, *supra* note 28, at 46, 47. See also Thoennes, *supra* note 17, at 27.

worked out before the family could effectively collaborate.”³³ Furthermore, Nancy Thoennes’ research on multiple CPM programs has yielded data which “fail[s] to provide evidence that less troubled cases are diverted to mediation while more troubled cases are litigated.”³⁴ In other words, it appears that more troubled CPM cases are referred to mediation just as often as less troubled CPM cases. Such persistent referrals by some court systems illustrates the value and faith courts are beginning to have in the mediation process and in the well-trained nature of the mediators.

The best interests of the child will always be the first priority of the mediation—even if that means keeping the child out of the parents’ custody or terminating parental rights. As emphasized by Marilou Giovannucci and Karen Largent, what is most important is “creating case plans and finding placements for children that guide them to permanency. The mediator relies on the professionals and the family to exchange information and create a plan that is in the best interests of the child.”³⁵ As an additional and final checkpoint, most jurisdictions have a judge (never in the mediation room) review the agreement immediately following the mediation.³⁶ If the judge approves, he/she will file a court order implementing the agreement.³⁷ If the judge does not approve, the agreement will not be implemented as is, and the parties will have to decide whether to schedule a new mediation session or pursue litigation to resolve the judge’s concerns.³⁸

³³ Kelly Browe Olson, *Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases*, 47 FAM. CT. REV. 53, 64-65 (2009) [hereinafter Olson, *Family Group*].

³⁴ Thoennes, *supra* note 17, at 27

³⁵ See Olson, *Family Group*, *supra* note 34, at 64.

³⁶ *Id.* See also Giovannucci & Largent, *supra* note 28, at 48, 49.

³⁷ Olson, *Family Group*, *supra* note 34, at 64.

³⁸ See Edwards, *Child Protection Mediation*, *supra* note 15, at 76.

II. Unique Strengths of CPM

As the courts and parties are realizing, mediation can offer child abuse and neglect cases numerous advantages. The most significant and frequently reiterated advantages are: the less-adversarial nature of the process, the empowerment of the parents, the ability to have confidential and realistic conversations among the parties, the opportunity to have other necessary people present, the child's chance to have a voice at the table, the potential to create a detailed and unique service plan and agreement, the possible improvement of parental compliance, and the ability to save time and money for all. The following is a discussion of the significance of the individual advantages, respectively.

A. The Less-Adversarial Nature of the Process

The complex question of how to resolve a family problem cannot be answered by an archaic, vague statute or even a more recent case decision. Similarly, an attorney's expression of the relevant legal issues of his or her client's case is not the same as the client's (the parents') expression of his/her interests and concerns with regard to the family or child. Gregory Firestone and Linda Weinstein articulate this problem as the "legalization of human problems":

The best interests of children in divorce and child protection cases have become defined as primarily a legal problem; in reality, they are much more complex psychological, social, and legal problems The failure to better examine family problems contextually results in little recognition for the ecological perspective of family dynamics. . . . The law is not the appropriate forum for assisting dysfunctional families to function better. Resolution of the legal case often does little to

improve or resolve the underlying family dynamics.³⁹

Unlike litigation, mediation recognizes these issues and has created a process that invites all of the invested parties—the parents, in particular—to gather together in a comfortable environment where they can express their feelings, needs, interests, concerns, and beliefs about what is in the best interest of their child(ren) and their family. The best case scenario and indeed the hope is that the GAL, social services caseworker, and service providers may then have a calm, facilitated, and constructive conversation with the parents about the best interest of the child. This conversational setting is considered to be more conducive to making a meaningful family decision than a hierarchical, argumentative, and un-inclusive process such as litigation.⁴⁰ Acknowledging the importance of this collaboration, Kelly Browe Olson, law professor and mediation scholar, writes:

The reasons that ADR techniques and processes work well in child welfare cases is that cases are so dependent on interdisciplinary cooperation. These cases create ongoing and overlapping responsibilities, rules and procedures Social workers, attorneys and other service providers need to learn to work together to help families. The primary experts on a particular family are not the legal or social work professionals, they are the family members themselves. It is important for the child's attorney to help the child navigate the system and quite often that means helping the system to work for the family and the child.⁴¹

³⁹ Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004).

⁴⁰ *Id.*

⁴¹ Olson, *Importance*, *supra* note 17, at 1341.

Mediation recognizes the parents' insight, and instead of heightening conflict between the parties, allows them to unite as a team working toward a common goal of meeting the child's best interests.

The focus of the process, the best interest of the child, is also different from litigation where attorneys (as well as experts) zealously advocate on behalf of their client's position regardless of whether or not it is in the child's best interests. Considering the Rules of Professional Responsibility, the lawyers involved have an ethical obligation to zealously represent their client, which includes refraining from actions that may diminish the client's case or rights.⁴² However, according to Firestone and Weinstein, "This kind of behavior is inappropriate for matters in which the court is required to determine the best interests of the child."⁴³ This is because such "zealous advocacy of a client's rights may be counter to the best interests of the child, and such advocacy tends to further escalate existing conflict between the parties and cause greater harm to the child."⁴⁴ Similarly, service providers, social workers, and other professionals who have been asked to give their perspective on the situation are often subtly pushed by the adversarial system into being an advocate for one position and an adversary for the other, rather than providing a candid, un-positioned opinion.⁴⁵

On a different note, the temporal focus of mediation is different from that of litigation. While the adversarial system emphasizes past events and family history, mediation is forward-looking, emphasizing the future situation of the child and the future condition of the family. Rather than basing a decision on a "momentary snapshot judgment of the family structure," mediation nods at the past of family but works to more fully embrace the sentiment that "the family is a living entity, dynamic in nature, involving personalities and

⁴² Firestone & Weinstein, *supra* note 40, at 204.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 206.

relationships that will change.”⁴⁶ There is hope, framed with realism, about the potential of the family based on its strengths and ability to improve over time with a strong and well-suited services plan. The actors in the process are also very cognizant that time is limited for achieving permanency and well-being for the child, and the less time, the better.

B. The Empowerment of the Parents

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions as to the care, custody, and control of their children.⁴⁷ However, the right of parenthood is not unlimited,⁴⁸ and when the state does step in through the *parens patriae* doctrine, the relationship between the parent, child, and state becomes one of a balance of rights and responsibilities.⁴⁹ Mediation makes great efforts to achieve this balance by inviting the parents to be a part of the conversation and decision-making regarding their child’s future on level ground with the professionals and state agency.⁵⁰ As Bernie Mayer explains, the state has “intruded into the heart of family life, and the power of the family has accordingly been curtailed.”⁵¹ He notes that this process can be incredibly, and possibly irreparably, damaging to the family, and continues, “In order to maximize the chance that the family can continue to function as the primary caretakers of children in a safe and constructive way, the power of the family has to be respected and supported.”⁵² The very process of mediation, by bringing the parents and all of

⁴⁶ *Id.* at 205.

⁴⁷ U.S. CONST. AMEND. XIV; *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴⁸ *Prince*, 321 U.S. at 167.

⁴⁹ Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 *BUFF. L. REV.* 1397, 1398 (1999).

⁵⁰ Firestone, *supra* note 17, at 102-04.

⁵¹ Mayer, *supra* note 30, at 16-17. Along with his own experience as one of the founders of CPM in the 1980s, Mayer includes in this paper a meta-analysis of numerous studies completed by others on CPM.

⁵² *Id.* at 17.

the other appropriate parties (attorneys, GAL, counselors, etc.) to sit equally at the same table in an open discussion, is a significant step toward balanced empowerment.

Further, mediation gives the parents a voice and allows their interests and proposals to be acknowledged and discussed by the parties. The full extent of the value of the parents' voice can be illustrated when juxtaposed to the parents' involvement in a litigated child welfare case. When the case hearings are litigated, the parents are very limited in what they can say in court (if anything at all), and they have almost no part in the decision-making process or in the building of the case plan.⁵³ On the other hand, mediation not only helps parents *feel* included and respected in the process, but it also truly *does* include the parents' insight, recommendations, and concerns. Gregory Firestone writes that by including parents in the mediation, more information and ideas can be exchanged which improve the quality of the agreement.⁵⁴ Furthermore, by giving the parents the opportunity to contribute to the final agreement, CPM "reinforce[s] the parents' role, increase[s] the parents' sense of ownership and understanding of the agreement, increase[s] the parental compliance with the agreement," and "reduce[s] conflict between the parents and professionals and increase[s] the group's ability to work effectively as a team."⁵⁵ Ultimately, Firestone concludes that such involvement "increase[s] the parent's confidence in the child protection process."⁵⁶

Parental involvement has proven to be advantageous to the progression of the child's case. Whereas Firestone's benefits listed above look at the advantages of parental involvement from the outside, Thoennes' article refers to numerous studies that have evaluated the advantages from the inside, from the parent's perspective: "a large majority of parents, usually around 90 percent, report that mediation gave

⁵³ Firestone & Weinstein, *supra* note 40, at 65.

⁵⁴ Firestone, *supra* note 17, at 100.

⁵⁵ *Id.*

⁵⁶ *Id.*

them an opportunity to discuss the issues of importance to them. They also report feeling that they were treated with respect.”⁵⁷ Furthermore, more than 80 percent of the parents expressed that, in the mediation, they felt listened to and understood. However, “In some studies the surveys with parents also indicated potential problems. For example, in the New Jersey and New York studies, about 20 percent of the parents reported feeling somewhat ignored or left out of real decision making.”⁵⁸ Sometimes, it is these feelings and their inclusions in the process that make all the difference.

With regard to the dependency court’s prime directive of family reunification, Thoennes’ review of the various studies found that in most of the surveys, parents expressed that by participating in the mediation they gained a better understanding of what they need to do to have their child home and the case closed.⁵⁹ By involving the parents and getting them invested, mediation has effectively responded to one of the most salient weaknesses of the child welfare system—helping parents understand what they need to do to reunify their family. According to Firestone, “Parental involvement is essential in order to resolve and hopefully remedy the issues of concern in a timely manner that best protects and provides permanence for children.”⁶⁰

C. The Ability to Have Confidential and Realistic Conversations among the Parties

In almost every mediation, one ground rule is that everything said during mediation is confidential—except for new reports of abuse and neglect or threats of harm to self and others.⁶¹ Otherwise, the agreement as reached in the mediation will be the only other piece of information coming out of the session (not confidential).⁶² The purpose of the rule

⁵⁷ Thoennes, *supra* note 17, at 32.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Firestone, *supra* note 17, at 99.

⁶¹ Edwards, *Child Protection Mediation*, *supra* note 15, at 73.

⁶² Parties may also agree upon the ability to share other pieces of information from the mediation for specific, mutually agreeable, purposes.

is to foster an honest, comfortable, productive, and informative discussion about the family's dynamics and how the family may succeed in the child welfare system.

In litigation, client confidentiality and rules of evidentiary privilege may prevent some highly relevant information from coming to the attention of the judge (decision-maker) who consequently must make a determination as to the best interests of the child; this is a very troublesome barrier to accomplishing this end.⁶³ Mediation, on the other hand, opens the floor for discussion about anything the family or other party may feel is important to the case and then enforces confidentiality at the end to cover the discussion had—but not the future agreement.⁶⁴ This rule seeks to facilitate the exchange of insightful information with one another under the trust of confidentiality in order to have an open conversation and ultimately make the best-informed decisions for the child.⁶⁵ Decisions made and agreements written with this extra information in mind are often more effective because they are not only fully-informed, but also suited to the unique dynamics of the particular family and child.⁶⁶ As reiterated by Edwards, “[M]ediation should offer the parties an environment where all ideas can be explored and all solutions can be tested with the knowledge that the only report that comes out of the mediation will be the terms of an agreement.”⁶⁷

Along with its importance to information-gathering, a candid conversation can also be a way to build relationships between the parties so as to provide a more unified front—all parties working toward the common goal of the child's future well-being. The hope is that, as families listen to the professionals and their attorneys in an honest, but non-judgmental environment, they may begin to truly understand the magnitude of the situation and what they can do to succeed

⁶³ Firestone & Weinstein, *supra* note 40, at 205.

⁶⁴ Thoennes, *supra* note 17, at 33.

⁶⁵ Firestone, *supra* note 17, at 110-11.

⁶⁶ *Id.* See also Edwards, *Mediation*, *supra* note 2, at 57.

⁶⁷ Edwards, *Child Protection Mediation*, *supra* note 15, at 73.

in the system. This conversation may also influence the lawyers', professionals', and caseworker's perceptions of the family and the family's problems. The increased understanding of all the parties often lessens the underlying adversarial feelings of the parties and works to create a more solid working relationship.

D. The Opportunity to Have Other Necessary People Present

There are no rules of proper legal standing in CPM, and consequently, mediation can become a very inclusive process, inviting additional parties to the table as needed.⁶⁸ Additional parties who may be invited to participate commonly include the following: a Court Appointed Special Advocate for the child, the parents' attorney(s), service providers (counselor, therapist, rehab provider, etc.), extended family or community members, the foster parents, a probation or parole officer, and even the children themselves (if age-appropriate).⁶⁹ In this regard, CPM greatly broadens the range of interested parties and can facilitate a more productive discussion of the child's future interests among all necessary parties.

It is important to note that, as Giovannucci and Largent point out, "Each individual participant does not shed his or her traditional role in a case, that is, mother, father, CPS worker, GAL, tribal representative, when they enter a mediation session. Rather, mediation expands the traditional roles of the parties."⁷⁰ CPM allows these various parties to gather together in a less formal setting wherein they can more freely describe their interests and concerns, recognize the other parties' interests and concerns, exchange information, and begin to work together problem-solving, in mutual understanding.⁷¹ Such understanding fosters relationships between the parties, which may encourage positive ongoing

⁶⁸ *Id.*

⁶⁹ Kathol, *supra* note 26, at 120. Her research included 110 surveys of judges, program directors, mediators, facilitators, and social service agency staff.

⁷⁰ Giovannucci & Largent, *supra* note 28, at 42.

⁷¹ See Olson, *Family Group*, *supra* note 34, at 53-54.

collaboration for the remainder of the parties' involvement in the child's case.⁷² Ultimately, the effect of having a well-thought out discussion with numerous perspectives all focused on one child is the production of a services plan uniquely crafted and safeguarded to meet the needs of the child and his/her family.⁷³

Families today are constructed and reorganized in a variety of ways, often including members from the extended family and even from the wider community. Recognizing the importance of some of these extended family members in the decision-making, mediation invites those additional people to the table when the mediator and/or the parties believe their participation is necessary.⁷⁴ Firestone and Weinstein emphasize that, in some cultures, their inclusion may be important not only for the ability of the parties to understand the family and its needs, but also to broaden the possible options for serving the best interests of the child.⁷⁵ Unlike in litigation where third party interests are irrelevant, mediation recognizes that these very people may be "instrumental to the success of the plan."⁷⁶

E. The Chance for the Child to Have a Voice at the Table

The extent to which a child may participate or be represented in his/her child protection proceeding varies by state.⁷⁷ There are no federal or constitutional mandates

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Thoennes, *supra* note 17, at 33.

⁷⁵ Firestone & Weinstein, *supra* note 40, at 205.

⁷⁶ Thoennes, *supra* note 17, at 33. According to Thoennes, "The rise of various forms of family group decision making has helped to underscore the important role that extended family and friends may play in the creation and completion of a service plan." Also, it is important to note that the frequency at which this inclusion of extended persons occurs often varies by race/ethnicity and by the type of abuse.

⁷⁷ Donald N. Duquette & Ann M. Haralambie, *Representing Children and Youth*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 617, 617 (Donald M. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

requiring independent legal counsel for children in dependency court. Other than a few state laws which have provided for such representation, the only regulation comes from Child Abuse Prevention and Treatment Act (CAPTA), which requires each state receiving federal child abuse funding to appoint a GAL for an abused or neglected child in a case resulting in a judicial proceeding.⁷⁸ Furthermore, CAPTA requires that the attorney make recommendations concerning the best interests of the child.⁷⁹ However, both states and scholars are beginning to ask whether the child's attorney should represent his/her best interests or expressed wishes.⁸⁰ Law professor and scholar Barbara Bennett Woodhouse emphasizes the child's right to have his/her voice heard: "[C]hildren have the capacity for growth toward autonomy and deserve the right to be treated in a manner consistent with this capacity."⁸¹ While courts struggle with ways in which to make the child's expressed wishes heard, mediation provides an opportunity for this by allowing the child to participate in the decision-making.

While it is still a rare occurrence in CPM practice today, inviting the child to the mediation table is a decision for the parties to make, albeit one that requires very careful consideration. On the most practical level, Alicia Hehr writes, "If child protection cases are to be resolved in the best interest of the child, it makes sense to involve the child, at least at some point in the chosen process."⁸² Hehr has dealt with this issue in her work and asserts that, if the environment is safe, children should be involved in the mediation not only because they are "the most appropriate sources of defining what these

⁷⁸ *Id.* at 618 (citing 42 U.S.C. § 5106a(b)(2)(A)(xiii)).

⁷⁹ *Id.*

⁸⁰ Duquette & Haralambie, *supra* note 78, at 617.

⁸¹ Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 *BYU J. PUB. L.* 321, 331 (1993-1994). She grounds her argument within the rights set forth in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH THE UNITED STATES LAW 94-95 (Cynthia P. Cohen & Howard A. Davidson eds. 1990) (describing the rights under Article 5 of the Convention).

⁸² Hehr, *supra* note 32, at 458.

best interests may be,” but also because their involvement may “foster or improve the child-parent relationship.”⁸³ Edwards also points out that the child has the greatest interest in the outcome and often has valuable information that no one else can provide.⁸⁴

Furthermore, mediation may provide a better environment for the child to voice his or her opinion than court. Rather than an adversarial environment, mediation has the potential to provide a supportive environment which may foster a child’s comfort in expression of his or her experiences and feelings.⁸⁵ Also, children are less likely to feel as though they are being forced to choose sides against their parents; instead, they can just talk to their parents and the others in the session about their perspective.⁸⁶

However, it is of the utmost importance that the inclusion of the child at the table will not cause further harm to him/her. Often, this determination will depend on the original harm done to the child as well as the child’s age and maturity. As a strong advocate for the inclusion of the child, Hehr insists that “while young children’s recall and communication skills may not be as fully developed as those of adults, research suggests that children, even young children, are developed enough to be helpful in cases.”⁸⁷ Moreover, Edwards suggests that concerns regarding the safety and emotional reactions of the child can be appeased by providers of the mediation taking extra precautions and perhaps providing additional services.⁸⁸ Edwards refers to the Los Angeles County Juvenile Court, which works to involve the children in the process as much as possible; however, when the conversations are not appropriate for the children, they provide the children with “specially designed rooms (by

⁸³ *Id.* at 459.

⁸⁴ Edwards, *Child Protection Mediation*, *supra* note 15, at 76.

⁸⁵ Hehr, *supra* note 32, at 461.

⁸⁶ *Id.* (referencing Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86-87 (1997)).

⁸⁷ Hehr, *supra* note 32, at 460.

⁸⁸ Edwards, *Child Protection Mediation*, *supra* note 15, at 76.

Disney, no less)” while they wait.⁸⁹ Moreover, Edwards emphasizes the use of “simple safety precautions to avoid inappropriate contact between the child and any previously abusive adult who may be a part of the mediation process.”⁹⁰ Ultimately, although risky, if the situation is right, the engagement of the child in the session may be beneficial to both the parties and the process.

F. The Detailed and Unique Service Plans and Agreements

Due largely to the advantages discussed above, the agreements made in mediation sessions are often much better-suited to the unique family involved. According to Thoennes, the advantages are due to the reality testing that occurs in mediations along with the focus on interests rather than positions: “People get really committed to resolving the problem, not just defending a position.”⁹¹ Ultimately, the plans are more coherent, more practical, and more likely to be complied with by the parents.⁹² Also, in many jurisdictions, mediated service plans and agreements are often implemented sooner than litigated agreements.⁹³

Although the final agreements seem, on paper, to be very similar to those arising from litigation, there are notable differences. According to Thoennes’ research, the visitation arrangements are more specific and more generous in mediation agreements.⁹⁴ Mediated plans also provide for various services that are better suited for the unique children and parents.⁹⁵ Furthermore, mediated agreements address relationship and communication issues which can be instrumental to a plan’s success but are largely absent from

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Thoennes, *supra* note 17, at 31 (citing CENTER FOR POLICY RESEARCH, DEPENDENCY MEDIATION IN THE SAN FRANCISCO COURT (1998)).

⁹² *Id.*

⁹³ *Id.* at 31.

⁹⁴ *Id.* at 30.

⁹⁵ *Id.* at 31 (citing S.I. Gatowski, et al., *Mediation in Child Protection Cases: An Evaluation of the Washington, D.C. Family Court Child Protection Mediation Program*, 2005 TECHNICAL ASSISTANCE BRIEF).

litigated agreements.⁹⁶ By their nature, specific agreements are beneficial because of the way in which they help parties stay committed to the agreement and prevent future misunderstandings or disputes.⁹⁷

Also, within the studies done by Thoennes, “[o]ne of the most consistent findings across the studies is that mediation is successful in producing agreements.”⁹⁸ While reaching an agreement on all the issues in the case is not the only purpose of mediation, it certainly is an advantage for those cases that do. Thoennes research found:

[I]n most programs, 60 to 80 percent of the cases end with agreements that address all of the issues before the court. At most programs, an additional 10 to 20 percent of the cases resulted in partial agreements that covered at least some of the issues. In most programs, only about 10 percent of the cases that begin with mediation reach no agreements.⁹⁹

The reaching of an agreement in mediation is particularly significant because it signifies that all of the issues covered by the agreement were considered, weighed in on, debated, discussed, and decided by all of the parties present at the mediation table. Such collaboration often yields a much greater commitment to and respect for the agreement as well as a more unified identity of the parties—everyone is invested in the future of the child.¹⁰⁰ Even if the mediation does not result in an agreement, it is often successful in ensuring that important information is shared, and it helps the parties understand each other’s roles and perspectives. Better understanding can result in better relationships and trust between the parties, as well as the realization that they are all in this together for the child.

⁹⁶ *Id.* at 31.

⁹⁷ *Id.* at 30-31.

⁹⁸ Thoennes, *supra* note 17, at 29.

⁹⁹ *Id.*

¹⁰⁰ *See* Firestone, *supra* note 17, at 111; Mayer, *supra* note 30, at 14.

G. The Improvement of Parental Compliance

Although measuring parental compliance with the service plan or mediation agreement is very difficult, numerous mediation programs and research studies assert that mediation does result in better parental compliance than litigation.¹⁰¹ According to Mayer, the studies show that “[p]articipants report high rates of satisfaction with the process, a greater commitment to the outcome, and higher compliance rates than in traditional approaches.”¹⁰² Thoennes proposes the following reasons why mediation might improve compliance: families can create plans that are practical and tailored to their needs; the plans are more specific, realistic, clearly interpretable, and focused on the services necessary; and finally, “[p]arents may feel a greater sense of ownership of the plan and willingness to make it work.”¹⁰³ In fact, many jurisdictions have considered utilizing CPM primarily because of the additional involvement of the parents, which some assert results in parents who are more likely to follow through with the agreement.¹⁰⁴

H. The Ability to Save Time and Money for All

An ideal CPM would result in the child returning safely and permanently to his/her parents’ home in less time than the regular litigation process. The advantage of saving time and money is beneficial to the child, the family, and the state.

Children have an under-developed sense of time, which makes anticipating the future, and consequently, managing delay, difficult for them.¹⁰⁵ Thus, even a short length of time away from one’s parents may seem long to a child. Edwards calls attention to this idea: “[C]hild

¹⁰¹ Thoennes, *supra* note 17, at 34.

¹⁰² Mayer, *supra* note 30, at 14.

¹⁰³ *Id.*

¹⁰⁴ See Olson, *Family Group*, *supra* note 34, at 53-54.

¹⁰⁵ Edwards, *Achieving Timely Permanency*, *supra* note 32 at 5.

development experts argue that ‘procedural and substantive decisions should never exceed the time the child-to-be-placed can endure loss and uncertainty.’”¹⁰⁶ Thankfully, unlike many overburdened court systems, mediation programs can often act more quickly by scheduling a session in the near future, working through the issues with the parties to reach a mutually acceptable service plan agreement, and getting a judge to review and order the agreement within a short period of time.¹⁰⁷ Furthermore, through all of the consequent steps in the case, it is most likely that, if the parents are compliant, mediation will move their case along much quicker than litigation.

The children’s average ages at the time they enter the child welfare system is an important consideration: “Nearly 33 percent (32.6%) of all victims of maltreatment were younger than 4 years old. . . . An additional 23.6 percent were in the age group 4–7 years and 18.9 percent were in the age group 8–11 years.”¹⁰⁸ This is noteworthy because those who are less than four years old are not only the largest group, but also the longest to potentially be at the mercy of the child welfare system.¹⁰⁹ Furthermore, stability is even more important given their young age.

For families who are without their children (not to mention possibly paying attorneys and/or missing court), time is also valuable. Lawyers and social workers would rather see the case end quickly with as little collateral damage as possible due to the number of other cases that are also calling for their attention.¹¹⁰ Furthermore, court systems can benefit from the use of mediation because, whether it is a court-run mediation program or not, the mediations save the judicial

¹⁰⁶ *Id.* (quoting J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 40-42 (Free Press 1973)).

¹⁰⁷ See Edwards, *Achieving Timely Permanency*, *supra* note 32 at 5.

¹⁰⁸ U.S. Dep’t of Health & Human Serv., Admin. for Children & Families, Admin. on Children, Youth and Families, Children’s Bureau, *Child Maltreatment 2008*, 25 (Dec 23, 2010), <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>.

¹⁰⁹ *Id.*

¹¹⁰ Olson, *Importance*, *supra* note 17, at 1344.

system money and reduce their dockets.¹¹¹ Beyond the practical benefits courts receive, many judges also express approval of the process of mediation over litigation for child welfare issues due to the unique benefits that the mediation process can provide families.¹¹²

II. Possible Weaknesses of CPM

Although mediation does bring numerous advantages to the child welfare system, it is important to recognize that some aspects of CPM are problematic. There are many court systems, judges, attorneys, and scholars that remain critical of the use of mediation for child welfare cases. The primary criticisms consist of: the power imbalance between the state and parents, the participation of parties who have a history of domestic violence, the potential marginalization of child abuse and neglect, the blind reliance on confidentiality, and the necessity of having a skilled mediator.

If left unaddressed, these problems could devastate a potentially successful mediation or CPM program. In the following five areas addressed, I will first present the problem that exists in the mediation process. I will next present the practices developed by mediation programs and scholars to overcome the problems. Notably, there is still much work to be done on these issues and still other solutions to be found.

A. The Power Imbalance between the State and Parents

By intruding into the family life, possibly removing children from the home, enlisting the child into the child welfare system, and giving the parents an ultimatum of service plan compliance for the return of their children, the state has abruptly and overwhelmingly asserted its power over the parents. The assertion, then, that mediation will “level the playing field” and give parents a voice equal to the state with regard to the decision-making seems nearly impossible.

¹¹¹ *Id.*

¹¹² See, e.g., Edwards, *Child Protection Mediation*, *supra* note 15, at 74.

With regard to legal representation, time, and costs in mediation or litigation, the state undoubtedly has the upper hand. As explained by Firestone, “[w]hile typically overworked and understaffed, the state child protection agency seemingly has unlimited resources to pursue a case while the parent typically has a court-appointed attorney, who often can only spend a limited amount of time on the case.”¹¹³ This could affect the parents in at least two ways: by making them feel as though they must settle in the mediation or by hindering the parents’ success in the mediation due to the lack of preparation with his/her attorney.¹¹⁴ Moreover, the state agency and professionals are much more likely to have previously been parties to mediations, and thus, they tend to be much more familiar with the process and dynamics of mediation than the parents are.¹¹⁵ Also, although agreements reached within a mediation are supposed to be “mutually acceptable” and “voluntarily reach[ed],”¹¹⁶ because the state already has possession of the child in many cases, in mediation the “parents often fear that, unless they do what the state requests, the state will either remove or not return their child to the care of the family.”¹¹⁷ Consequently, an agreement made under the shadow of fear is not “voluntarily reached.” These are only a few of the ways in which the power imbalance can affect a mediation.

Nevertheless, CPM attempts to level this tangible power imbalance. Mayer writes of this “underlying tension about empowerment” and the way in which the parents’ power must be handled with care: “[T]he power of the family and the parents has to be circumscribed and enhanced at the same time. This requires a great deal of finesse which may run counter to the structure and culture of court and child protection systems.”¹¹⁸ CPM must work to “empower families and parents to the extent possible within the limits of the

¹¹³ Firestone, *supra* note 17, at 102.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Mayer, *supra* note 30, at 16-17.

state's responsibility for protecting children."¹¹⁹ Some common practices include better educating the parents about the process, using common language rather than legal jargon, altering aspects of the process, and inviting support figures to the mediation.¹²⁰ Giovannucci and Largent emphasize the significance of pre-mediation preparation with the families, including "a face-to-face meeting, seeing or being in the room where mediation will take place, reviewing the agreement to mediate (sometimes reading it out loud), explaining the parameters around confidentiality, and the degree of choice parents have about participation."¹²¹ Furthermore, preparation meetings can help build trust and rapport by allowing the parties to speak with the mediator about questions they have, concerns regarding how/what they want to say in the mediation, and what the roles are of the different parties who will be present in the mediation.¹²² By taking this time, the family is given a chance to become familiar with the dynamics of mediation, thus building their empowerment, and hopefully confidence, as participants in their future mediation.¹²³

Ultimately, mediation may not be able to create a perfect balance of power between the parents and the state; however, of all of the legal processes available today, it seems to be the one closest to providing some equality. Conclusively evaluating mediation's efforts to create a power-balance for the parties, Mayer writes,

Effective programs keep this concern at the forefront of their design, training, and service approach. But the structural inequalities are so great that, no matter how much attention is paid to this, the concern will always loom large, and the expectation that power can in some way be equalized is unrealistic. However, families can experience a significant increase in power,

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Giovannucci & Largent, *supra* note 28, at 46.

¹²² *Id.*

¹²³ *Id.*

influence, and voice through these processes from what they have previously experienced in their interaction with the child protection and judicial systems and from what they have come to expect—and this change is very important. It is what brings them into a new relationship to the whole process.¹²⁴

In sum, mediation has yet to provide honest power equity. Yet, mediation does provide the parents with more power than any other of the processes currently available.

B. The Participation of Parties Who Have a History of Domestic Violence

It is not uncommon that parents who are working through a child abuse and neglect case also have a history of domestic violence.¹²⁵ Due to the inherent power and control imbalances within an abusive relationship, it is unlikely that the parties can be said to meet one of the prime directives of mediation: the ability to make voluntary, un-coerced decisions.¹²⁶ In fact, the very holding of a parental meeting may risk the safety of one of the parties. However, many programs today are mediating child abuse and neglect cases even after the family has been screened and shown to have a

¹²⁴ Mayer, *supra* note 30, at 17.

¹²⁵ U.S. Dep't of Health & Human Serv., Admin. for Children & Families, Child Welfare Information Gateway, *Domestic Violence and the Child Welfare System*, <http://www.childwelfare.gov/pubs/factsheets/domesticviolence.cfm>. “A majority of studies reveal there are adult and child victims in 30 to 60 percent of families experiencing domestic violence.” (citing Appel & Holden, 1998; Edleson, 1999; Jaffe & Wolfe, 1990).

¹²⁶ See ABA, *Mediation*, *supra* note 22. Also, thank you to University at Buffalo Law Student Helen Root for allowing me to consult her recent project regarding this issue in the state of New York.

history of domestic violence.¹²⁷ Consequently, many assert that victims continue to be forced to mediate their safety.¹²⁸

A majority of the published literature regarding the effects of domestic violence on mediation has considered only the dangers of divorce mediation rather than child abuse and neglect mediation. However, if the dynamic of domestic violence between the parties is present, it will surely affect the success of the mediation whether the focus is on divorce or child abuse. In the article, "Ending Mandatory Divorce Mediation for Battered Women," Andree G. Gagnon asserts that mediation involving parties with a history of domestic violence is problematic because the violence corrupts the essential elements of mediation: "[V]oluntary participation, equality or rough parity of bargaining power, neutrality on the part of the mediator, and confidentiality."¹²⁹ Primarily, there are two different types of problems caused by mediating cases with parties who have a history of domestic violence: (1) the effect that the dynamics of violence may have on the parties during the mediation, and (2) the message sent to parties and the wider society that the violence is accepted and noncriminal.

The first type of problem is apparent in the way in which the dynamics of domestic violence manifest in the mediation session. A close balance of power is crucial for a successful mediation wherein parties can make independent decisions without pressure or coercion; however, as Gagnon writes, "equality of bargaining power and mutual cooperation do not exist in a battering relationship."¹³⁰ It is unlikely that a victim of domestic violence will be able to attend a mediation with the perpetrator, feeling as though she (the victim) had equal power of decision-making or even the freedom to express everything she may wish to address. As Peter Salem

¹²⁷ Edwards, *Achieving Timely Permanency*, *supra* note 32, at 12-13 (referring to California court practices).

¹²⁸ Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 277 (1992).

¹²⁹ *Id.* at 274.

¹³⁰ *Id.* at 274-75.

reports, “Victim advocates contend that the dynamics endemic to an abusive relationship preclude the possibility of collaborative decision making, even with a skilled mediator.”¹³¹ Furthermore, the victim’s physical and emotional safety may be at risk by attending the session with her perpetrator. Also, Gagnon points out that “the terms of the agreement may compromise a woman’s safety by giving the batterer access to her through joint custody and visitation agreements.”¹³² If the parents are unable to participate with a sense of unthreatened self-determination, the mediation will fail to accomplish one of its important end goals—a voluntary, mutually agreed upon resolution.

The second type of problem arises from the significance (or lack thereof) that is attributed to the domestic violence in the mediation. This problem calls attention to the elements of mediator neutrality and the confidentiality of mediated sessions. Mediator neutrality, Gagnon writes, becomes a problem in a group session with the victim and perpetrator of domestic violence because “[i]f the mediator does not condemn the abuse, the batterer’s belief that his behavior is acceptable is maintained and the battered woman is disempowered.”¹³³ Such a lack of recognition may further widen the gap between the parties’ sense of power in the mediation. Also, because the process is confidential, mediation may appear to be a venue that perpetrators can use unfairly because cases are hidden to the wider society. The violent acts may even go unrecognized in the mediation. Not only does this send a negative message to the wider society, but it also presents a discouraging outlook for any victim of

¹³¹ Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 35-36 (1994-1995).

¹³² Gagnon, *supra* note 129, at 276. See also Salem & Milne, *supra* note 132, at 35-36 “[A] mediated agreement may provide for unsafe (i.e., unsupervised) and ongoing contact between a victim and her abuser.”

¹³³ Gagnon, *supra* note 129, at 276. It should be noted that this is one interpretation of the effect that could follow a mediator’s failure to condemn the abuse. In perhaps another circumstance, the victim may have discussed with the mediator privately her desire not to have the mediator condemn the abuse to maintain a calm and productive mediation session.

violence who may be forced to or who may have previously wished to mediate a case.

One of the few studies that have considered domestic violence in child abuse and neglect mediations was based on client satisfaction with family court counseling in Australia.¹³⁴ There, Barbara Davies and Stephen Ralph found that “abuse clients were less likely to be able to focus on children’s needs than nonabuse clients.”¹³⁵ Yet, counselors also reported that following the mediation, many families “improved coparenting skills and shift[ed] parenting responsibilities.”¹³⁶ In another study originating from Australian courts, of the 149 surveys that were compiled and examined, “[r]espondents who said they had experienced or been threatened with violence by their ex-partner . . . were less likely to feel that they could resolve future disputes with their ex-partner without outside help, and more likely to fear that their ex-partner would not abide by the agreement reached.”¹³⁷ Also, reinforcing the asserted similarities between the problems of mediating cases of domestic violence and cases of child abuse and neglect, the results “suggest that as with domestic violence, respondents found conferencing in child abuse cases highly unsatisfactory, and that conferencing is not at all appropriate in these circumstances.”¹³⁸ These findings are significant because to date, there is little to no published research of the satisfaction with CPM among parties with a history of domestic violence in United States.

However, some proponents of mediation assert that as long as the mediation is truly voluntary, it may be acceptable

¹³⁴ Barbara Davies & Stephen Ralph, *Client and Counsellor Perceptions of the Process and Outcomes of Family Court Counselling in Cases Involving Domestic Violence*, 36 FAM. & CONCILIATION CTS. REV. 227 (1998).

¹³⁵ *Id.* at 235.

¹³⁶ *Id.*

¹³⁷ Rosemary Hunter, *Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law*, 30 J. L. SOC’Y 156, 172 (2003). The survey was conducted regarding the Legal Aid Commission’s PDR program at Legal Aid Queensland from May-June 2000.

¹³⁸ *Id.* at 173.

for cases of domestic violence.¹³⁹ Gagnon asserts that by making mediation mandatory, the system fails to acknowledge the dangers of domestic violence and instead “puts battered women at risk for more abuse, contributes to their further disempowerment, and continues to protect their assailants from legal sanctions.”¹⁴⁰ Instead, expressing a widely held opinion, he writes that for cases of domestic violence, “the optimal mediation process is one that is voluntary.”¹⁴¹ However, even this is found to be problematic by victim advocate and attorney Barbara Hart who asserts,

the battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, not free to identify and advocate for components essential for her autonomy and safety and that of her children, not free to terminate mediation when she concludes it is not working.¹⁴²

As Hart makes clear, mediators need to be acutely aware of and able to respond to the power and control dynamics that may permeate a mediation.

As expressed by Hart, both parties’ “voluntary” acquiescence to mediate is still not enough to put many domestic violence and mediation advocates at ease.¹⁴³ Instead, the developed common practice has come to include numerous mechanisms of identifying and possibly continuing on with a mediation.¹⁴⁴ Salem and Milne suggest eight techniques for reducing the influence of domestic violence:

¹³⁹ See Gagnon, *supra* note 129.

¹⁴⁰ *Id.* at 272-73.

¹⁴¹ *Id.* at 291.

¹⁴² Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 321 (1990).

¹⁴³ *Id.*

¹⁴⁴ See Salem & Milne, *supra* note 132, at 38; Edwards, *Achieving Timely Permanency*, *supra* note 32, at 12.

[1] Mediator education and training regarding the numerous specialized techniques designed for cases involving domestic abuse.

[2] Screening is conducted to determine whether the dispute and the parties are appropriate for mediation.

[3] Private caucuses provide the opportunity for a safe, private discussion with each party about concerns that may arise during the screening process of during the course of mediation.

[4] Shuttle mediation is conducted as the mediator moves back and forth between the parties (in separate rooms or at different times).

[5] Telephone mediation allows parties to mediate without leaving home.

[6] Community resources and support services, such as a victim advocate, attorney, or counselor may be effective in helping a client objectively assess options during a mediation session.

[7] Ground rules may be established to restrict the agenda to specific issues, such as a physical exchange of the children between the parents, or to preclude inappropriate topics that batterers may want to negotiate, such as reconciliation, dropping abuse charges, or modification of restraining orders.

[8] Attorney review before finalizing mediated agreements is essential.¹⁴⁵

Of course, even if the case passes the screening or fails to pass but incorporates some of the additional methods, the mediator must continually reassess the dynamics between the parties to ensure that all of mediation's critical elements are being met, including self-determination and safety. At any point, the mediator or a party may end the session and work either to schedule another mediation session for another time, perhaps

¹⁴⁵ Salem & Milne, *supra* note 132, at 38.

with different protocols, or to remove the case from the mediation system and return to the formal court process.¹⁴⁶

Many mediation programs boast great confidence and “success” with the implementation of various safeguards for the mediation of cases involving domestic violence. In California, where “Family Violence: A Model State Code” was implemented, “[e]valuations of the mediation process confirm that victims of violence and victim advocates prefer appropriately conducted mediation to the formal court process” when the appropriate procedures are in place and mediation can be safe and fair.¹⁴⁷ Also, Firestone writes of the importance of empowering parents through the process of mediation rather than litigation.¹⁴⁸ In recognition of the affect that domestic violence between the parents might have on the mediation, he proposes that it would be less problematic in a child abuse and neglect case than in a divorce case.¹⁴⁹ Firestone quotes the work of Crush (2007) who recognizes that the rationale for participation is fundamentally different and so is the focus of the mediation: “[c]hild protection mediation is not focused on the best interest of the family but on the best interest of the child.”¹⁵⁰ Due to these differences, Firestone and Crush assert that the dynamics of violence between the parents do not weigh as heavily on CPM.¹⁵¹ That such weight still exists must be reckoned with and may not be remediable. Whether or not a domestic violence case should be mediated seems to hinge upon both the extremity of the current relationship between the parties as well as the mediation program’s ability to provide the parties with adequate domestic violence safeguards.

Ultimately, Salem sums it up well when he states that the majority of mediation proponents “agree that many cases involving domestic abuse are inappropriate for mediation; that

¹⁴⁶ *Id.* at 36.

¹⁴⁷ Edwards, *Achieving Timely Permanency*, *supra* note 32, at 12.

¹⁴⁸ Firestone, *supra* note 17, at 99-100.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting Linda Crush, *When Mediation Fails Child Protection: Lessons for the Future*, 23 CAN. J. FAM. L. 55, 72 (2007)).

¹⁵¹ *Id.*

screening is necessary to determine which cases are appropriate; the dynamics of domestic abuse' that participation in the mediation process must be safe, fair, and voluntary; and that victims of abuse should not be required to mediate."¹⁵²

C. The Potential Marginalization of Child Abuse and Neglect by Mediating

Many advocates fear that by moving cases from a public, adjudicatory process to a private, mediated process the crimes of child abuse and neglect will be taken less seriously. In other words, they are concerned that society will define the cases as less important or serious because a mediation process as opposed to litigation has been chosen.¹⁵³ Indeed, privatizing the conflict through mediation can have important symbolic repercussions. This reaffirmed criticism of the use of mediation for cases of domestic violence and divorce is also transferable to the use of mediation for cases of child abuse and neglect. Consider the sentiments of following scholars. Gagnon writes, "[T]he private nature of mediation counsels against its use: there are both societal and individual consequences when the crime of domestic violence is hidden."¹⁵⁴ Also, Sara Cobb, in her article, "The Domestication of Violence in Mediation," writes of the critical legal and feminist scholars who have "collectively decried the dangers of mediation for the 'violated,' arguing that mediation favors the continued oppression of women and the domination of state's interests" as the "informal processes reconstitute gender inequalities . . . , decriminalizing violence against women . . . and reducing women's access to formal arenas where claims of injustice have the potential for social reform."¹⁵⁵ These scholars recognize that the very process of

¹⁵² Salem & Milne, *supra* note 132, at 36.

¹⁵³ See Gagnon, *supra* note 129, at 275.

¹⁵⁴ *Id.*

¹⁵⁵ Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & SOC'Y REV. 397 (1997) (referring to Harrington 1985; Abel 1982; Lerman 1989; Rifkin & Harrington 1987; Rifkin 1989; Fineman 1988; Stallone 1984; Germane, Johnson, & Lemon 1985; Lerman 1984).

mediation can reduce the perceived severity of domestic violence. Along the same lines, is CPM reducing children's access to justice if their cases are not litigated and the perpetrators are given continued substantial decision-making power over the future of their victim—their child?¹⁵⁶

While a mediation is often most successful when all of the involved parties are present, the results of a survey and research conducted by Joan Kathol reveal that many parties are often absent from the mediation—particularly the parents' attorneys or additional representation for the child.¹⁵⁷ Furthermore, "According to the respondents, not one of the participant groups was present at 100% of the mediation sessions."¹⁵⁸ This finding is worrisome considering first and foremost the child's representation, but also the other parties' participation in the mediation which is essential to the goal of such collaborative understanding and decision-making.

However, Edwards, a long time child protection judge and mediation proponent, disagrees with the argument that mediating child abuse and neglect cases marginalizes the issue when the mediations are "properly conducted." He writes:

This argument has been dispelled by over twenty years of practice and consistent findings that child safety is not in jeopardy with properly conducted mediation. Several protections are built into the mediation process, including participation by a guardian ad litem and/or attorney for the child, the presence of the social worker, facilitation by trained mediators who are focused on the best interests of the child, and, finally, judicial review of all proposed agreements. More importantly, everyone in the mediation process understands that the issue of child abuse or neglect cannot

¹⁵⁶ This power is bridled by the other parties present (social worker, guardian for the child, etc.); however, the very presence at the table gives the perpetrator a powerful voice.

¹⁵⁷ Kathol, *supra* note 26, at 120.

¹⁵⁸ *Id.*

be mediated or marginalized. All circumstances surrounding the allegations can, however, be discussed and heard, as can all issues related to the safety and best interest of the child and the safety of the family members.¹⁵⁹

With great faith in the process of mediation, Edwards is very confident in the ability of mediation to properly handle and give serious recognition to cases of child abuse and neglect. However, it is unlikely that every case will be properly mediated, and even if they are, the problem persists that the cases remain hidden, failing to bring to the public's attention the prevalence of the crime. Further, even if the public is made aware of the prevalence of the cases that are being mediated, it will appear as though the courts are no longer "punishing" perpetrators of child abuse and neglect because so many cases are being sent to mediation rather than court (although some parents in CPM do have criminal proceedings originating from the incident at issue pending).

D. The Blind Reliance on Confidentiality

Another weakness of CPM is its dependence on a free-flowing and open exchange of information with only vague and conditional promises of confidentiality for the parties. States vary in their individual confidentiality provisions, but, by and large, "in CPM there is less certainty that mediation communications will be inadmissible in a subsequent judicial proceeding than in other types of mediation."¹⁶⁰ Parties may be reluctant to speak out of fear of the following ambiguities: whether the disclosures made in mediation may be subject to discovery in a later judicial proceeding, whether parties that are mandatory reporters may disclose information, and the extent to which social workers or GALs may change their recommendation/opinion based on disclosures made in the

¹⁵⁹ Edwards, *Child Protection Mediation*, *supra* note 15, at 75.

¹⁶⁰ Firestone, *supra* note 17, at 109.

mediation.¹⁶¹ In Thoennes' study, she found that "in the New York study, about a third of the parents reported some concern about whether things said in mediation might be shared beyond mediation."¹⁶²

Some propose that parents should be protected from confidentiality problems by having their attorneys speak on their behalf. In Firestone's article, he places importance on the recognition that "empowering parents to actively participate in mediation does not mean that parents should be required to actively participate."¹⁶³ Instead, he recommends that when the parents' active participation could be problematic due to pending criminal charges, it may be advisable to have the parents' attorneys speak for them.¹⁶⁴ Although this would protect the parents, it is hard to see how such tempered participation of the parents could truly embody the essence of the mediation, empowering the parties to share their voice, understand all of the information available, and make a mutual agreement based on such insight.

Undoubtedly, the issue of confidentiality is very complex when the mediation may hinge on the disclosure of sensitive information as it seeks to empower the parents and must give the utmost import to the child's safety. Until clear guidelines are established for each state or mediation program and are made clear to each participating party, there will continue to be problems with this difficult issue.

E. The Necessity of Having a Great Mediator

Today, there are no federal or state certification or licensing requirements for mediators.¹⁶⁵ The only existing qualification requirements are set by state ADR commissions or bar associations.¹⁶⁶ This is highly problematic because,

¹⁶¹ *Id.*

¹⁶² Thoennes, *supra* note 17, at 32.

¹⁶³ Firestone, *supra* note 17, at 101.

¹⁶⁴ *Id.*

¹⁶⁵ Mediation Training Inst. Int'l, *State Requirements for Mediators*, <http://www.mediationworks.com/medcert3/staterequirements.htm>

¹⁶⁶ *Id.*

technically, without close oversight by a hiring committee, anyone without any mediation training or experience could attain a job as a child protection mediator.¹⁶⁷

Ultimately, the mediator's competency may be the greatest determining factor of the success of a mediation. While this is not a typical "weakness," it can be conceived as a limitation of mediation because the success can be so dependent on the mediator's capability for conducting an effective and appropriate CPM. The research and literature continually reiterates that the mediator's skill and his/her substantive knowledge of child welfare law were not only absolutely critical, but also the single most important factors for an ethical and successful mediation session.¹⁶⁸ Reflecting on his experiences over the years, Mayer writes that it is not always the mediator's approach, but instead the skill, that matters.¹⁶⁹ Furthermore, Mayer insists that the best child protection mediators have a "substantive knowledge of family dynamics, the child protection system, the legal framework for child protection intervention, and issues related to intervention in child abuse and neglect."¹⁷⁰ Thoennes' article provides further support: "[R]esearch consistently shows that individuals conducting dependency mediation must be familiar with the child welfare system, respected by the professionals who will constitute the repeat players at the mediation table, and skilled in handling mediation sessions with a multitude of participants."¹⁷¹ Knowledge of the child welfare system is certainly important for a child protection mediator; in addition, many advocates also emphasize the importance of the mediator's familiarity with the culture and background of the family to increase communication and understanding within the mediation.¹⁷² While basic training is essential to becoming a good mediator, it appears time and

¹⁶⁷ See *id.*

¹⁶⁸ See generally Mayer, *supra* note 30; Firestone, *supra* note 17; Thoennes, *supra* note 17; Giovannucci & Largent, *supra* note 28.

¹⁶⁹ Mayer, *supra* note 30, at 17.

¹⁷⁰ *Id.*

¹⁷¹ Thoennes, *supra* note 17, at 26.

¹⁷² Mayer, *supra* note 30, at 18.

time again that skill, specialized knowledge, and experience are the key factors.

Another concern is that because the mediator may be fulfilling more than one role in a mediation, a conflict of interest may arise. According to Edwards, this can happen when the mediation program is established such that “a service provider is part mediator, part investigator, and part evaluator along with other duties that court administration may assign.”¹⁷³ At this point, the process no longer meets one of the prime directives of mediation because the mediator is not a neutral third party as required.¹⁷⁴ Other scholars are concerned not with the mediator actually fulfilling more than one role, but with the mediator’s temptation to. As a reminder to mediators, Firestone writes:

While it is often tempting to want to direct the outcome and ensure the safety of the children, it is critical that the mediator remembers his or her role in the process and seeks to empower the various mediation participants to do their job in mediation rather than seeking to substitute the judgment of the mediator for the judgment of the participants. If the mediator loses neutrality and seeks to shape the outcome, the mediator is likely to be compromising the mediation process and the extent to which all participants feel empowered to exercise self-determination. The mediator also should not seek to replace the judgment of the parties with the mediator’s judgment about the matter and should respect the parties’ ability to reach a good enough agreement that will then be subject to court review.¹⁷⁵

¹⁷³ Edwards, *Child Protection Mediation*, *supra* note 15, at 75.

¹⁷⁴ ABA, *Mediation*, *supra* note 22.

¹⁷⁵ Firestone, *supra* note 17, at 104.

The mediator must always keep in mind that he/she serves as a neutral, third party—the facilitator of the mediation rather than the influencer. At the heart of CPM, the parties are the determinates of the resolution. Emphasizing the need to continuously be aware of the purpose of CPM, Mayer writes, “The underlying assumption of CPM is that parents and child protection professionals need to work together as part of a team and that in order to do so the nature of the interaction needs to change so that parents really are equal and empowered members of the team.”¹⁷⁶ According to Mayer, “The best way to do this is through the use of a process-oriented mediator who can change the dynamic of the interaction between parents and professionals from inquiry, interview, evaluation, and imposed planning (imposed by the professionals on the parents) to one of negotiation.”¹⁷⁷ While it is always ultimately up to the parties, the skilled mediator makes the magic of mediation happen. If the mediator is less than skilled, the mediation may face substantial barriers.

Conclusion

This article has reviewed the important areas for consideration in assessing a child protection mediation program. There are eight resounding strengths of the CPM. The less-adversarial nature of the process acknowledges the unique needs and dynamics of families by providing them with a comfortable environment which nurtures a facilitative discussion of their and their child’s needs for the future. For the parents, there is empowerment in their ability to have a voice at the table and to contribute to future decision-making. Furthermore, because mediations are confidential, parties have the chance to disclose whatever information they feel is necessary to help guide the future agreement. By inviting other necessary parties, such as service providers or grandparents, CPM’s inclusive nature helps parties form agreements that are not only thorough, but also well-supported by extended family or the wider service community. Also, by

¹⁷⁶ Mayer, *supra* note 30, at 13.

¹⁷⁷ *Id.*

giving the child the chance to have a voice at the table, mediation acknowledges the value the children themselves are to the mediation process. With all of these considerations in mind, CPMs are much more likely to result in detailed and unique service plans and agreements. Further, because of the parents' involvement in the decision-making, it is believed that the parents are more likely to comply with the agreements. Finally, many assert that the CPM saves courts, attorneys, and parties more time and money.

Studies have indicated a general satisfaction with this process in child protection cases. In fact, in a recent article by Edwards, he states that almost all court-referred CPM programs have reported "excellent results."¹⁷⁸ Using settlement rates as an indicator of success, Thoennes boasts that CPM helped families reach agreements on all of the issues at hand in 60-80% of the mediations.¹⁷⁹ Furthermore, both Thoennes and Barbara Davies' research points out that both parents and professionals in the CPM programs have found great success and satisfaction with the process.¹⁸⁰ Finally, child protection mediation has been recently identified by the NCJFCJ's Permanency Planning for Children Department as a "best practice."¹⁸¹ Mediation has also been involved in many court improvement initiatives in states across the country.

While the significant attributes of the process compel greater implementation, the possible weaknesses of CPM also require a very careful consideration, as several of them have the potential to gravely harm CPMs if not dealt with adequately. The inherent power imbalance between the state and the parents in a CPM is truly antithetical to the core principles of mediation wherein the parties must be power balanced and must not feel coerced. It is hard to imagine how a family whose child has been removed from their home by

¹⁷⁸ Edwards, *Mediation*, *supra* note 2, at 63.

¹⁷⁹ Thoennes, *supra* note 17, at 29.

¹⁸⁰ *Id.* at 32; Barbara Davies et al., *A Study of Client Satisfaction With Family Court Counseling in Cases Involving Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 324 (1995).

¹⁸¹ Edwards, *Mediation*, *supra* note 2, at 64.

the state could feel equal to the state in a subsequent CPM. Along the same lines, domestic violence presents a particularly hard case against CPM. It is difficult to say that there will be no power imbalance, coercion, or fear for safety within or resulting from the mediation among parents who have a history of domestic violence. Also, there is a concern that by mediating rather than litigating child abuse and neglect cases, the system is marginalizing the crime, or failing to condemn it, and sending a greater message to society. Further, the promise of confidentiality can be double-sided as the full exchange of information is critical for a productive discussion of moving forward; however, despite a form signed at the beginning of a mediation, there is no way to ensure that one's statements will not arise again. This is highly problematic for parents and parties who have a criminal proceeding for the case underway as well. Finally, it comes down to the fact that the simple most important factor for a successful mediation is an extraordinary, skilled mediator. Unfortunately, this simply cannot be assured for all CPMs. However, for each of these weaknesses there is a growing dialogue of best practice responses and an ever increasing body of practice-based advice, coming from those scholars and programs that have had the most experience with CPM. Such an increasing wealth of information regarding these issues is invaluable to the furtherance of the practice of CPM.

Furthermore, in consideration of the complexities presented by the strengths and weaknesses of CPM, it becomes apparent that national guidelines regulating the ethics, process, and mediator requirements could greatly advance the practice of CPM as it exists today. Fortunately, there is a national workgroup affiliated with the Association of Family and Conciliation Courts (AFCC) and National Council of Juvenile and Family Court Judges (NCJFCJ) that has taken it upon itself to draft national guidelines for CPM programs across the nation. The workgroup is comprised of child welfare and/or mediation advocates and scholars who have been working on the guidelines for at least a year now. It is expected that these guidelines will be insightful and thorough; however, they will not be binding but will be available for

mediation groups to adopt, to adopt with reservations, or to decline. Overall, they will be an incredible resource for CPM mediators and programs as well as a great advancement for the general practice of CPM.

Ultimately, it is up to CPM programs, child advocacy organizations, attorneys, and parties to continue this dialogue of the unique nature of CPM and to begin applying this knowledge of the strengths and weaknesses of CPM to their own involvement with CPM. Time and time again, CPM seems to prove itself as a very promising process for children in the child welfare system. In fact, CPM has already begun to revolutionize the child welfare systems of states across the nation. However, the process can only be as effective as advocates are committed to better understanding its potential. With the potential to truly improve the future of millions of children in the child welfare system, CPM deserves the chance to fulfill its promise—children's best interests are relying upon it.