

# FAMILY MEDIATION:

## Exploring the Benefits and Challenges of Publicly Funded Mediation Services in Ontario

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## EXECUTIVE SUMMARY

This research project studied publicly funded mediation services in Ontario. This comes at a time when family justice professionals and provincial and federal governments are working to find expeditious and cost-effective ways to support separating families during their difficult transitions. Mediation services in Ontario have been an integral part of a variety of family-focused solutions since 2011 when the Ministry of the Attorney General (MAG) made publicly funded, voluntary family mediation services available throughout the province at every courthouse via two forums:

- 1) On-site mediation: Provided to individuals on the day they are appearing at the courthouse for their family law matter. This is a free service.
- 2) Off-site mediation: Accessible to all individuals. Generally, up to eight (8) hours of mediation are provided and is for families with many issues or those dealing with more complex matters. Unlike on-site mediation, individuals may seek mediation services without having started an application in court. This service charges user fees based on income.

As part of a suite of family law services, the Family Law Information Centres (FLICs) were established as a one-stop resource portal to access the following:

1. The Information and Referral Coordinator (IRC) (usually the “front” person working in the Family Law Information Centre)
2. Court staff to provide information about the family court; court process; court forms; guides to procedure and how to get a lawyer
3. Mediation Services (on-site and off-site services)
4. Mandatory Information Program (MIP) coordinator/provider
6. Assorted pamphlets about the court process and community services
7. Computer/printer for public use (available in some court locations)

Funding for these services are provided through Ontario’s Ministry of the Attorney General (MAG), which retains independent contracted service providers to staff the array of family law resources, and particularly on- and off-site mediation. Another important related service is the Advice Lawyer, staffed through Legal Aid Ontario.

### Purpose of this Research Project

This project was undertaken in response to a Request for Proposals from the Association of Family and Conciliation Courts, Ontario Chapter (AFCC-O) for research intended to learn more about the challenges and best practices in the provision of publicly funded mediation services in Ontario. The AFCC-O provided funding support and advice, but the methodology, research findings and recommendations are solely those of the authors.

## Methodology

Five components were part of this research:

1. *A literature review*
2. *Online Survey.* An online survey of Ontario family justice professionals was undertaken to address mediation services from two perspectives: 1) Mediators and 2) Family justice professionals who refer to mediators/mediation
3. *Key Informant Interviews with family justice professionals*
4. *Judicial Interviews*
5. *Court Site Visits to selected Ontario locations*

Analysis. The data analysis follows two lines: quantitative data generated through the online survey and qualitative data gathered in open responses in the online survey and through the key informant interviews.

Mediation has been defined as “a process in which a mediator, or impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement” (Symposium on Standards of Practice, 2001 as cited in Pokman, Rossi, Holtzworth-Munroe, Applegate, Beck, & D’Onofrio, 2014). It is now widely acknowledged that many, if not most, families benefit from the mediation process and other non-court dispute resolution mechanisms, rather than the longer and much more expensive course of litigating the matter through court. The provision of mediation services for families experiencing separation in Ontario has increased as a primary alternative dispute resolution option when it comes to diverting people out the court-based family justice system.

Growing concerns about access to family justice have resulted in numerous reviews and consultations about the ways families can be triaged in a more proactive, fair, positive, cost-effective way, while still ensuring that legal rights and obligations are respected and that parties with serious conflict issues, such as inter-partner violence, find the right protections and venue for their needs. Concerns about access to legal advice is also growing concern in the mediation context.

One of the key policy goals of alternative dispute resolution service provision has been to limit the negative impact associated with separation and divorce, particularly the impact on children (Madsen, 2013a; Smyth & Chisholm, 2017). The goal has been to find less costly, more expeditious means that also provide parents with opportunities to reach collaborative parenting agreements that put children’s needs at the forefront, rather than a win-lose competition associated with court litigation.

## Overview of Findings

*Online Survey.* There were 138 respondents: 95 were Mediators (69%) and 43 were Referrers to mediation services (31%).

*Key Informant Interviews.* 28 interviews with 30 family justice professionals were conducted. These interviews were audio recorded and transcribed.

*Judicial Interviews.* 17 judges were interviewed. These interviews were audio recorded and transcribed.

*Site Visits.* In-person visits to eight selected Ontario court sites were completed: Guelph, London, Newmarket, Sudbury, Windsor and Toronto (311 Jarvis, 393 University, and 47 Sheppard).

## Defining Success in Mediation

Both mediators and referrers to mediation were asked how they view success in mediation. Respondents were given a range of options that canvassed the extent to which issues were resolved (e.g., settlement on all or some legal issues) to communication and relationship skills. Overwhelmingly, both groups identified that resolution on all issues was not the preferred way to define success. There was higher endorsement for outcomes such as “better coordinated parenting approach to meet children’s needs,” “decreased conflict,” “improved communication between parents,” and “client satisfaction.” That said, resolution of legal matters was also important (e.g., Agreement/resolution reached on ALL issues, Agreement/resolution reached on SOME issues, facilitated decisions about spousal/child support), but that the endorsement of the communication benefits of mediation went beyond mere resolution of issues.

## Achieving Success in Mediation

Given the diverse outcomes associated with mediation – both resolution of legal issues and facilitating communication for a complicated interpersonal dynamic – participants were asked to comment on what it takes to successfully mediate. Two key areas were identified: 1) the skills of the mediator including their training and interpersonal skills acquired through time and experience to manage the complicated dynamics; and 2) clients who have the necessary mindset to mediate summarized as “Reasonableness. Respect. Readiness.” Where an individual at the mediation is high conflict, has substance abuse challenges, is involuntarily engaged in the process or there is a power imbalance, mediation is generally contra-indicated.



## Who is More Likely to Use Mediation Services?

Individuals are reported to be more receptive to an overture to try publicly funded mediation when they are younger, dating/unmarried, lower income, have no legal representation (self-represented), little/no property to divide, lack complex financial issues (e.g., no spousal support), have simple child support calculations<sup>4</sup>, and/or looking for a parenting plan.

Individuals appear to be less interested in mediation where their case involves a divorce, or is “complicated” due to more complex property and financial issues (e.g., marital assets, spousal support), are represented by a lawyer, or report IPV/A.

## Good Interprofessional Relationships are Key to Effective Mediation Services

Good interprofessional relationships are critical to effective mediation services. In many respects the strength (or weakness) of these relationships helps to explain those sites where mediation appears to have positive respect and good uptake in comparison to those sites where mediation services are underutilized.

The contracted service providers and their roster of mediators understand their mandate and work hard to make contacts, facilitate, and educate. But ultimately, whether their efforts are successful is often a function of their skills and how welcomed they are as part of the family justice system within the jurisdiction/court site they serve. The inclusivity of mediation services rests in many domains: acceptance by other courthouse personnel, the allocation of FLIC services, referrals by lawyers, referrals by the judiciary, and province-wide efforts to educate individuals about alternative resolution options.

## The Judicial Perspective

Interviews with judges revealed an overall positive view of the availability and utilization of mediation services. Nevertheless, the judicial familiarity with court-connected mediation services ranged from no awareness and/or no direct judicial referrals, limited knowledge about the services with limited referrals, to high regard and knowledge of mediation with frequent referrals.

Those judges who reported a higher level of knowledge and use of the services identified a variety of opportunities that facilitated referrals. One consistent theme mentioned as being effective was efforts by the mediators/site contractor to reach out and build the relationship by providing information to judges. Other strategies that helped to increase judicial referrals were daily reminder sheets and before court in-person introductions.

Family Law Rule 17(8)(b)(iii), which permits judges to order litigants to mediation intake, can be useful as it allows the litigants to learn more about mediation and then make the decision to proceed with the full mediation on consent of the participants.

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<sup>4</sup>Simple child support is often referred to as T4 child support – the potential payor is an employee who receives an annual T4 for income tax purposes. These situations allow for straightforward calculations in reference to the Child Support Guidelines. In contrast, self-employed individuals have more complicated calculations.

Many key informants and online survey participants identified that strong judicial endorsement of mediation services is positively associated with litigants accessing mediation services, and that judicial attitudes and endorsement of mediation is one of the key factors in building both respect and uptake of the court-annexed publicly funded mediation services.

### Connecting the Public to Mediation Services: Advertising, FLICs, & the MIP

*Advertising: Getting the Word Out.* A major impediment to the use of mediation is the general lack of awareness by the public about the availability of mediation. It appears that this can be further broken down into two aspects: 1) a general lack of awareness about the availability of mediation services; and 2) confusion about what mediation is and does. The internet is a primary source for information gathering by the public. There should be easy-to-find, comprehensive, and accessible web-based information about both legal issues and access to services, including mediation. In addition, there might be value in a province-wide media campaign to generate greater knowledge about different avenues to family justice.

*Family Law Information Centres (FLICs).* The FLIC, and the Information and Referral Coordinator (IRC) who staffs the FLIC, were identified as a key entry point for the public to obtain information and learn about services to deal with separation and divorce. While assisting with referrals to mediation is one aspect, IRCs also do much to organize Mandatory Information Program (MIP) attendance as well as refer to community services for inter-partner violence, housing, and other social services. The issue is that not all of the FLICs are prominently visible in the courthouses. The results are telling: the FLIC might be found at the end of a long unmarked hallway, or the “office” is a moving roller cart with a printer and some supplies that is hauled to an available room, such as a lawyer/client meeting room. In some locations, this also impacts the availability of space for the mediators who may be sharing the same space as the FLIC and/or may also not have sufficient space to assure privacy, conduct shuttle mediation, or have access to Wi-Fi.

*The Mandatory Information Program (MIP).* The MIP is widely viewed as one of the most important opportunities to educate individuals about litigation alternatives, such as mediation. The concern is that the MIP, as currently conceived and implemented, may not be achieving its purpose as it lacks flexibility, and is very heavy and dry in content and delivery.

### Independent Legal Advice

Clients of mediation are often not knowledgeable about the role that lawyers can play in the mediation process by providing legal advice before, during, and post mediation (e.g., drawing up an order or separation agreement). The ability of clients to obtain affordable, reliable, and settlement-focused, client-centred legal advice to help them complete agreements is in short supply. Concern was also expressed by some mediators that some lawyers may not have sufficient knowledge about mediation and may be too quick to advocate for not signing the agreement and/or “recruit” a client into litigation with the suggestion of a better outcome.

Tied to the lack of availability of independent legal advice is the role and availability of legal aid to low-income individuals to support their access to legal advice and justice. As a general practice, Legal Aid Ontario (LAO) provides access to vital services to individuals who are unable to afford legal representation and who qualify according to low-income guidelines. Services are rendered by three methods: 1) on-site Duty Counsel at Family Court who provide limited legal advice services to individuals on the day in which a person has a matter before the court, including the provision of legal advice for those who have accessed on-site mediation services; 2) the issuance of a “traditional” legal aid certificate to allow eligible individuals to retain a lawyer to represent a client in identified areas of required service<sup>5</sup>; and 3) service-specific legal certificates that allow eligible clients to access with limited scope legal services for advice for specific issues, such as advice about dealing with domestic violence. Ongoing efforts are needed to increase access to legal advice and representation.

### Voice of the Child

Amongst the 95 mediators who responded to the online survey, 22% include the child’s voice in the mediation process, 28% do not, and 50% include it sometimes. The key informant interviews allowed for greater depth to explore the concerns that mediators are expressing about including the child’s voice. Overall, there does not appear to be frequent inclusion of the child’s voice in the mediation process.

Two key themes emerged from online survey participants and key informants: 1) lack of training to properly conduct the assessment and the risk that they might do harm to the child; and 2) concerns about the inability of the mediator to maintain required neutrality in the process when they are also the conduit of the information gleaned from the child.

### Inter-Partner Violence and Abuse: When Might Mediation Be Appropriate?

In Ontario, all MAG-funded mediators are required to conduct screenings for the presence of inter-partner violence and abuse (IPV/A) and/or the existence of power imbalances prior to the commencement of on-site or off-site mediations. Mediators accredited through the Ontario Association of Family Mediators (OAFM) (and other accreditation agencies) must also comply with screening mandates before mediation.

One of the areas of inquiry of this research was to seek understanding about the circumstances and best practices mediators utilize to make the decision to proceed with mediation having identified that IPV/A or a power imbalance is a concern. This has been a controversial area of practice. Some mediators choose not to mediate if IPV/A is flagged. Other mediators may choose to proceed after further screening to ascertain the nature of the IPV/A and where there has been a request and consent of the parties to proceed, with necessary modifications to the mediation (e.g., shuttle, safety plan, staggered entry).

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<sup>5</sup> <https://www.legalaid.on.ca/en/getting/eligibility.asp>

This divide in perspective of the “always no” versus “it depends” appears to be playing out in the field. This research finds that it is more likely to be referrers who say “no” to mediation if there are domestic violence concerns. This is in contrast to mediation practitioners, many of whom appear to be assuming the more nuanced approach of “it depends,” bringing to bear their professional judgement and best practices to make a deeper assessment as to whether mediation might be appropriate.

## Conclusion

One of the striking aspects of doing this research in 2018 is to compare the findings herein with Madsen’s (2013b) review conducted in 2012 and to realize how similar the findings are. Most critically is to note how the challenges and issues identified in 2012 have remained virtually unchanged six years later. Concerns about mediator qualifications, lack of awareness and acceptance of mediation by legal professionals, the low rate of remuneration and high rates of precarity for mediation practitioners, the lack of space allocation to mediation services and the FLICs, uneven access to legal advice, and the ongoing uncertainty about funding coupled with low levels of funding relative to the high expectations of services remain virtually the same. Even more concerning is that Madsen’s research reflected on the recommendations of the Mamo, Jaffe, & Chiodo research of 2007, identifying many of the same challenges.

## INTRODUCTION AND ORIENTATION TO THIS REPORT<sup>6</sup>

This project was undertaken in response to a 2016 Request for Proposals from the Association of Family and Conciliation Courts, Ontario Chapter (AFCC-O), for research intended to learn more about uptake and the challenges and best practices in the provision of publicly funded mediation services in Ontario. With the availability of publicly funded province-wide mediation services in Ontario since 2011, this project was viewed as an opportunity to examine the benefits and challenges associated with mediation and its affiliated services, and to increase their use and improve their effectiveness. The AFCC-O provided partial funding, logistical support and advice, but the methodology, research findings, and recommendations are those of the authors.

This report is broadly structured as follows:

- A literature review about mediation services and the Ontario context
- The research methodology
- Findings from the research and associated recommendations

## LITERATURE REVIEW

### Overview of Mediation Services

The provision of mediation services for families undergoing separation has increased as a primary alternative dispute resolution option when it comes to diverting people out the court-based family justice system. Mediation has been defined as “a process in which a mediator, or impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement” (Symposium on Standards of Practice, 2001 as cited in Pokman, Rossi, Holtzworth-Munroe, Applegate, Beck, & D’Onofrio, 2014). It is increasingly acknowledged that many families benefit from the mediation process and other non-court dispute resolution mechanisms, rather than the longer and much more expensive course of litigating the matter through court (Federation of Ontario Law Associations, 2016<sup>7</sup>; Madsen, 2013a).

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<sup>6</sup> Throughout this report, quotes are presented as gender-neutral. Rather than using she/he/her/him, this report uses the plural but non-gendered they/them/their.

<sup>7</sup> The Federation of Ontario Law Associations (2016). Response to the consultation on expanding legal services: Options for Ontario families endorse a more effective use of mediation. The concern was expressed that the lack of greater uptake may be due to individuals being unaware of the service or suspicious about alternative dispute resolution mechanisms (see p. 12–13).

Madsen's (2013a) review outlines the benefits associated with mediation:

*There is evidence that court-connected mediation may assist families in navigating separation in a more cost effective way, thereby reducing the financial drain on individual family members at and after separation; that mediation may assist in reducing conflict between parents over time, for the benefit of their children; and that mediation may assist vulnerable populations, among others, to craft creative plans at separation which can assist in meeting the needs of parents and children after separation (p. 202).*

That said, concerns are being raised that family law matters have reached a critical juncture where growing concerns about access to justice have spurred numerous reviews and consultations about the ways families can be triaged in a more proactive, positive, cost-effective way, while still ensuring that legal rights and obligations are respected and that parties with serious conflict issues, such as inter-partner violence, find the right protections and venue for their needs.<sup>8</sup> This dovetails with a growing concern about the number of self-represented litigants now appearing in family law courts (Birnbaum, Bala, & Bertrand, 2012; Macfarlane, 2013). Legal fees are the primary costs incurred by most individuals involved in the family justice process, but other costs such as transportation, court fees, lost wages, and child-care costs, amongst others, are also incurred. In addition, concerns about lack of access to legal advice is a concern in the mediation context as well, where agreements must still be created within the prescribed framework of the law, particularly where children's best interests are at stake for both parenting arrangements and child support (Batagol & Brown, 2011). Furthermore, as Batagol and Brown identify, some parties may be particularly vulnerable in mediation and need legal advice to ensure that the process does not result in exploitation.

Family law matters due to relationship breakdown are the sixth most common type of "everyday legal problem" that Canadians encounter.<sup>9</sup> This is within the broader context in which this survey identified that within a three-year period 48.4% of the adult Canadian population experienced a legal problem, with 30% experiencing multiple legal problems.

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<sup>8</sup> Bonkalo, A. E. (2016). *Family Legal Services Review*. Submitted to the Ministry of the Attorney General (Ontario).

Available at [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family\\_legal\\_services\\_review/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/)

Cromwell, T. (2013). Action Committee on Access to Justice in Civil and Family Matters: A roadmap for change.

Available at [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)

Law Commission of Ontario (2010). *Voices from a broken family justice system: Sharing consultations results*.

Available at [www.lco-cdo.org](http://www.lco-cdo.org)

<sup>9</sup> See Farrow, T.C.W., Currie, A. Aylwin, N. Jacobs, L., Northrup, D. & Moore, L. (2016). *Everyday legal problems and the cost of justice in Canada: Overview report*. Available at [cfcj-fcjc.org](http://www.cfcj-fcjc.org). The five top ranking everyday legal problems reported in the survey were consumer problems, debt, employment, neighbours, and discrimination.

A recent research report calculated the costs associated with different types of dispute resolution methods for family law matters (Paetsch, Bertrand, & Boyd, 2017). Key findings included:

- Mediation was viewed as the most useful alternative dispute process for cases of low conflict, and where the disputes were focused on children and parenting, child or spousal support, and the division of property and debt.
- Lawyers estimated that low-conflict files take an average of 4.8 months to resolve through mediation, whereas high-conflict files take an average of 13.7 months through mediation.<sup>10</sup>
- Lawyers reported high client satisfaction with the mediation process.
- Mediation was viewed as very useful for low-conflict disputes (but less so for high-conflict disputes where litigation was more likely to be viewed as useful).
- Mediation was viewed as generating longer-lasting resolution between the parties than litigation or arbitration.
- Lawyer's bills for services for low-conflict cases were roughly half the cost for those resolved through arbitration or litigation.<sup>11</sup>

One of the key policy goals of alternative dispute resolution service provision has been to limit the negative impact associated with separation and divorce, particularly the impact on children (Madsen, 2013a; Smyth & Chisholm, 2017). The goal has been to find less costly, more expeditious means that also provide parents with opportunities to reach collaborative parenting agreements that put children's needs at the forefront. Alternative dispute resolution mechanisms are one path. In addition, courts also use strategies, like case management, to settle cases, with most cases never reaching the trial stage associated with court litigation.

In many ways this move away from a win-lose outcome echoes the message of former Canadian Supreme Court Justice Thomas Cromwell<sup>12</sup> who noted in his report on access to justice that "relationship breakdown is not a legal event that has some potential social consequences, it is a social phenomenon that has some legal consequences." This message represents a seismic shift in thinking when it comes to relationship dissolution. It may also follow that this requires a complete shift in how to approach family law matters where alternative dispute resolution should be the primary focus and court services an adjunct when other processes have been utilized first or are inappropriate.

One of the key recommendations of Justice Bonkalo's report on family law services in Ontario was that courthouses be identified as "community hubs" for individuals to get information, referrals to services and, as a last resort, to litigate in court. In many ways this recommendation reflects the further development of the Family Law Information Centre that exists (in various forms) in every courthouse in Ontario.<sup>13</sup>

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<sup>10</sup> In contrast, low-conflict litigation took 10.8 months on average, and high-conflict litigation took 27.7 months, on average.

<sup>11</sup> Collaboration (\$6,269); Mediation (\$6,345); Arbitration (\$12,328); and Litigation (\$12,395).

<sup>12</sup> Cromwell, T. (2013). *Action Committee on Access to Justice in Civil and Family Matters: A roadmap for change*. Available at [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)

<sup>13</sup> Bonkalo, A. E. (2016). *Family Legal Services Review*. Submitted to the Ministry of the Attorney General (Ontario). Available at [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family\\_legal\\_services\\_review/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/)



Ontario responded to concerns about access to justice and an increased emphasis on non-court family dispute resolution with significant initiatives (Madsen, 2013a). Madsen's review captures the efforts of the Ontario government to roll out services to all Ontario courts in 2011, building on the services that were already annexed in the 17 Unified Family Court sites. Those services included three components:

- i. Provision of on-site and off-site mediation services that are either free (on-site) or heavily subsidized and geared to income and number of dependents (off-site);
- ii. Provision of a 2- to 3-hour Mandatory Information Program (the MIP) about key family law concepts and the impact of separation; and
- iii. Site staffing with an Information and Referral Coordinator (IRC).

The mandate is that Family Law Information Centres (FLICs) serve as the physical hub for service location, providing an easily identifiable and accessible single-point entry for individuals seeking to connect to all levels of services: courts, alternative dispute resolution, and community resources for things such as counselling or domestic violence services.

Madsen's (2013a) service review identified significant difficulties that bear mentioning as they are issues that continue to permeate family law justice services that are the focus of this report. Madsen noted the following challenges:

- Attracting and retaining qualified mediators
- Implementing screening for domestic violence and power imbalances in a meaningful way
- Delivering in-depth quality mediation, particularly for on-site mediation
- Ensuring equal access to mediation services throughout the province
- The contract structure in which service providers bid and, at times, may be in competition with each other
- Lack of cohesive "public" face of the program
- Inconsistent access to independent legal advice for those accessing mediation services

## Relationship Breakdown and Fragile Families

An increase in fragile co-parental relationships has been observed. As marriage rates have decreased, an increase in common-law and cohabiting relationships has occurred. The number of children born to parents who have never lived together but plan to share parenting has also increased. Statistically, cohabiting/common-law unions are more fragile and have higher separation rates than marital unions. Across 17 countries, children are twice as likely to experience their cohabiting parents' relationship breakdown by age 12 as compared to married parents; and children born to single mothers experience even greater instability as parents ride the relationship "merry-go-round," moving in and out of multiple unions (Social Trends Institute, 2017).

In many ways the Ontario courts experience this firsthand — the Ontario Court of Justice and Unified Family Courts have a higher percentage of parents that have had more tenuous relationships either through a very short-term coupling (aka, "hook-up"), short dating relationship, never lived together, or lived together with more relationship fragility. In contrast, families with matters before Superior



Court of Justice typically involve divorce amongst individuals who were married and are more likely to have lived together with their children for a longer period of time. This is relevant as research begins to identify how these relationship typologies can influence the type of dissolution process that parents adopt.

Waller and Emory (2018) note that unmarried parents generally have less access to legal advice and knowledge and fewer financial resources when navigating the legal system. They also tend to have less knowledge of the other person from whom they are separating. Waller and Emory's research sought to understand why some unmarried parents were more likely to agree to a mutual parenting arrangement after separation than others. Fragile couples were more likely to have distrust in the legal system as well as lack the resources to access an appropriate venue for resolution of their family law matters. Furthermore, fragile couples were more likely to experience disengagement (one parent, typically a father, who is out of the picture), as well as conflict and concern about parenting capacity. Ultimately, Waller and Emory identified that the quality of the relationship between the couple had an influence on the path chosen to reach a parenting agreement:

- Disengaged parents were likely to be passive and do nothing, letting the de facto parenting arrangement stand (often sole parenting by the mother);
- Those who were cooperative reached informal agreements, in part motivated by concerns that court involvement would increase conflict; and
- Those in conflict were more likely to seek a legal resolution to establish their parenting plan.

While many types of separating families may benefit from mediation, these authors wonder if the disengaged and/or conflicted parents might derive particular benefit from mediation as it would provide a cooperative and accessible venue to establish a parenting agreement to give them greater legal certainty regarding custody, visitation and child support, and the opportunity to be coached and learn communication skills to allow them to co-parent more positively in the future.

*Implications for family mediation?* Waller & Emory (2018) suggest that information and resource hubs like Australia's Family Relationship Centres have a critical role to play, particularly for disengaged parents who don't trust the courts. In addition, fragile families may also be more in need of support services for domestic violence, employment, housing, and mental health matters. Ontario's FLICs reflect this approach. While some disengaged couples will be less likely to try mediation, and families with deeply entrenched conflict are more likely to turn to the courts, a large swath of families stand to benefit from mediation services to both resolve their legal matters and to provide coaching opportunities for learning new conflict management and communication skills.

*What is family mediation?* This may seem simple to those working within family justice, but it is not unusual for lay individuals to confuse "mediation" with some type of counselling or reconciliation service. There can also be confusion that mediation is a form of arbitration or pseudo-court-like process, where the mediator is the third party who will define and orchestrate an outcome. Even within the mediation profession there can be differences in approach and opinion. Some mediators may be more legally focused and facilitate a resolution that is likely to mirror the types of outcomes associated with court intervention. Other mediators may seek a transformative approach emphasizing client empowerment and work to increase communication skills that will help the couple develop communication tools to assist them in the future, beyond the mediation table. Ultimately, the role of a mediator is complex.

This definition of family mediation outlines that:

Mediation in family law matters is a voluntary, non-adversarial dispute resolution mechanism in which an impartial, professionally trained mediator assists clients, of a relatively equal bargaining position, to reach a mutually satisfactory agreement on issues affecting the separated family. Mediation is a facilitative technique, not an advisory one. The mediator's role is to act as a facilitator, to assist the disputing parties in arriving at their own solutions.<sup>14</sup>

### Publicly Funded Mediation Services in Ontario<sup>15</sup>

In 2011, the government of Ontario under the auspices of the Ministry of the Attorney General (MAG) made publicly funded voluntary family mediation services available at every Family Court throughout the province with two service delivery methods<sup>16</sup>:

**On-site mediation** is most typically available on the day individuals are appearing at the courthouse to have their family law matter heard.<sup>17</sup> The goal is to either resolve a fairly defined issue or narrow the issues. Generally, on-site services are limited to two (2) hours for all aspects of mediation, including intake/IPV screen, the actual mediation, and writing of the memorandum of settlement. This is a free service and available to all as this service is not means-tested. Clients who are unable to resolve their issues in 2 hours may seek to continue their mediation using the off-site services.

**Off-site mediation** is accessible to all individuals. Generally, up to eight (8) hours of mediation, including time for intake of both parties, is provided. Off-site is used for families with many issues or those dealing with complex matters, or completing a process started at the courthouse. Unlike on-site mediation, individuals may seek mediation services without having started an application in court. Those individuals who have an application pending in court, and/or anticipate having more issues to resolve than could be accomplished in 2 hours of on-site may also access off-site services. Off-site may also be used by those who have been first seen on-site but need more time to resolve their issues. There is a subsidized sliding scale user fee for service that is charged on a geared to income/number of dependents basis. The assessed user fees must be reinvested by the contracted service provider and applied to the costs associated with running the mediation program and ancillary services.<sup>18</sup>

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<sup>14</sup> Ministry of the Attorney General. Policies for government-funded mediation services at the family court. Retrieved from: <https://www.attorneygeneral.jus.gov.on.ca/english/family/policies/php>

<sup>15</sup> Extensive reviews of the process and creation of Ontario's public mediation services are well documented in Mamo, Jaffe, & Chiodo, 2007, and by Madsen, 2013b.

<sup>16</sup> This project focuses only on family mediation services. The province also offers child protection mediation; those services were not part of this research.

<sup>17</sup> In most court sites there is some flexibility to conduct "on-site" mediation on a different day to accommodate client and mediator schedules. Most often clients are encouraged to book a date prior to their return date in court.

<sup>18</sup> User fees are not designed to be an impediment to families using these services. Service providers can determine whether to decrease or waive the user fee for those individuals who do not have the financial means.

*Contractors and the Provision of Mediation and Family Law Information Services.* The Family Law Information Centres (FLICs) were one of the initial efforts to make support services available to individuals with family law justice matters. They were established in 1999 in all 17 of the Unified Family Court sites. In 2011/2012, services were expanded to all family court locations.<sup>19</sup> The FLICs, ideally conceived, are a one-stop resource portal for access to the following:

1. Information and Referral Coordinator (IRC) (usually the “front” person working the Family Law Information Centre (FLIC))
2. Court staff to provide information about the family court; court process; court forms; guides to procedure, and how to get a lawyer
3. Mediation Services (on-site and off-site services)
4. Mandatory Information Program (MIP)
5. Advice lawyer staffed through Legal Aid Ontario
6. Assorted pamphlets about the court process and community services
7. Computer/printer for public use (albeit not in all court sites)

MAG elected to provide the above noted FLIC services through independent contractors obtained through an open competitive procurement process. Every five years MAG issues a Request for Proposal (RFP) for the various court sites. Some court sites are bid on individually, whereas in other areas there are multiple court sites that are “packaged” for bidding. As part of that proposal, the contractors are responsible for the provision of staffing and a suite of services, specifically on-site and off-site mediation, the IRC, and the MIP.

*Mediator Qualifications.*<sup>21</sup> MAG requires that mediators have comparable qualifications to those of a “practising mediator” that can be established through a number of practice and professional training trajectories. The requirements, under which mediators would have been operating during the course of this project, are outlined in Appendix A. In Appendix B the new requirements are outlined that were issued as part of the most recent request for proposals and to be implemented April 1, 2019.

The MAG contract requires that there be supervision of all mediators to ensure that services are high quality and that mediators and other service providers (e.g., the IRC) are screened, trained, and monitored. In addition, the mediators must have a senior supervisory person who can be accessed for case consultations. Part of the supervisory role in many sites also includes the distribution of case files, with consideration given to the type of issues the file presents and matching the file with a mediator’s skill set and competencies.

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<sup>19</sup> Retrieved from <http://www.cfcj-fcjc.org/inventory-of-reforms/ontario-family-law-information-centres>

<sup>20</sup> It was reported that the contracts are typically issued for three years, with two optional years to extend the contracts to five years. Over time, it appears that the five-year timeline has largely been adopted as the typical cycle for issuance of the RFPs.

<sup>21</sup> In Ontario, there are currently no statutory requirements for family mediators. As Madsen (2011) discussed, technically a person can simply “hang out a shingle” and practise as a mediator.

## METHODOLOGY

This research was undertaken following the awarding of a contract for support of research to the noted authors by the Association of Family and Conciliation Courts, Ontario Chapter (AFCC-O), after an open request for proposals (RFP) that was issued in early 2016. The genesis for the research was at the initiative of AFCC-O, which had identified that Ontario-wide provision of mediation services was in its fifth year, a timely opportunity to review the state of those services and look at best practices and challenges.

In conjunction with input from the Ministry of the Attorney General, eight court sites were identified as a representative sample of Ontario court sites due to their geographic locations, court structure, and population size. The outcomes and discussions in this research project are not about these sites specifically, but serve the broader purpose of serving as a gateway into understanding the range of best practices and challenges associated with a variety of factors that similar sites may also have.

The following court sites were visited:

- Windsor (OCJ and SCJ at different court sites)
- Guelph (OCJ and SCJ at same court site)
- Newmarket (Unified Family Court)
- London (Unified Family Court)
- Sudbury (OCJ and SCJ at different court sites in a Northern community)
- Toronto: 393 University Avenue (SCJ), 47 Sheppard Avenue (OCJ), 311 Jarvis Street (OCJ)

**Ethics Approval.** This project was reviewed and granted ethics approval through the University of Waterloo Research Ethics Office and King's University College.

**Online Surveys.** Three online surveys were created to collect data from three sources: 1) Family justice professionals (both mediators and referrers to mediation services; 2) Clients who have used mediation; and 3) Family law clients who have not yet used mediation.

For this report, only data collected from the online survey for family justice professionals is addressed. Data collection beyond the eight court sites (noted above) was conducted through Qualtrics, an online survey platform. Broad invitations were issued for participation from family justice professionals throughout Ontario seeking input from two types of participants: 1) Mediators; and 2) Family law professionals who refer to mediators/mediation. AFCC-O was instrumental in using their email lists to advertise the research survey to its members. In addition, key individuals who are contracted service providers made specific outreach through their own networks and contact lists to encourage survey participation, some including incentives for a gift card awarded through a draw. This survey went live in March 2018 and remained open until May 2018.

*Mediation Client Research Participants Sought, But Not Recruited.* As noted above, this research project made attempts to collect data from two client groups: 1) individuals who had recently used mediation services; and 2) individuals who either had a family law matter pending or were contemplating filing an application, but had not yet used mediation. The goal was to learn directly from individuals what they did or did not know about publicly funded mediation services. Two different online surveys were created for each of these groups. Unfortunately, recruitment efforts were not successful in generating sufficient participation as only three surveys were completed across the two surveys. As a result, there is no data reported from these two online surveys.

The recruitment process asked mediators and IRCs to hand out information sheets inviting individuals to participate where they had utilized publicly funded mediation services or following attendance at a MIP or the IRC office during May and June 2018. Further reflection on such low participation suggests that a different approach, such as a personal interview, is needed to reach individuals who may already be quite emotional and overwhelmed by the legal process. This approach would be a time and labour intensive research approach (and thus have high associated costs), but given the sensitivity of the subject matter and the diversity in literacy and comfort of the public with research it is likely the only viable way to collect sufficient quality information. Further research that included the perspective of mediation clients, both past and prospective, would assist in generating greater understanding about the needs of the public.

**Key Informant Interviews.** Interviews with key informants occurred from March 2018 to June 2018. These individuals were all family law professionals who provide a range of services: Information and Referral Coordinators (IRCs), on-site mediators, off-site mediators, private mediators, the executive directors for the contracted site services, and a lawyer. Recruitment was primarily achieved through an invitation that was noted at the end of the online survey and through word of mouth. Ultimately, key informants self-selected into the project by contacting the researcher to note their willingness to participate. Overall, 28 interviews with 30 individuals (some were joint interviews) were conducted with most interviews lasting a minimum of 60 minutes, and many up to 90 minutes.

Interviews were conducted over the phone, digitally recorded and then transcribed verbatim. These transcripts were given to the participants for their review and were invited to make any changes, corrections, or additions they wanted.

**Judicial Interviews.** Permission was sought, and granted by the Offices of the Chief Justice, to allow for telephone interviews with family judges throughout the province. Overall, 17 judges were interviewed with interviews lasting approximately 30 minutes. All interviews were transcribed verbatim and the transcripts were provided to each of the judicial participants to allow for review and any changes, corrections, or additions that they wanted to make.

**Site Visits.** In-person visits were made by one of the researchers (Whitehead) to each of the eight selected court sites during the months of May and June 2018 to visibly see the work spaces, meet with various personnel working at the court sites, and in one instance to attend a Mandatory Information Program (MIP) and sit in as an observer to a mediation. One day was spent at each site, with one site having a second day to allow for attendance at an MIP and mediation.

**Analysis.** The data analysis follows two lines: quantitative data generated through the online survey and qualitative data gathered in open responses in the online survey and through the key informant interviews. The qualitative data was analyzed looking for key themes and patterns across respondents following an iterative process of conducting line-by-line coding and seeking to connect those patterns across the open responses and interviews (Braun & Clark, 2006). The goal of saturation was reached as the interviews furnished diminishing levels of new information to the research questions.

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<sup>22</sup> All family law professional research participants self-selected themselves into this study. Family law professionals were invited through general advertising through AFCC-O newsletters and at the end of the online survey to contact the researchers if they wanted to participate in a key informant telephone interview. Only those individuals who reached out to the researchers were included.

**Limitations of this Research.** It is important to identify the limitations of this research project and to clarify what is included and what is not. For example, while efforts were focused on understanding family mediation, both publicly funded and private, the largely self-selected participation<sup>22</sup> of individuals involved in providing publicly funded mediation services were the majority of participants who responded to the online survey and request for key informant interviews. Private mediation practitioners, policy makers, and organizations are largely absent from the results of this research project. As noted above, efforts to recruit mediation clients and family law clients who have not yet used mediation were unsuccessful. Future research efforts would benefit from including private mediation/mediators, individuals who utilize mediation services, and broader outreach to policy makers about mediation services in Ontario.

Participation in the online survey was predominantly mediators (69%) in contrast to those who are professionals who refer to mediation (31%). This was also true for the key informant interviews where mediators (n=18) and lawyer/mediators (n=7) volunteered for a key informant interview. Therefore, the results of this research reflect a dominant mediator perspective; most of whom were involved in provision of publicly funded mediation services (both part time and full time).

Finally, it is important to note that there are differences in how court-connected publicly funded mediation services are delivered. Geography, language, and cultural diversity, availability of accessible and trained staff, and the size of the region all impact service delivery. Therefore, all recommendations should be interpreted with these caveats in mind. For example, what might be a viable and feasible suggestion in a large urban area may not be feasible in a small, remote, Northern community.

## RESULTS

### Data from the Online Survey of Family Justice Professionals

A central part of this research project was an online survey seeking input from family law professionals from two vantage points: 1) mediators/mediation service providers; and 2) referrers to mediation services. The goal was to learn about professional backgrounds, perspectives on the use and outcomes associated with mediation, and best practices regarding including the child's voice in mediation and how to make decisions about the appropriateness of mediation where inter-partner violence/abuse has been identified.

A total of 138 participants completed the online survey (N=138).

Mediators comprised 69% (n=95) of the participants and referrers to mediation services 31% (n=43).

**Gender:** A majority of the survey participants were female (69%) and the other 29% were male. This likely reflects the link to the provision of mediation services, which are dominated by females as reflected in degree completion in social work or practising as a family lawyer.

**Age:** The age distribution of participants suggests that this is a group that is engaged in this work later in their careers, rather than earlier: 20 to 39 (17.1%), 40 to 59 (49%), and 60+ (30.0%).

**Degree & Credentials:** Just under half of the participants (48.6%) held an LLB or JD designation, 32.1% were mental health professionals, and 17.9% held other types of professional designations. A majority of participants were accredited mediators (62.0%) and 22.1% were not accredited.



Different paths of questions were asked of these two groups and results are presented separately. Participants could complete both paths if they self-identified as both a mediator and a referrer to mediation. Participants were asked to first complete the path with which they most identified and to then re-access the survey and complete the other path. No data is available on how many participants completed both paths, as the surveys were anonymous.

## Mediation Practitioners: Training & Experience

### Professional Background & Training

Mediators are a well-educated group that come from various professional backgrounds. A higher percentage of mediators (90%) have been accredited as mediators compared to 21% of referrers, ( $X^2(1, N = 119) = 52.43, p = .001, \phi = .001$ ).

Respondents were also asked to identify how they designate themselves professionally and could select all that applied. The largest category was as a mediator ( $n=80, 49\%$ ) followed by lawyer ( $n=36, 22\%$ )<sup>23</sup>. Others identified as social workers ( $n=12, 7\%$ ), Information and Referral Coordinator (IRC) ( $n=7, 4\%$ ), Dispute Resolution Officer ( $n=6, 3.7\%$ ), and Psychotherapist ( $n=2, 1\%$ ).

*Accreditation.* Most of the mediators indicated that they were accredited (94%), with the majority through the Ontario Association for Family Mediation (OAFM) ( $n=82, 57\%$ )<sup>24</sup>. The high level of accreditation is indicative of being well trained and meeting the requirements of the Ministry of the Attorney General. Accreditation through an organization such as OAFM requires that mediators have taken requisite courses in mediation<sup>25</sup> and have completed at least 100 hours of internship and conducting mediation cases under an experienced mediator supervisor.

Many family mediators also have training and/or certification in other areas of practice such as elder mediation, child protection, workplace mediation, and parenting coordination.

*Time & Experience.* A large percentage of mediators responding to the online survey have considerable time and experience in the provision of mediation services:

- 300+ hours (43%)
- 200 to 299 hours (12%)
- 100 to 199 hours (7%)
- 50 to 99 hours (3%)
- Less than 50 hours (3%)

This high level of time and experience is also reflected in the years of practice of the mediators:

- 10+ years (29%)
- 6 to 10 years (23%)
- 1 to 5 years (13%)
- Less than 1 year (3.6%)

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<sup>23</sup> In accordance with section 5.7 the Law Society of Ontario Rules of Professional Conduct, lawyers may act as mediators provided that "at the outset of the mediation, ensure that the parties to it understand fully that (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue."

<sup>24</sup> Other accrediting associations included ADRIO (ADR Institute of Ontario) ( $n=18, 12.6\%$ ); FDRIO (Family Dispute Resolution Institute of Ontario) ( $n=19, 13.35\%$ ); and FMC (Family Mediation Canada) ( $n=6, 4\%$ ).

<sup>25</sup> For example, OAFM requires that accredited mediators complete various courses, including but not limited to: Fundamentals in Family Mediation, Advanced Family Mediation, Domestic Violence Training, and Family Law. See <https://www.oafm.on.ca/family-mediation/becoming-an-accredited-family-mediator/> for all of the required elements necessary to be accredited.

Overall, the respondents to the online survey were a highly experienced group with 63% reporting having conducted 300+ hours of family mediation in their career. This was borne out by the number of years in practice as a family mediator with 43% having 10+ years; 34% having 6–10 years; 19% having 1–5 years, and 5% having less than 1 year. This survey may not reflect the population of those practising mediation generally, but it does mean that the respondents to the survey were a highly experienced and well-trained group.

### Percentage of On-site/Off-site/Private/Other x Professional Designation

Analysis indicated a significant effect for professional designation (LLB/JD, mental health professional, other) on the percentage of private mediation practice,  $F(2, 92) = 7.82, p = .001$ . Participants with an LLB or JD designations had a higher mean percentage of private mediation practice ( $M = 68.95, SE = 6.04$ ) than mental health professionals ( $M = 39.59, SE = 7.76$ ) and other types of designations ( $M = 30.22, SE = 8.37$ ).

One of the research questions was how age and professional status impact the number of hours that are expended in reaching a mediated agreement. Two analyses were performed looking at both age and years of experience.

**Age.** Analysis showed that the effect of age (25 to 39, 40 to 59, 60+) on the average number of hours it takes to reach an agreement on custody (on-site) was significant,  $F(3, 66) = 2.74, p = .05$ . On average, participants in the 25 to 39 age group spent more hours reaching a custody agreement on-site ( $M = 2.29, SE = .87$ ) than participants in the 40 to 59 age group ( $M = .79, SE = .20$ ) and the 60+ age group ( $M = 1.38, SE = .33$ ).

**Years of Experience.** Analysis showed that the effect of years of experience (less than a year, 1 to 5 years, 6 to 10 years, more than 10 years) on the average number of hours it takes to reach an agreement on child support (private) was significant,  $F(3, 63) = 3.95, p = .01$ . On average, participants with less than a year experience spent more hours reaching a child support agreement (private) ( $M = 8.00, SE = 2.00$ ) than participants with 1 to 5 years' experience ( $M = 2.23, SE = .62$ ), 6 to 10 years' experience ( $M = 2.59, SE = .47$ ), and more than 10 years' experience ( $M = 3.06, SE = .42$ ).

**Age by Years of Experience.** A significantly higher proportion of participants in the 60+ age group (53.1%) had more than 10 years' experience as a mediator in family law disputes compared to the 42.9% in the 40 to 59 age group, and the 16.7% in the 25 to 39 age group ( $X^2(9, N = 94) = 20.67, p = .01, \phi = .01$ ).

These results demonstrate that mediators who have acquired more time and experience take fewer hours to reach settlement than mediators with less time and experience. While this is intuitive, it reflects the fact that much of mediation provision is an art and is also about skills. The ability to successfully mediate requires the acquisition of diverse and perceptive people skills in addition to understanding the law, how to draft agreements, and do appropriate intake. These results also highlight that time and experience generally means less time is needed to reach an agreement, suggesting that this increased facility might warrant better pay. It may also help explain why those

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<sup>26</sup> 200-299 hours = 18%; 100-199 hours = 10.5%; 50-99 hours = 4% and <50 = 4%



with more skills and experience may, over time, withdraw from providing publicly funded mediation services and be more likely to focus on private mediation that pays considerably more than the more modest wages for conducting publicly funded mediation.

## Mediation Practice

In the online survey, and in the key informant interviews, mediators were asked to discuss various aspects of their mediation practice to provide some insight into how they approach the acquisition and retention of clients.

*Referrals.* The online survey asked mediators to report on the means by which they get referrals. The largest referral sources were client self-referrals and lawyers. A moderate number of referrals came from other mediators, counsellors/therapists, judges, the IRC, Advice/Duty Counsel, the MIP, and court staff. Fewer referrals were reported from Legal Aid Ontario and Dispute Resolution Officers.

*Engaging and retaining mediation clients.* In the online survey, mediators were asked to articulate the ways in which they engage and retain mediation clients. Overall, they reported a facility with honed interpersonal skills that both draw parties in and then assists them through the mediation process. These highly developed professional skills are challenging to quantify, but highlight the acumen of having the training, and often the temperament and ability, associated with managing other people's emotions. One participant discussed the lack of respect and understanding for the unique skill set that many social workers possess that is often the key to being a successful mediator (KII\_1). These interpersonal skills include empathetic listening, the ability to ask relevant probing questions, to manage strong emotions and conflict, and generally find a way for individuals to talk about their own needs and challenges and to express that to their ex-partners.

Maintaining a neutral position was identified as central to success in the mediation process, even though this can be challenging. This neutral position requires having the skills to describe the process, but not overwhelm clients with too much information. It includes being non-judgmental, showing respect, compassion, and understanding to both parties. It was articulated as the ability to remain curious without relying on pre-formed judgments. It also includes the ability to state views when necessary, without criticism. Having a sense of humour can make things easier. It was noted that being honest and open draws people in with empathy that they are being heard. As one mediator noted: "I promise them I will never tell them what to do. The issues and solutions belong to them. The process belongs to me" (online: 6.1).

Mediators can also play a strong educative role, teaching new perspectives and skills in communication skills to individuals, many of whom have limited skills in this area or have lost their way with each other. One mediator teaches clients that "listening does not mean agreeing." There can be opportunities to express compassion and to suggest that more time might be needed for one party to adjust to the suddenness of a separation before mediation proceeds. And there are often opportunities to remind parents that putting their child's needs at the forefront is critical to their future role as co-parents.

In contrast, those factors and elements that can short-circuit a mediation are often aspects that are beyond the control of a mediator and often come down to issues with at least one of the clients that is resistant to the mediation process. Such factors include:

- Unable to let go of the relationship
- Rigid positional stands
- Dishonesty/non-disclosure

Overall, mediators bring a host of training and experience to this role and draw on a wide array of training and skills to help families navigate the conflict and separation.

### Mediation as a form of precarious work: How mediators and IRCs “knit” together their careers

Mediators are to be praised for their high levels of education and training, expertise, dedication, and their commitment to helping people. Yet, it says something about a mediator’s career when you are advised as a mediator-in-training to “not quit your day job.” As one key informant noted, “the perception that you are going to walk out of your mediation theory training, internship and start working as a mediator is a myth” (K11\_8). For most junior mediators, finding an internship and then getting placed on a roster is not immediate or easy. As described in many key informant interviews, the reality of being a mediator in Ontario is that this is most typically a job that requires that one “knit” together many types of professional services and/or willingness to travel to different locations in order to have a career as a family law professional, some of which includes the provision of mediation services.

Some individuals are full-time mediators, but that appears to be more the exception than the rule. In the online survey, only 22% of mediators identified that they had no other professional work than the provision of mediation services. Whereas the other 78% have other work such as practising law, mental health counsellor, teaching, and assorted other work such as arbitrators, coaching, clinician, writer, Ontario Children’s Lawyer (OCL), and parent coordinator.

This key informant remarked on the challenges for many social workers trying to be mediators without sufficient work to sustain them full-time:

*It’s the same conversation I have with social workers everywhere, you know. It’s not enough money for your primary bread and butter, so you would do this on the side. But I know a lot of mediators who, let’s say, work part time at the hospital and they do part-time mediation in court, you know, or part-time teaching social service work at a community college, and then they do a little bit of counselling, and then a little bit of mediation. So most people just don’t do mediation because there’s not enough money to do that. You can’t just have it as your primary practice, unless you are a lawyer, and then you can just add that as an adjunct of what you are doing (K11: 762–769).*

Many mediators cobble together enough work by their willingness to serve in multiple roles. For example, many mediators also serve as the IRC rotating their roles on different days, and/or in different court sites. Similarly, many smaller sites offer on-site mediation for a day or two a week. Some mediators are scheduled at different court sites each week in order create full-time or nearly full-time work hours.

One young, newly trained mediator noted that she works about 30 hours a week, on average, taking whatever work is available and travelling to many different locations as both a mediator and serving as an IRC. This IRC/Mediator described her willingness to do whatever it takes to learn this role:

*I wanted this very badly. I love this work so much. I know as a young mediator...I'm maybe one of the youngest mediators on the roster, [that] I was willing to do whatever it took to get my name out there. It's all about building your reputation and I know that" (KII\_12:144–147).*

What is important to note is that she has had other financial means to assist her during this training time and as she grew her practice — a position that not all trainees/newly minted mediators have.

**Independent Contractors and Compensation.** Publicly funded MAG-rostered mediators can be hired as either employees or independent contractors.<sup>27</sup> Interviews with rostered mediators suggested that many are being hired as self-employed independent contractors working under the auspices of the selected service provider, who is a contractor with the Ministry of the Attorney General (MAG). In other words, the service provider who wins the service contract from MAG retains mediators and IRCs as self-employed sub-contractors. As a self-employed sub-contractor this means that the individual mediators are responsible for remitting their own federal/provincial income taxes and paying both portions of the required Canada Pension Plan (CPP) contributions. Additionally, it means there is no Employment Insurance coverage, health benefits, pension, or eligibility for termination pay. This adds precarity as there is no coverage for unemployment or other benefits and leaves, such as maternity/parental leave or compassionate care leave. This also means there are no paid vacation days or sick days.

Many mediators have extensive education, training and qualifications, and many years of experience. Some dismay was expressed at the low rate of pay accorded to mediators, particularly since that isn't reflective of the high level of their qualifications. In addition, some mediators discussed that they incur significant travel time and expenses to reach other court sites. Factoring in additional expenses such as parking, the overall financial compensation can be paltry. By comparison, a private mediator can charge significantly more. Over time, a quest for better pay in the private sector can mean high turnover as mediators are more likely to prioritize private files as they gain experience and stop doing on-site and off-site mediations.

The issue of the independent contractor status has additional challenges for some mediators. One mediator discussed the ongoing challenge in being required to rent meeting space in order to conduct off-site mediations.<sup>28</sup> This was not identified as an issue by all mediators, as some are provided with space through their site contractor and have support staff to handle the bookings, room scheduling for shuttle mediation, or staggered entries. Given that this is not the practice across service providers and, in fact, appears to be more an exception than the rule, it would be prudent that the onus to fund space for off-site mediation should fall to the service provider, rather than to the mediator.

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<sup>27</sup> MAG does not prescribe the employment relationship between the service providers and those individuals hired by the service provider (e.g., Mediators, IRC, etc.)

<sup>28</sup> This is not a new issue; Madsen 2013b identified the lack of consistency in how off-site is provided, and that some mediators are expected to pay the costs for renting space off-site.

## Mediation training is funded out of their own pockets

The independent status of mediators means that mediators must pay for their own mediation education and internship. On its face, this does not appear overtly unreasonable as most professionals have paid for their own education and training. One distinct difference from a university education, however, is that there is no financial aid available for individuals taking accreditation courses. And these courses average about \$4500 (depending upon the provider) to complete.<sup>29</sup>

Once the courses are complete, becoming accredited requires that the mediator trainee complete an internship of 100 hours and five mediated agreements under the supervision of an accredited mediator. An intern must pay the supervisor(s) a fee (in some interviews this was reported as \$3,000). It should be further noted that this does not entitle the trained mediator to be placed automatically on a roster; being hired onto a roster follows a typical hiring process for any job.

One frustrating aspect that was identified by some mediators was that some of the lead contractor service providers<sup>30</sup> will only hire onto their court roster (the on-site and off-site mediators) those individuals who did their internship training with them. On the one hand, there is a sense of quality control when the supervising contractor knows the extent of the training and how well the intern has mastered the technical and professional expertise. On the other hand, there is a sense among other trained mediators that their training is not recognized, and that after considerable time and expense that not all sites are willing to hire.

Some participants acknowledged that they have worked to enhance their training beyond their 100 internship hours by sitting in on additional mediations, on their own time, for no pay. This indicates the level of commitment of many mediators to ensure they have the requisite level of skill. One mediator noted that her internship had been uneven in its training providing her with lots of files on custody, but not enough knowledge for handling support and property. This mediator has sought additional training to fill in the gaps (KII\_12).

## Recommendations

1. To MAG: That a uniform practice be adopted for the provision of space for on- and off-site mediation to remove the onerous financial obligation from the mediator personally and that the space is provided by the lead contracted service provider.
2. To MAG: That funding for mediators be increased to address compensation and precarity in order to offer fees that pay for time and experience, and reduce turnover.

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<sup>29</sup> All mediation training requires theory and skills courses in Basic Family Mediation, Advanced Family Mediation, and Screening for Power Imbalances/Family Violence. Lawyers seeking to become mediators must also take training in Family Relations. Non-lawyers, particularly those from social work/human services background, are not required to take Family Relations, but must take a course in Family Law.

<sup>30</sup> The service providers are the individual or corporation that responds to the Request for Proposals issued approximately every five years by the Ministry of Attorney General (MAG) and makes a bid to provide the site services for each courthouse, or a selected group of courthouses.

## Referrers to mediation: Who are they and why do they refer?

Of the 138 respondents to the online survey, 43 respondents completed the survey as referrers to mediation. The questions probed the education background and how and why they make the decision to refer to mediation services.

The professional background of referrers who participated in the online survey were overwhelmingly lawyers (65%), with the second largest source identified as Information and Referral Coordinators (16.3%) who staff the Family Law Information Centres (FLICs). A higher percentage of referrers (69.8%) held LLB or JD designations compared to 40.0% of mediators, ( $X^2(2, N = 138) = 12.52, p = .002, \phi = .002$ ). Thus, the largest contingent of the referrers were legally trained (JD/LLB) ( $n=38, 27%$ ) with a significant number of referrers holding Master's degrees in psychology and similar fields ( $n=16, 11.5%$ ) or a Master's of Social Work (MSW) ( $n=16, 11.5%$ ).

Other referrers from the online survey identified as judges, mediators, psychologists, therapists/counsellors and social workers, but these had a very low respondent rate of only 1 or 2 participants in each category. The low numbers of responses should not be interpreted that these professionals are not referring to mediation services, but likely reflects that the research recruitment and advertising efforts were focused on avenues that reached a higher number of family law professionals (e.g., AFCC-O news blast and website).

Overall, these respondent referrers were seasoned professionals with most having worked in their identified role for quite some number of years (0–5 years = 11; 6–15 years = 17; 16–25 years = 7; 26+ years = 8). The majority of respondents self-identified as working in the Southwest region of Ontario ( $n=14; 32.6%$ ) and Toronto ( $n=12; 28%$ ) with other regional representation from Central East ( $n=4; 9.3%$ ), Central South ( $n=4; 9.3%$ ), Central West ( $n=3; 7%$ ), East ( $n=5; 11.6%$ ), and Northeast ( $n=1; 2.3%$ ), with no one identifying their location as Northwest.

One of the notable aspects of the referrers' professional training is the large number who reported having some professional mediation training ( $n=28; 66.8%$ ). Referrers with training were most likely to have completed a course in Introductory Family Mediation ( $n=21; 23.3%$ ), Advanced Family Mediation ( $n=16; 17.8%$ ) and/or Screening for Domestic Violence and Power Imbalance ( $n=23; 25.6%$ ). Despite this training, most did not report being an accredited mediator ( $n=20; 62.5%$ ) while 7 respondents (22%) reported accreditation/certification through OAFM, ADRIO, FMC, and FDRIO.<sup>31</sup> This suggests that referrers in this survey likely have a more sophisticated knowledge, awareness, and greater familiarity with mediation service provision, but that most referrers are not, in fact, providing services in mediation as they are not formally accredited themselves.

Referrers are seen as key facilitators to the uptake of mediation services. Over the past 12 months, referrers identified the percentage of cases/files that they referred to three types of mediation services. Globally,

- 1) On-site court-based mediation – 26.7%
- 2) Off-site mediation – 33.5%
- 3) Private mediation – 27.8%

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<sup>31</sup> While there were 43 referrers, not all respondents chose to answer the question, so the reported number of respondents reflects the actual number of respondents who answered the question.

The top five reasons for making referrals to on-site and off-site mediation:

- 1) Cost-effective
- 2) Narrows the issues
- 3) Privileges client decision-making over third-party decision-making
- 4) Reduces conflict
- 5) Quicker Resolution

The factors that referrers consider in making the decision to refer closely align with their reasoning noted above:

- The financial resources of the parties
- Issues/Complexity of the case including the issues to be resolved
  - Simple issues/Narrow issue: Refer to on-site (2 hours)
  - Complex issues/financial matters and/or property or high conflict: Refer to off-site (up to 8 hours, including time for mediation intake of both parties)
- Likelihood of mediation being successful (e.g., parties are agreeable, able to communicate/compromise, are interested in mediation)

This online survey referrer participant summarized many of the other comments by noting:

*I always try to ensure that clients are aware of mediation as a possible method for resolving their family law disputes. If clients are currently in court or committed to beginning a court process, I will refer them to on-site mediation and explain that they have access to a free session every time they are in court. If clients are not currently in court and/or have a desire to avoid starting a court case, I will refer them to our off-site mediation services and explain the process and applicable subsidized fees.*

*The income level of parties is also a factor, as often times mediation is a more affordable option than hiring a lawyer to represent them in court. Some parties are also reassured to hear that they can begin mediation more quickly than they can obtain a court date. I consider the relationship between parties and their motivations when explaining mediation services. For instance, I explain that mediation is a negotiation process and that it is most effective when both parties are committed to finding solutions. I explain that high levels of conflict or ongoing relationship violence can make negotiation more difficult, but also that we structure the mediation process to be as safe and fair for all parties as possible.*

Referrers were asked to provide their level of agreement/disagreement with possible impediments to families using court-based mediation services (both on-site and off-site). Of the 43 referrer respondents, their top concerns were:

- Power imbalance between the parties/domestic violence
- Perception that litigants want “their day in court” and a ruling by a judge
- Lack of information about how court-based mediation can be used to narrow issues
- Lack of access due to time restrictions/availability of on-site services



The concerns about impediments to using court-annexed services dovetails with the reasons referrers choose not to refer to court-based mediation services: domestic violence and/or high conflict.

Nevertheless, facilitating the utilization of mediation services is contingent on education and dissemination of information to individuals. Participant referrers identified the most effective motivators for undertaking mediation as:

- Judicial efforts to suggest mediation at various stages (n=35/43);
- Distribution of information at the time of filing (81% (81% n=35/43); and
- increased time/availability of on-site mediators (n=32/43).
- Information about mediation services gleaned from the Mandatory Information Program (MIP) (n=27/43) with some respondents not endorsing it as an effective way to motivate clients to try mediation (n=13/43); a division of opinion not seen in other categories noted above.

The MIP is discussed in greater detail later in this report.

*Referrals to Private Mediation.* Family justice professionals who are referring to mediation can also choose to refer to a private mediator. While the limited financial means of the parties is one of the primary drivers in whether to suggest publicly funded services that are either free (on-site) or subsidized (off-site), when there is the ability to pay, choosing private services is primarily motivated by seeking expertise including: there are property issues or spousal support that require legal expertise; desire to have other professionals involved (e.g., financial evaluators, mental health professionals, custody evaluators), which may be related to the presence of high-conflict parties); and wanting to retain a mediator with a legal background.

### How do family justice professionals define “success” in mediation?

The evaluation of services is typically outcome driven. We tend to focus on what we can count. And in family law justice we tend to think of an outcome as an end where there is a final resolution of the matter. This may be a court order or a legal separation agreement where the matter is considered settled and the file is closed (or for those in family law, until something happens and the parties re-open the case). This research project sought to understand whether there were nuances of what makes mediation “successful” beyond the outcome of “settlement on all the issues.”

*Mediators’ perspectives.* The results of the online survey indicate an overall pattern to view positive relationship-building opportunities between the parents as a strong measure of success, with the degree of settlement of issues as somewhat secondary. Mediator respondents generally agreed/strongly agreed that mediation facilitated the building of relationship enhancement skills. It is noteworthy that there was higher endorsement in the “strongly agree” category for these items. The areas that were most highly rated as “success” in mediation were:

- Better coordinated parenting approach to meet children’s needs (n=92/94; 98%)<sup>32</sup>
- Decreased conflict (n=90/95; 96%)
- Improved communication between parents (n=89/94; 95%)
- Improved relational interactions between parents (n=89/94; 94%)
- Developed respectful interactions between parties (n=85/94; 91%)
- Client satisfaction (n=84/93; 90%)

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<sup>32</sup> Participants could respond to more than one category.

One key informant summarized the positive feedback that couples give to the mediation process, even where there is no or only a partial agreement. As reflected, it is the other skills, resources, and opportunities that are also of benefit:

*A partial or no agreement we often get really positive feedback...that people gain more from mediation than just agreement on issues right; they gain improved communication skills with the other party, they may gain a template for communication that's going to help them in the future, they gain a renewed sense of priorities regarding their children or their family, they might gain referrals to other resources that end up being really helpful for them, and they have somebody listen to them, and essentially validate their concerns and their fears about their children, about their relationship (KII\_20:706–714).*

In contrast, there was somewhat lower endorsement by mediators for viewing success about issue settlement, particularly the idea that all issues must be settled in order to consider that mediation has been successful. While the overall numbers of those who agreed/strongly agreed with the statements is still quite strong, what is noteworthy is that the category of those who selected “agree” was higher than those who endorsed “strongly agree,” which was different from the pattern in the responses above.

- Agreement/resolution reached on ALL issues (n=64/94; 68%)<sup>33</sup>
- Agreement/resolution reached on SOME issues (n=82/94; 87%)
- Facilitated decisions about spousal support (n=72/92; 79%)
- Facilitated decisions about child support (n=77/91; 84%)
- Avoided contact/appearance in court (n=77/94; 82%)

This mediator sums up the complex thinking needed for contextualizing mediation success:

*Obviously, I want all of the files I handle to be resolved by agreement on all issues, but really, anytime I can be involved in a file where mediation has improved the parties' situation — by any of the standards outlined above — that is success to me. Family matters and relationships are fluid. None are perfect, and as long as we can move people along in reducing conflict and finding areas of consensus, which hopefully will lead to more growth in the future, that is success in my mind (online: 5.8).*

While the hope is often expressed that mediation has provided some lasting positive communication/relationship skills that the parties will use moving forward, this mediator offered that this doesn't always happen. As one private mediator noted in an interview, a significant part of the mediator's role is to manage the emotions of the parties, particularly depending on which party is seen as doing the “leaving” and which party is the one who views themselves as “being left.”

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<sup>33</sup> Participants were asked to select “all that apply” and therefore could select more than one category.



*The leaver and the leaved are in a completely different place. So, you've got to help them manage their emotions as they're going through this uncoupling of a long-term relationship. This concept of fault. We're breaking up because of this (money, communication, he worked too much, she had an affair), so, now there's fault; there's a fault element to that, and when there's a fault element to that, then I've got to either be compensated for that because you hurt me and you owe me. There's this blame game that goes on (KII\_27:690–697).*

And, finally, as this mediator notes (echoed by others), sometimes the mediation isn't settled on the first try. The mediation can be an ongoing process to start changes in communication, attitudes, and levels of anger that may open the door in the future for an ability to come together and settle matters between them:

*My success as a mediator is not defined by the outcome on paper. If clients reach a full and final agreement on all their issues that is an outstanding outcome. Equally important is helping parties learn to communicate and discuss issues that arise from separation, as these will continue long after the mediator is active with clients. Showing clients the alternative to litigation is success. When parties separate, there is a new narrative to their relationship and it is very important to help them understand what their new communication and partnership (if they are parents) can be. If clients are able to resolve all issues, that is excellent, however, given time restraints, financial restraints and readiness, mediation may not always be able to settle all the issues at one time. But it can certainly set the stage for further discussion and paths toward resolutions in the future.*

The referrer perspective on "success." Whether there is confidence in the mediation process is somewhat contingent on how the outcomes of mediation are perceived by those who might refer individuals to mediation services. Online survey referrer participants were asked to rate their level of agreement/disagreement with how they defined success in mediation. Amongst the 43 respondents, there was high levels of cohesiveness in selecting "agree" or "strongly agree" in viewing success as:

- Agreement/resolution reached on ALL issues (n=25/43; 58%)
- Agreement/resolution reached on SOME issues (n=42/43; 98%)
- Improved relational interactions between parents (n=37/43; 86%)
- Decreased conflict (n=40/43; 93%)
- Better coordinated parenting approach to meet children's needs (n=39/43; 91%)
- Facilitated decisions about child support (n=38/43; 88%)
- Improved communication between parents (n=37/43; 86%)
- Avoided contact/appearance with court (n=36/43; 84%)
- Developed respectful interactions between parties (n=36/43; 84%)
- Client satisfaction (n=35/43; 81%)

The only item where there was a significant range of views was the response to the query about "agreement/resolution reached on ALL issues," with 25/43 respondents (58%) who responded as "agree" or "strongly agree" while 14/43 (33%) responded as "disagree" or "strongly disagree." The almost unanimous selection of "agreement/resolution" on SOME issues suggests that viewing success in mediation involves much more than whether there is agreement on all issues, but rather

whether some progress is made and perhaps, more critically, that the relationship benefits from better communication, less conflict, and a coordinated focus on children are also significant and worthy benefits of the mediation process. This strongly resonates with the feedback provided by the mediators.

Ultimately, persuading individuals to try mediation is primarily about information and education at all levels: judges, lawyers, all court-annexed personnel, and clients/society. This online survey participant summed their experience:

*Many clients are still unaware of mediation as an option to resolve their family law disputes, and of the benefits of mediation...I think a concerted effort from everyone working at the courts could remedy this. There is a prominent belief in our culture that family law disputes are settled in family court. Shifting this perspective has been challenging but very rewarding for many clients, especially when they benefit in other ways besides resolving disputes (i.e., improved communication, better understanding of children's needs, etc.).*

*There are also some misconceptions regarding mediation that may deter people from trying mediation. These include the perception that mediation is couples therapy and ineffective for resolving disputes, that only some types of issues can be mediated, that mediation is never appropriate when there has been intimate partner violence, that mediation is not compatible with litigation, and others. It continues to be important that clients are informed regarding what mediation can and cannot do for themselves and their families.*

*More broadly, mediation involves negotiation, compromise, and a move away from seeing family law issues as a win/lose, zero sum game. I believe it is difficult for people to shift their thinking in this broad manner, but that such a shift can do wonders for families and our society (online: 8.23).*

### What factors contribute to successful mediations?

The online survey provided mediators with the opportunity to reflect on their mediation practice overall, and to comment on those factors, elements, attributes, and conditions that contribute to successful outcomes (with a converse question asking about those factors that contribute to unsuccessful outcomes). These were open text questions.

The elements likely to achieve positive mediation outcomes rest along two axes:

- 1) the skills and approach of the mediator; and
- 2) the characteristics of the mediating parties.

#### 1) Skills of the Mediator

The quality of the mediation process requires adequately trained mediators, and enough time with intake and explanation of the process to help identify issues and personalities, as well as ensure that the parties understand what can and cannot be done in mediation.

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<sup>33</sup> Participants were asked to select "all that apply" and therefore could select more than one category.

Mediators identified important elements that can be ascribed to the mediator that included:

- Fully endorses the core principles of the mediation process (parties are there voluntarily, acting with self-determination)
- Practises within their skill level/expertise/knowledge
- Understands the limits of mediation
- Understands the law and what can and cannot be negotiated within the legal framework (and the ability to communicate that to clients)
- Ability to remain unbiased, gain client trust
- Clear explanation of process; opportunity to ask questions
- Agreements are living documents that can/will change over time

Other aspects identified as increasing success in mediation were:

- Positive judicial endorsement
- Referrals from Duty Counsel
- Clients adequately prepared by their legal counsel

Factors that can contribute to a lack of engagement with the mediation process include:

- If mediator doesn't have control over the process, but rather one of the parties is being highly directive
- Parties don't provide full financial disclosure
- Parties don't follow the stipulated guidelines regarding the mediation process

Mediators consistently identified that mediation clients required legal counsel before, during the process, and at the agreement stage so that they have a better understanding of how the law applies to their case. In some cases, legal advice is needed to correct the misinformation that has been gleaned from family, friends, or the internet. Yet, some mediators identified that some lawyers can be an obstacle to the mediation process where:

- Lawyers don't truly understand the mediation process and either interfere or don't know how to support their client
- Lawyers have advised their client against mediation or against the mediation agreement
- Adversarial lawyers/unreasonable interference/difficult counsel who hamper the mediation process

## **2) Characteristics of the parties that influence decision to mediate**

The online survey asked about the circumstances under which mediation would be a good option for families, and when mediation would not be a good option for families. The obvious circumstance when mediation may be contraindicated is in the presence of domestic violence/abuse. That is an area of inquiry with many layers and is discussed in greater detail in a separate section of this report (see below).

What was apparent is that these two questions (good option versus not a good option) are highly complementary to each other — a yin and yang of circumstances that reflect the necessary conditions that respect the principles of mediation that are required to make it successful.

*Mediation Indicated: "Reasonableness. Respect. Readiness."* The key principles of mediation — reasonableness, respect, and readiness — largely serve as the framework by which respondents articulated their responses to the open-ended online survey question about when mediation is viewed as appropriate. This list summarizes the key points identified about what should be present to proceed with a mediation, and what is also likely to make it successful, including an enduring negotiated result:

- Willingness of parties/Voluntary/Self-determination/  
Capacity to make decisions
- Can articulate own needs/wants and the needs/wants of the other party
- Facilitated process/Parties need a third party
- Open and honest communication/full disclosure
- Basic level of trust/Good faith in working to resolve issues
- Maturity/insight into their own behaviours
- No fear of reprisal/no escalation of risk/without intimidation/retaliation
- Learn skills to communicate effectively
- Figure out how to move on
- Save money/No legal battle/Lawyers fighting it out/Cheaper/Faster
- There are children and want positive co-parenting/Place children's needs at forefront/  
Individualized parenting plan
- Openness to reasonable compromises within the law/Flexible
- Limited financial resources
- Lawyers present for "built in" legal advice/Immediate ILA (Lawyer Assisted Mediation)
- Parties willing to uphold/follow agreement
- Early in the process — before litigation/things escalate

This mediator respondent to the online survey summarized many of the items above regarding the benefit of using mediation:

*It can facilitate communication and help the parties resolve their conflicts in a more peaceful and humane way. Separation and divorce can be very expensive so families who do not have enough money (e.g. low income, unemployed). Those who are from marginalized communities (e.g. newcomers, racialized persons, etc.) often face stigma and shame from their communities in addition to having low income. They may not understand the law (e.g. language barrier) and may be at risk of coming into conflict with the law (family and criminal). As a Social Worker I believe that mediation can be therapeutic and help parties to process their loss (at times) and grieve. For couples who have children and other shared responsibilities, it makes sense to use mediation as a method to problem solve and communicate effectively with one another. Agreements (if drafted in good faith) can be mutually beneficial (financially, mentally/emotionally, etc.) (online: 5.1).*

*Mediation Contra-indicated.* In contrast, the circumstances and conditions under which mediation is contra-indicated, and less likely to be successful, are essentially for the opposite reasons noted above. Mediators articulated that a lack of being able to reach a mediated agreement is often about the parties themselves, and not the mediator or the process of mediation. When an individual is emotionally “stuck” and not yet ready to move on from the relationship or wanting vengeance, hoping to achieve an agreement can be insurmountable. Anger was identified as a key roadblock. For some individuals, being “stuck” is about being entrenched in the position they have taken and unwilling to view it differently or to compromise.

Some mediators think waiting too long to start mediation allows parties to become too entrenched, but other mediators expressed the concern that not having enough passage of time to allow for anger to evaporate can be an impediment when a party is still too deeply rooted in their emotions and grief to be able to fully engage in the process.

High-conflict cases, often associated with mental health challenges, addictions, or personality disorders, are strong impediments to mediation. Other impediments include parents who insist they are right or lack insight and responsibility. This is an ongoing problem for litigation, and is no less true for mediation.

This respondent outlined why mediation doesn’t tend to be effective with these types of clients:

*I counsel in the area of high conflict separation and divorce. There are some parents who are absolutely unwilling to compromise with one another. They need a judge to give them a very clear and easy to follow court order. Parents who mediate an agreement often have difficulty following the agreement in high conflict situations (really high conflict, not moderate conflict). Each term of the mediated agreement seems to rankle them, especially if the other parent had been a strong proponent of the particular term (online: 5.2).*

For some clients, unrealistic expectations or misconstrued interpretations of the law can be remediated at times with a mediator’s guidance, but for other clients this can be the “wall” that can’t be overcome.

One mediator identified that clients can appear to reach an agreement only to have a party refuse to take it to a lawyer for ILA because they no longer like the agreement. This is certainly within the purview of the client’s rights, but the issue may be that the mediation process can, at times, be “manipulated” by an individual who hasn’t garnered their desired outcome.

The following list outlines those factors and characteristics that may suggest that mediation is contraindicated, or may be closely associated with mediations that do not achieve positive outcomes. This list reflects a heavy focus on IPV/A, and the other associated behaviours and stances that are likely to present when IPV is an issue:

- High-conflict families
- IPV/A is strong or continuing history/Threatening/Concerns about safety/Long history of abuse/Fear of reprisal
- Power imbalances/Negotiating out of fear/Presence of coercion
- Concerns about safety/Wellbeing of children
- Lack of voluntary engagement (due to IPV, mental health, conflict, anger, pressure)
- One or both parties have unreasonable expectations
- Parent(s) don't want to mediate
- Complete inability of parties to talk/Highly positional/Entrenched view/Unable to compromise/Inability of party to commit or make a decision about anything
- Mental health/Capacity issues that inhibit party from full participation (e.g., bipolar, personality disorder, depression)
- Drug/Alcohol addiction
- Financial abuse
- Not following court orders (need judicial directive for compliance)
- Peace bond/Restraining order
- CAS involvement in the case
- Clients pressured to attend — lack free will/self-determination
- One party is "stuck" or obsessed with breakdown/Unable to move on/Looking for second chances/Persistently asking why it failed
- Bias on part of mediator that impacts neutrality
- Not following past agreements/Unlikely to follow mediated agreement
- Used as a delay tactic
- Physical illness/Issues that impede full participation
- Mediator feels unsafe because of behaviour of client(s)
- When family better served by counseling first (e.g., to address illness, death, change in sexual preference, financial downturn)

## THE JUDICIAL PERSPECTIVE ON PUBLICLY FUNDED MEDIATION SERVICES

Key informant interviews included telephone interviews with family court judges across Ontario (n=17). Overall, the interviews revealed a positive and receptive stance to the availability and utilization of mediation services. Nevertheless, there was significant variation in knowledge about mediation services, with some judges having no awareness and/or no direct judicial referrals, limited knowledge about the services with limited referrals, to high regard and knowledge of mediation with frequent referrals.

Those judges expressing particularly high regard and endorsement of mediation services are more likely to find ways to actively refer families to those services. Those with less or no knowledge of the mediation made few or no referrals to the service. Others respected the service but acknowledged that they had not yet found a way to effectively incorporate a pattern of referring behaviour in their



approach when hearing cases. As one judge noted, “I’m not sure as far as the judiciary is concerned that we’re perhaps promoting it is as much as we can or should. Although it’s in our own interest to do so...I think we can do more to promote it” (J2, 179–184).

In contrast, one service provider described the efforts made in their courthouse to ensure that judges are aware of the service, and noted that the judges at their location go to great efforts to make referrals to mediation, and that these judges have stated this is a valuable service and that it would be awful to lose it (KII\_5: 321–325).

When word about this research project started to spread, one of the unintended impacts was that there was more discussion about mediation services amongst the judiciary before the research interview was conducted. Some of the judges interviewed commented that there were more meetings being scheduled with the contracted service providers and more efforts to consider increasing referrals than previously. In turn, later interviews with some of the key informants who provide the services were reporting increased overtures by their local judges for meetings to learn more about the mediation services. This was viewed as a positive development, particularly in some instances where there had been little uptake for such meetings in the very recent past.

The impact of this research project on generating more awareness about mediation services is reflected in this exchange with one of the judges. This judge stated during the interview: “I did not even know we had mediation services in the building. The other sitting judge and I do not make any use of the service. A lot of litigants...have lawyers. If not, they have been told about mediation at the mandatory MIP [Mandatory Information Program] (J5).” This judge reported that no one who provides the court-connected mediation services had ever asked to come and meet and introduce themselves. However, the interview sparked the interest of this judge, who subsequently followed up in an email after the interview to share the following:

*I thought you would be interested to know that Justice X and I met with the person in charge of the mediation services...We now have the brochures and a better understanding of the services the mediators can offer. We drafted a handout that the trial coordinator puts with the case conference files and motions so the visiting judges know this service is available if they think a referral would be appropriate. We understand that at least one referral was made by a visiting judge and a successful settlement was mediated by the parties.*

The interviews with judges suggest that while many judges know about mediation services, not all judges are getting enough information about mediation services. It would be helpful for all judges to receive a package of materials that outline the family law services by highlighting the FLIC, on- and off-site mediation services, and the MIP. Ideally, this package would be site-specific, providing an important opportunity for the judges and the contracted provider an opportunity to connect and get to know more about the site mediators and IRCs. Ideally, this would subsequently involve regular face-to-face engagement to build the relationship and provide opportunities for dialogue about how each side can continue to enhance the use of services in ways that assist all family justice professionals.

Those judges who reported a higher level of knowledge and referrals to the services identified a variety of factors, and opportunities that facilitated those outcomes. One consistent item that was mentioned as effective was efforts by the mediators/site contractor, to reach out and build the relationship with the judges by providing information. This furnished opportunities for the judges to become more knowledgeable about the extent of the mediation services and affiliated FLIC services, information about the mediators' training and background, and information about mediator availability. Get-togethers, such as "bench and bar" meetings, were also identified by both judges and service providers as one arena that furnished an opportunity to get to know one another and to learn more about the services and the mediation process.

While there is certainly an onus on the service providers/mediators to initiate overtures with the bench, some of the judiciary acknowledged that they also have a responsibility to build relationships and endorse the use of the FLIC and mediation services. This also included willingness by the judiciary to have frank and constructive conversations with mediation service providers. As one judge acknowledged:

*I think it is our responsibility to sort of reach out to them and start working together...[if] we're not happy, tell them why we're not happy and what we can do better. In a constructive way...they want the business...it's not very helpful...for them to sit around all day and do nothing and they don't want to do that, they actually want to be helpful, and so you know, I think the court needs to, or the judges really need to encourage that and find a way because every court site is a little bit different (J6, 411–417).*

The uniqueness of each court site speaks to an important issue. While there may be a general "best practices" that might work across court sites, ultimately building capacity within each court site that have different types of litigants, volume of services, and other variants, requires that the collaboration be cultivated to reflect those aspects.

### Reminders About Mediation Services

Two key strategies were frequently identified as a "best practice" (as either being currently used by some judiciary, or when asked during the interviews that some judges would be receptive to): a daily reminder sheet at family court for the presiding justices about services available that day, and in-person introductions.

*Daily Reminder Sheet.* Most judges reported having received a list of mediators' names and information, but stated that this was received only once or twice a year, and so this information may get lost in the volume of material that comes to them. Some judges mentioned that a daily reminder sheet about mediation services is placed upon their bench. Typically, these reminder sheets are distinctive and printed on brightly coloured paper (and therefore stand out from the other paper on the bench) and provides the names and qualifications of the mediators, languages spoken, and the mediators' availability that day (e.g., the mediator may already be scheduled to conduct mediations that have been booked from a previous court day). Some sheets also mention the name of the IRC working that day. Amongst the judges who currently receive such notices, all reported an overwhelmingly positive regard for this assistance and that it helps to learn more about the providers and is a daily cogent reminder about the other services.



*In-person introductions.* Some judges could name the on-site mediators/service providers and mentioned that they knew them, including seeing and welcoming them into their courtrooms. Other judges admitted that they didn't have a clear idea of the names and faces of mediators at the courthouse. Some judges noted that it has been customary for certain personnel, like Duty Counsel, to "pop" by their office just before court and introduce themselves, to let them know that they will be in court that day to assist. It was noted that this was not generally a practice that has been adopted by on-site mediators but would be warmly welcomed by some judges, and seen as a great way to build a relationship and familiarity so that there were faces to go with names.

Ultimately, it is important for judges to be regularly informed about the mediation services in their courthouse. This, in turn, strengthens the communication and relationships amongst all courthouse staff.

### Legislative Provisions for Judicial Referral to Mediation Services

Two existing legislative provisions were identified by judges to encourage the use of mediation services for appropriate cases. First is a provision in the *Family Law Rules*<sup>34</sup> allowing the court to order parties to undertake the mediation intake process. The other allows an order to be made for mediation, where the parties consent to engage.

(i) *Ordering parties to mediation intake:* Pursuant to the Family Law Rules a...judge hearing a family law conference may order parties to mediation intake pursuant to 17(8)(b)(iii).

(8) At a case conference, settlement conference or trial management conference the judge may, if it is appropriate to do so,

(b) make an order requiring one or more parties to attend,

(iii) an intake meeting with a court-affiliated mediation service,

On-site mediation is highly accessible, as they are already in the courthouse, free to the parties, regardless of income. One impediment to note is that not all SCJ sites are fortunate to have mediation services as part of their continuum of ADR services. Referrals could be made to the off-site services that will be scheduled, most often in a location outside the courthouse, and with a sliding scale user fee geared to income and number of dependents. In some instances, depending upon the extent of the issues, a couple could start with the on-site service for the intake, and if they decide to proceed with the mediation segue to off-site services to continue.

Rule 17(8)(b)(iii) was identified as an important tool for judges with respect to mediation, but also a tool that is underutilized. To be clear, this is not a judicial order to engage in mediation itself, but rather to start the process of possible intake. Intake is preliminary to an actual start to mediation, and generally includes a presentation to parties about the mediation process, an individualized initial screening for IPV/Abuse, and a discussion with each party as to the issues with which they would like assistance. Judges are aware that they may not order parties to mediation without consent, as mediation must be voluntary, but as one judge noted, getting parties to the mediation table so they could learn more about the process is often helpful in motivating parties to utilize the full mediation service. As this judge noted, the judiciary can be particularly influential in getting parties to give mediation serious consideration:

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<sup>34</sup> Family Law Rules. O. Reg. 439/07, s.1.

*Sometimes all it takes is the judge who they are there to see to say: “Have you thought about mediation? Mediation gives you the opportunity to work out the issues on an amicable basis.” Sometime it just takes the judge to say that and then they seem to give it more thought (J4: Lines 148–150).*

One key informant mediator advocated greater use of judicial referrals to mediation noting the benefits of the intake process, with the benefit that it can also allow for connection to other community and social services, where warranted:

*I actually would love to see an evolution towards mandatory referral to intake for everybody...with the mediator, the on-site mediator or the off-site mediator, whoever it is. Having complete discussions and screen out for any reason...that way it’s safe and that way absolutely everybody benefits from the valuable consultation that you get one-on-one - confidentially with a person who should be qualified to screen you properly, assess whether you’re to benefit or not, whether it’s safe for your family and get you into better process. Get you into the hands of family court support worker if it’s not a suitable case, or even if it is, you know, it, get you support whether you proceed with mediation or not (KIL\_18:277–285).*

This quote speaks to the often-overlooked aspect of mediation referrals and the role of the Information and Referral Coordinator — the opportunity for families to be connected to additional information and services that go beyond the limited focus of mediation services.

(ii) *Orders to mediation:* There are also legislative provisions for judges to make an “order” for mediation pursuant to s. 3 of the *Family Law Act*, and to appoint a mediator pursuant to s. 31 of the *Children’s Law Reform Act*, but only on consent of the parties.

Judicial support and endorsement is critical. Some judges have created a sheet that is handed to parties, as they find this written information is often influential in convincing parties to follow through with at least attending at the mediation office to make an appointment. It was frequently cited in key informant interviews, and in open-ended questions to the online survey, that judicial support for mediation through these types of initiatives has a very positive impact, and that “top-down” support motivates lawyers, clients, and other support staff to more positively endorse mediation.

### Judicial concerns about mediator qualifications and competency

This is a controversial topic. The divide rests with perceptions about who is qualified to conduct various types of mediations, and specifically between those perceived as qualified to deal with parenting issues and those also qualified to deal with “complicated” financial issues and property matters (e.g., s. 7 expenses, exclusive possession of the matrimonial home, spousal support, or non-T4 child support such as payable by the self-employed). There is a general perception that mediators with a mental health background are well qualified to deal with the issues and challenges associated with devising parenting plans, but that complicated financial matters should only be mediated by lawyers, who are perceived to have the necessary legal expertise.<sup>35</sup> That said, concerns were also expressed by the judiciary about the competence of even some lawyer-mediators (e.g.,

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<sup>35</sup> This concern has been previously identified. See Mamo, A.A., Jaffe, P., and Chiodo, D. (2007). *Recapturing and renewing the vision of the family court*. Centre for Research and Education on Violence Against Women and Children. Available at <http://learningtoend-abuse.ca/sites/default/files/Family%20Court%20Study%202007.pdf>

new calls, or not family law focused) to deal with complex financial matters that were best left to the purview of the court.

Ideally, the judiciary would like to have on-site mediators with both backgrounds — mental health and legal. One judge expressed the concern, particularly as it related to a mediator not fully understanding the law around child support and mediating an agreement that was ultimately outside the legal framework:

*We've had...a fair number of issues with consent coming up where Duty Counsel won't sign off on them, and the whole mediation is just a waste of time because they've [the mediator] done things outside of the Child Support Guidelines that really makes no sense at all. So, that's problematic because the people don't really understand that; [the clients] are there in good faith to mediate something, but our obligation is to make sure support is supposed to be in accordance with the Child Support Guidelines unless there are very specific reasons as to why it shouldn't be. Sometimes you look at it and there's no explanation and it just doesn't make any sense and you have to say to the people, "I'm not signing off on this," and the people don't really understand, the litigants (J6, L144–152).*

This speaks to the professional requirement that the site contractor take responsibility for ensuring that the mediator's areas of expertise align with the issues in the mediation file.

One judge, who was highly knowledgeable about the mediation services at their court site, expressed confidence in using the on-site accredited mediators for the discrete issues that tend to make their way for this two-hour service. This judge also expressed confidence knowing that the service provider takes care in the assignment of files to the off-site mediators to make sure that the issues line up with the expertise of the mediator.

This is similarly reflected in information from the service contractors who noted that it is the ethical mandate that accredited mediators not practise outside their areas of competence. Mediators gain professional competency through continuing education and supervision under the direction of more senior mediators. It was acknowledged that some mediators, without a legal background, become very competent with complex financial and property matters, understanding the legal issues, and appropriate resolutions, in a manner that exceeds many lawyers. While mediator competence relates to a host of factors that extends beyond specific degree or professional credentialing, some mediators without a legal background should not be undertaking mediation of economic issues.

### Converting mediated agreements into legally binding agreements

The process of converting mediation agreements into court orders, or other legally binding documents (e.g., a separation agreement or Minutes of Settlement), was a key concern that was raised by some of the judicial participants. The format of the written mediation "Memorandums of Understanding" may not translate well when presented to Duty Counsel, court staff, or the bench. These agreements were either having to be re-written, returned for modifications to make them legally compliant, or the mediators were asked to revisit/remediate, as some of the resolved issues were outside the court's purview to order.

Echoing earlier concerns, some judicial concern was expressed that there are some mediators who do not fully understand the legal requirements that must be adhered to in a mediated agreement. There was similar concern about some private mediators. Amongst private mediators, there is a group of highly sought after experts who are deemed highly proficient and very competent for handling the most complicated of cases. At the other end of the spectrum, some judges noted concerns that mirrored what they were seeing with the publicly funded service provider mediators — a lack of knowledge that results in agreements with inappropriate resolutions. As one judge noted, a great deal of judicial resources are spent on carefully untangling the mediation report and checking in with the parties to figure out if they have a sense of what they agreed to. In some instances it turns out the agreement doesn't really reflect what the parties wanted (J15).

For example, couples before the Ontario Court of Justice (OCJ) have mediated agreements that include the allocation of furniture (i.e., property); this creates a dilemma that the OCJ judge can't make a court order with respect to property. Therefore, one of the legal gaps that needs to be made clear to the parties is that the agreement regarding the furniture won't be legally binding unless they take the matter to the SCJ. This requires good and clear mediation, education for mediators, and Independent Legal Advice.

*What is the solution?* One judge discussed that the mediators at their court site often attend to listen to how the mediated agreement is being finalized into a court order. This has proven to be an effective means by which the mediators have learned about wording, and what can and cannot be in an agreement (J8).

Another suggestion was that mediation agreements mirror the type of consent order forms used by self-represented litigants, lawyers and Duty Counsel. The forms allow for more details (e.g., for a parenting schedule), but the outline follows the same format. It was thought that this would also save time for Duty Counsel, who often have limited time with clients, and should not have to rewrite or read through the mediation memorandum of agreement with a "fine tooth comb" in order to understand what was agreed to and what can go into the court order. It would make things easier for court staff who also have to type up agreements into court orders (J11, 313–341).

In some courthouses there have been active discussions between court staff, bench, and the mediation service provider to develop an approach that works more effectively. As a result, some are developing forms with "tick boxes" and write-in sections to facilitate the process of communicating the terms of mediated agreement with the court. Some judges, however, have concerns about a "tick box" approach.

Some efforts are also currently underway to create an electronic EOrder form that allows for selection of key and common terms for orders, which would also have the benefit of omitting irrelevant provisions, making for a shorter and tidier end result. Ultimately, this area is important and needs to be addressed between the relevant professionals to arrive at what works best.

One challenge is that there appear to be some court sites where different judges have different approaches to the specific terms that they want in orders. Nevertheless, it would be worth considering whether there should be an initiative to develop a standard order that could be digitally completed that would facilitate the efficient construction of court orders with some similarity across Ontario (much the like EOrders that are being developed in the criminal system).

## What happens after the judicial referral to mediation?

Another concern that was identified is that judges are often not aware of what happens to a file after it is referred to mediation, particularly when the parties do not return to court. This may be the result of a complex process that is ultimately voluntary for the parties, who may or may not choose to follow through. Some judges have tried to follow the “trail” by making endorsements on the file that mediation was going to be attempted. Within the current process, if the parties do not return to court to have the agreement formalized into a court order, the judge often has no information about what happened with the case (e.g., successfully mediated but no court order sought, mediation not attempted, mediation not completed, etc.).

It is worth noting that some mediators expressed a similar level of frustration — mediating a file and drafting an agreement and then having no idea whether the parties actually successfully sought and located ILA and/or whether the agreement was turned into a legally binding arrangement (a legal separation agreement or a court order).

One concern for mediators is that final resolution following mediation is often contingent on getting timely access to ILA. Yet, ILA may be unavailable or inaccessible on the day the parties are at court, and may choose for time-saving reasons, or legal naiveté, to not have the agreement followed through to court order or separation agreement. The concern expressed by both bench and mediators are the clients who return some months or years later, expressing that the other party is breaching the agreement when, in fact, there was no legal agreement to breach.

It is worthy highlighting that mediated agreements/memorandum of understanding have a prominent front sheet stating that this is NOT legally binding, and mediators report that they explicitly tell clients this as they leave their service. It is reasonable to speculate that at the time of the mediated agreement, the good will of the parties may be sufficient for them and they minimize or are unconcerned about the agreement’s enforceability until conflict arises. The other theory is that parties may be tired, missing work, dealing with child care, or a myriad of other issues that makes it unattractive and/or causes hardship to put in the additional time and effort to follow through with these final steps.

Therefore, the lack of a system to track these files was identified by both the judiciary and mediators as an issue to address, possibly an issue that could be addressed by MAG and the Family Law Rules Committee, province-wide. A consistent process needs to be in order to obtain information about mediation services to evaluate outcomes in a more rigorous manner. This should be in addition to the data that MAG currently tracks about the level of agreement reached in mediation cases (e.g., partial on issues, full agreement on issues).

**Meetings between service providers and the judiciary.** Opportunities for judicial and mediator/service provider meetings are important. These meetings should include the reporting of current usage statistics as well as discussions about how to improve services, from both perspectives. These meetings could also include other court staff (e.g., First Appearance Clerk, counter staff, registrars, court managers). It was noted by one judge (J11) that there can be a great deal of turnover and that ongoing efforts to educate new staff and provide updates to established staff is critical to helping serve clients who are unaware of the types of services available to them.



**How long does mediation take and what is success?** Some judges expressed concern about the length of time it takes to complete the intake process and mediation. While some judges focus on the mediation process as a way for separated parents to gain additional relationship and communication skills, others are more outcome driven and prefer to see an “efficient” process, where if mediation doesn’t work within a prescribed time during the court day, the file would be returned to court later in the day so the judge could reach a resolution.

The length of time associated with the mediation process may be part of the problem. On-site mediation is supposed to be conducted within 2 hours, and must include: explanation of the mediation process, separate screening of each party for IPV/A or other capacity issues, consultation with each party to understand their issues, the mediation, and write up the mediation report/memorandum of understanding. The mediator may also be involved in helping to shepherd the parties to Independent Legal Advice before, during, and at the end of the mediation process. It would be helpful if mediation service providers shared more about this process with other family justice professionals at the courthouse, to allow some co-ordination of efforts, and greater appreciation of what can be completed with on-site mediation.

This also ties into the broader (and earlier) question of what “success” in mediation looks like. The broad continuum of outcomes can include no resolution, partial, full, or delayed resolution, as the parties may not reach an agreement on the court date, but only to return some months later to complete an agreement when some of the relationship conflict has settled. This speaks to the complexity in defining “success” as only a court order. This is a complex discussion that should be had as part of continuing discussions to understand the less obvious benefits and outcomes of mediation as well as the obvious.

One judge noted the “side” benefits of mediation:

*I think that part of the benefit with a mental health background is maybe helping the people understand, as they start working through their plan and their communication, regardless of what you call it. Forget the joint custody for a second, it’s important to have a good working relationship between two parents, and I think that’s part of the mediation. (J6, L203–207)...we might not see it in the numbers because the end product is probably the same, but if you can get people to appreciate each other... understand each other, for the kid, all that stuff...it’s sort of like mediation counseling (J6, L223–6).*

**Timing mediator presence with court sittings.** Overall, it appears that efforts are made to schedule on-site mediation services with the days that the family judiciary sits and referrals to mediation are most likely to be made (e.g., first appearance court, but not trials). Nevertheless, some gaps were identified that a tweaking of the schedules might serve both the bench and mediators better. This should also include increased funding to ensure there is on-site mediation coverage for all days when family court is sitting for all court levels. There are, however, pragmatic constraints, including the current funding model (based on case file volume) that often do not allow for mediators to be on site every day, particularly in smaller court sites. In addition, each court site has its own unique features, such as geographical or staffing issues, that may pose additional challenges not typically faced by other sites. Resolution of these site-specific issues could be best achieved by frank and open discussions between the bench and the contracted service providers who oversee service provision for the specific courthouse.

## The role of lawyers in the mediation process: A judicial perspective

The judiciary has a unique perspective on lawyers and mediation. Some judges noted that they have been met with resistance from some lawyers when mediation is suggested. One judge noted that it is not unusual for lawyers to assert that there is a power dynamic between the parties and that their client is vulnerable and therefore mediation is not appropriate.<sup>36</sup> This judge (J15) noted that they are aware of the research and therefore don't quibble with this assertion, but nevertheless noted their impression that lawyers may not have sufficient training to understand how effective mediation can be and how the process can help clients. It was further noted this might be a "generational" issue, as newer lawyers are receiving much more education and training about ADR in law school.

Some judges also suggested that some lawyers seemed confused about their role in the mediation process. One judge recounted such an experience:

*I was in court and had a senior family lawyer in front of me on a matter, very close to settlement, and I said, "Why don't you try mediation today." A really good family lawyer. And she said, "Your Honour, I don't even know what my role is [at mediation]." And I said, "I'm pretty confident you can go in with your client and participate." But, then I thought, we've [judges] never really been told that, or questioned that, cause I know when I was in practice, when mediation first started and I had a case .... lawyers weren't allowed to go in, which I thought kind of weird at the time. Anyway, I immediately spoke to [the service provider] and they said, "lawyers can go in, absolutely." So, I make that is very clear when I'm talking to lawyers now if they're hesitant, I'll say, "Well, you can still participate, you're there for supporting your client and to give independent legal advice." That's one thing that I think maybe the bar is a little confused about as well (J17, 455–467).*

This judge further described seeing litigants respond positively to the judicial suggestion that they try mediation, but seeing resistance from their lawyers. As another judge commented, litigants in most cases have limited financial resources, even those with privately retained lawyers. Judicial suggestions to use mediation may allow the parties to negotiate and resolve their dispute within their financial resources. Unfortunately, there is no way to monitor and collect data on these types of outcomes, but this judge does make a notation in the file that mediation was "strongly recommended" as a way to keep track.

### Judicial endorsement is critical

With respect to all courts, it was noted by many key informants that strong judicial endorsement of mediation services is positively associated with whether they see clients accessing mediation services. Judicial attitudes and endorsement of mediation are key catalysts in building both respect, and uptake, of the court-annexed mediation services.

Many judges recognize that the provision of family law services, which includes mediation, is about a team approach to helping individuals who are in distress make their way to resolution. One judge commented:

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<sup>36</sup> This is an appropriate response for cases with IPV/A. The concern being expressed was whether this was being advocated appropriately as opposed to a lawyer finding a reason to retain the case, when mediation may, in fact, have been a viable and fruitful option.



*It's teamwork, working along with the mediators, and the IRCs and lots of people trying to help the litigants. I think it's very rewarding to a judge to be quite honest, and we all get very excited when we resolve files, so, we have the help of the mediators to do that... It's so helpful to the litigants because most people don't want to be here...they're nervous...we don't want them to be, we want them to be moving on in their lives and as weird as this sounds, to have a good experience in going to court. I don't know if it's ever a good experience, but, I think it's certainly something the mediators strive to do" (J17, 291–301).*

And finally, this judge provides some pragmatic suggestions about how to handle referrals to mediation:

*I may glance down [at the reminder sheet on the bench] and say, "We have two excellent mediators today. They're here and they're available to help you."...Even if it's late in the day, [and] they both want to do mediation, I'll say, "I want you to do me a favour, a court services officer is going to show you where it is, going to take you there, because you both agreed to mediate. I've done the referral here [noted on file], she'll take you there...Because it's late in the day they're probably not going to be able to start it today, but, I want you to make an appointment and I want you to come back and tell me when your appointment is." They're usually pretty good about that, and they'll say, "Yah, we got an appointment next week, or tomorrow we're going to come back."...If I think a case should go to mediation it's on my motions list. I'll call them [the case] right away and say, "This is really resolvable and could benefit from mediation." And if they say 'okay,' I mean, you can't force them right, then they go off and I'll handle the rest of my list and then they'll come back a few hours later, three hours later, and say we've settled everything, and they're so happy (J17, 359–368; 370–373).*

## Recommendations for the Judiciary

These recommendations recognize the independence that each judge has to perform their role as they deem appropriate, and with deference to helping the families that appear before them find the best solution.

1. To Service Providers/Judiciary: Mediation remains challenging to access equally across Ontario. Therefore, it is suggested that there be better communication between the service providers and the judiciary (e.g., Lunch 'n Learns).
2. To the Judiciary: Family Law Rule 17(8)(b)(iii) (ordering litigants to mediation intake) and section 3 of the Family Law Act (ordering parties to mediation on consent of the parties) should be utilized more by the judiciary, where appropriate, to raise awareness that families have the option to participate in mediation.
3. To the Judiciary: Some judges acknowledged the important role they have within the courts, and that it is incumbent upon them to take the lead to initiate contact with the site contractor/service providers. In that vein, the judiciary should be encouraged to consider relationship-building opportunities with the mediation service providers.
4. To the Judiciary: Positive judicial endorsement of mediation services was viewed as a cornerstone for generating respect and utilization of mediation services by other court-related staff.

5. To the Judiciary: Consider inviting mediators to make introductions/check-ins a few minutes before court starts as a way to get to know each other better, outline availability, qualifications, and generally build a team approach to court services.
6. To Service Providers/Judiciary: Consider inviting the delivery of a daily “reminder sheet” for the bench that outlines names of mediators, qualifications/background, languages spoken, availability for services that day, and any other relevant information.
7. To the Judiciary: Consider new strategies and ways in which the bench can better “triage” cases that might be suitable for mediation and increase opportunities to make referrals, simultaneously reducing the judicial caseload.
8. To Service Providers/Court Staff/Duty and Advice Counsel: Make efforts to optimally coordinate services within each court site (e.g., Duty Counsel, on-site mediation services and court sittings) to service clients as quickly and efficiently as possible, with a particular focus on building capacity to ensure mediation clients can access ILA.
9. To Judiciary: In appropriate cases, judges should recommend mediation as the next step in a case and endorse the record so that it is clear that the parties have been ordered to attend intake and consider mediation. Judges should set return dates that provide the parties with sufficient time to attempt mediation.
10. To MAG: Address the funding gap that leaves some sites, particularly those SCJ sites that are at separate addresses from OCJ, and are under-served in the provision of on-site mediation services.
11. To MAG: Examine a file system that would allow to better track cases that have been referred to mediation services so that all family justice professionals and MAG can better ascertain the state of the resolutions and outcomes for parties and mediation services.
12. To the Family Law Rules Committee: Address issues related to judicial directions for use of mediation and process for incorporating terms of Memorandum of Agreement into court order.

## THE MEDIATION SERVICE PROVIDERS PERSPECTIVE: FACILITATORS AND IMPEDIMENTS TO FAMILIES USING MEDIATION SERVICES

Earlier discussion in this report primarily focused on understanding the families who have actually come to mediation. This still begs the larger question: how to get families through the mediation door? This can be about getting parties to engage in the intake process to learn more about mediation and whether it might be able to serve them in their resolution process to actually engage in the mediation process. It may also be about those parties who try mediation but are not yet in a place for resolution, but who may return another day when they are ready and able. This section of the report canvasses the issues around the on-site and off-site services, the clientele served, professional relationship building, pragmatic issues related to space and sign allocations, qualifications and training of mediators, and how to educate the public about family justice resources, one of which is mediation.

### Who is more likely to use mediation services?

The interviews and online survey responses revealed that there is a perception by professionals about typical users of publicly funded on-site and off-site mediation services that is related to the legal and personal characteristics of the individuals.

Individuals are reported to be more receptive to an overture to try mediation where they are younger, dating/unmarried, lower income, have no legal representation (self-represented), little/no property to divide, lack complex financial issues (e.g., no spousal support), have simple child support calculations,<sup>37</sup> and/or looking for a parenting plan.

Individuals appear to be less interested in publicly funded mediation where their case involves a divorce, or is “complicated” due to more complex property and financial issues (e.g., marital assets, spousal support), are represented by a lawyer, or report IPV/A.

Individuals who are interested in using private mediation services are also more likely to come from the second group, primarily because they have the financial means to pay for the mediation services and they are more likely to have matters that require more time and expertise that private mediation services can provide.

Ultimately, the uptake of publicly funded mediation services is contingent upon a whole host of factors.

### The Provision of Publicly Funded On-site and Off-site Mediation Services: Benefits and Challenges

As outlined earlier, MAG currently funds two types of services: 2 hours of free on-site mediation for those individuals who are at the courthouse on the day they have a matter before the judge; and off-site mediation, which provides up to 8 hours of subsidized mediation services, geared to income, with or without a matter before the court.

A noted feature of both on-site and off-site services is that the intake process is free. The intake meeting is a critical step in the mediation process, but also has the material benefit of allowing individuals to learn about the mediation process and develop some comfort with the role of the mediator. As in all potential mediation cases, the intake allows the mediator to screen for IPV/A and capacity issues to see if mediation is appropriate. This final point is important: not all cases referred to mediation will be appropriate for mediation, and the intake process is a necessary step in making that determination. And if mediation is considered appropriate by the mediator doing intake, the next step is to secure the consent of both parties; without consent of both parties, mediation will not proceed. Even court-ordered mediation only proceeds because both parties consented to the court order. In contrast, judges can order parties to participate in the intake process, even without the consent of the parties, but the actual mediation will only proceed with the consent of both parties.

*Availability of On-site mediation services.* The provision of on-site services has high variation across court sites. At larger urban centres, services are available every day. In smaller centres, in accordance with allocated funding, services are only available on certain days. While efforts are made to line up services with the days that the courts are hearing family law matters, this nevertheless leaves gaps in service, particularly in Superior Court of Justice locations.

Like mediation services, the IRC role is also available according to the level of funding and the days when family law matters are being heard. Therefore, in some court sites the IRC is there every day of the week to address questions from individuals, while in many smaller centres, the IRC might only be available one or two days a week.

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<sup>37</sup> Simple child support is often referred to as T4 child support — the potential payor is an employee who receives an annual T4 for income tax purposes. These situations allow for straightforward calculations in reference to the Child Support Guidelines. In contrast, self-employed individuals have more complicated determinations of child support.

One challenge in some smaller court sites is aligning service provision with court sittings when unexpected shifts have occurred in the court schedule (e.g., after a week with a statutory holiday). At times, the court sittings no longer align with the prescribed days when the IRC and mediator are on-site. These gaps can mean that services are not always in sync with what is actually happening at the courthouse or with the needs of litigants looking for assistance.

*The time crunch.* The time allocated for an on-site mediation is limited. Current protocols allow for 2<sup>38</sup> hours in total to conduct client intake with both parties separately, at which the IPV/A screening takes place, followed by the actual mediation as the parties sit to identify issues and, ideally, reach an agreement that will be reflected in a Memorandum of Understanding. As many mediators reported in key informant interviews, providing such extensive services within such a tight timeline is a consistent challenge. Many mediators thought simply allowing one more hour, for a total of three hours for an on-site mediation, would allow them and the clients to more effectively complete all of the steps on one day.

*Provision of off-site mediation services.*

One of the differences between on-site and off-site mediation services is that individuals may access off-site services without having to file an application in court. Off-site services are also available to those individuals with a matter pending in court, but unlike on-site services this is not a condition of access.

Currently, individuals may access off-site mediation services for up to eight hours, including time for mediation intake of both parties, and pay according to a scale that is geared to income and number of dependents. By and large, rostered mediators noted that most individuals are content with the user-fee arrangement. Some clients balk at the associated user fees due to their low income. When that happens, some mediators try to work around this by providing on-site services where this might be appropriate, as they are free.

The issue of paying user fees for mediation can be a roadblock in other ways, particularly if one of the parties may have already spent money on legal representation, when one spouse may be seen to be “pushing” for mediation, and/or the mediation process is not something the other party knows much about so they are reluctant to spend the money when they are not sure about whether that will generate a settlement. The intake process can make a difference, as this allows the parties an opportunity to be educated about how mediation works.

One mediator suggested that off-site cases often have a different “feel” than on-site files as the parties are often there willingly, seeking an alternative to litigation:

*I love some of the off-site files, where they're not even in court yet... they're looking for an alternative. We don't want to be in the court system. We know what that can do. And so they are ready. You know it's still hard. It's not like those cases are perfect but at least there is this idea of wanting something different or maybe just wanting to make the decisions themselves (KII\_16: 194–198).*

Longer time for mediations is often required because either the issues or the interpersonal relationships are more complex. One mediator noted that in their experience, longer mediations are

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<sup>38</sup> There appears to be a difference of opinion about time allowed for on-site mediation. Key informants were clear that only 2 hours were technically allowed (with some stretching it to 3 hours when necessary). MAG suggests it already is 2-3 hours. This discrepancy should be addressed by MAG and their contracted service providers.

often more about the people and less about the issues (e.g., personality, emotions, blame) (KII\_25). Mediation sessions often need to be extended when significant changes are introduced mid-stream into the process, such as a new partner is declared, the announcement that a new baby is on the way, or a client, who previously had an intention to keep the house, decides that they want to sell. As one mediator noted, it isn't that you necessarily have to start over, but it does often require some back-tracking to address the new dynamics that the changes invoke.

Off-site mediation is often also an opportune venue for a "mediation tune-up" (KII\_25) — individuals who successfully mediated in the past return for some revisions to an agreement because the child has aged and some adjustments are necessary with regards to the schedule, schooling, or other issues. Some mediators identified this as a wonderful success — that the mediation experience had been positive the first time, so the parents returned when new issues presented, avoiding the litigation process.

*Adding Mediation User Fees to Employment Assistance Plans.* An innovative suggestion was made for thinking about funding for mediation — making efforts to get Employment Assistance Plans (EAPs) to consider adding mediation services as a cost recoverable item. Being able to reduce employee stress during separation/divorce allows people to move forward more quickly. Finding ways to assist people with the expense associated with accessing mediation (both private and off-site) would allow people to access necessary services and reduce time lost to litigation, absenteeism, and "presenteeism" (i.e., at work but too distracted to work). Reducing stress reduces health care costs and associated illnesses such as strokes, hypertension, and heart disease. It is noted that this would require a monumental shift in thinking by benefit providers.<sup>39</sup>

### Recommendations regarding on-site and off-site mediation services

1. To AFCC-O: That AFCC-O consider starting a campaign to lobby extended health care providers to get mediation services user fees (e.g., private or off-site) listed as an item covered by Employee Assistance Plans and other extended health plans, as we now do for Registered Massage Therapy or psychologist services.
2. To MAG: First Appearance Court has been identified as a key time for referrals. Consider taking a leadership role and working with the court clerks and service providers to facilitate uptake of mediation services. This recommendation, more generally, also includes the invitation to have open communication with the contracted service providers to work to ensure that mediation coverage coincides with court times/dates when referrals are most likely.
3. To MAG: That MAG ensure mediation contracts have funding to provide sufficient on-site mediation services for all regular family court days at both the OCJ and SCJ.
4. To MAG/Service Provider: That MAG give consideration to extending the time allotted for an on-site mediation from 2 to 3 hours to adequately permit mediators the time to conduct a proper intake, IPV/A screen, mediation, and writeup of report.<sup>40</sup>

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<sup>39</sup> Progress in having services, such as massage therapy, that are now standard in most extended health plans was raised as an example of how progress can be made to include services that previously were not covered.

<sup>40</sup> This suggestion is made recognizing that the current provincial deficit and associated program cutbacks are always to be considered in advocating for expanded services.

5. To MAG: That MAG consider adopting a formal policy to extend on-site mediation services to include individuals who are unable to pay (even subsidized off-site user fees). This would be particularly appropriate for those who seek mediation services on a day when their matter is not on the court docket but is before the courts. This would also facilitate access to Duty Counsel to review the agreement. MAG funding should be increased to address this service gap.
6. To Service Providers: Training, education, and relationship-building requires continuous conversation on how to improve services to address complexity and the presence of new staff and judiciary. Contracted service providers should endeavour to reach out to find ways to engage with bench-in events such as Lunch 'n' Learns or Bench and Bar meetings.
7. To MAG: MAG should work to develop a system, ideally with judicial input, to better track court files that have been referred to mediation services. Some judges expressed concern that they do not know what happens to cases that have been referred to mediation intake, unless the matter comes back before them. Collecting this data would further assist in future research efforts to investigate some of the barriers and challenges that litigants face, especially with using mediation.

### Relationships are the Cornerstone of Mediation Services

The central crux about mediation services is that it is primarily about relationships — the working relationship between all family law professionals. Successful provision of mediation services is about making and building of relationships — whether as the site contractor, mediator, or IRC with the other courthouse personnel, judges, communities, legal bar, and the clients who pass through the door. Building strong professional relationships is critical for ensuring that mediation services are fully endorsed locally at each courthouse, within the wider community, and more broadly as a socially valuable provincial family justice service.

This broad concept of relationships as the cornerstone of mediation services is critical because in many respects it helps explain those centres where mediation appears to have positive reputation and good uptake in comparison to those where the mediation services are less known, or known but underutilized.

The contracted service providers and their roster of mediators understand their mandate and work hard to make contacts, facilitate, and educate. But ultimately, whether their efforts are successful is often a function of how welcomed they are as part of the family justice services team within the jurisdiction/court site they serve. The acceptance of mediation services rests in many domains: acceptance by other courthouse personnel, the allocation of FLIC services, referrals by lawyers, referrals by the judiciary, and province-wide efforts to educate individuals about alternative resolution options.

*Part of the Family Justice Services, But Not Part of the Courthouse.* The mediation service providers have a unique role within the courthouse. On the one hand, mediation services are closely connected to the court and viewed as a useful alternative dispute resolution mechanism. Yet, the model adopted by the Ministry of the Attorney General (MAG) has them funded as “contractors.” This is unique when compared to the other services at the courthouse — court managers, court clerks, counter staff, and the judiciary, who are all viewed as permanent employees.



The result is that mediation service providers occupy a rather awkward place in the courthouse — they are part of the services, but not necessarily viewed as part of the “court.” The sum total of these elements is that in some instances there is a lack of cohesion and respect with the other court services and personnel at a court site. This isn’t true of all court sites, but this awkward disconnect was highlighted by the fact that an IRC/Mediator might be given a key to lock up the courtroom/ courthouse after an evening MIP, but is denied kitchen/staffroom privileges or access to the staff washroom because they are not considered to be part of the court services. This disconnect can negatively impact opportunities to get to know the other court staff and, more critically, can relegate mediators to an “outsider” status, despite the roles they play in the provision of family law services.

Being respected and being thought of as a true member of the family justice professional team includes consideration for introducing processes that facilitate uptake (e.g., appending mediation brochures to court house filings). It allows for greater consideration in terms of allowing appropriate signage that might point to the FLIC location, and making space available for information stands that includes brochures for community resources.

Ultimately, the need for a cohesive and collaborative teamwork approach that includes all on-site professionals was a common theme articulated in the key informant interviews and survey. It was reported that in some locations court staff are quite solicitous about asking how they can help the IRC/Mediators and providing referrals to services. It was noted that this friendly and team-oriented rapport made a positive difference when working with clerks, lawyers, and other staff, like the court service officers. In sum, mutual reciprocity and support was key. This key informant, a mediator, summarized what was heard in both interviews and through the survey regarding the need for a more coordinated effort to providing services:

*I wish we weren't all under separate umbrellas, I think that you know, we're really all technically providing services for the Ministry in some way. I think we need some more connection with one another...I'll be honest myself, I put as much effort as I can to making that connection with some of the Duty Counsel and the judges, but, maybe even having opportunities to sit down together and not keeping our role so separate but, working together as a team because we need it (KII\_12:434–439).*

With this in mind, one of the key facilitators to mediation uptake was judicial endorsement. This sentiment was expressed unequivocally by key informants and by respondents in the survey. Judicial endorsement and making referrals was identified as key to setting the tone and generating greater respect and uptake of services.

*Lack of adequate space.* The presence of the IRC/Mediator can be further complicated by other factors. In smaller centres, the IRC/Mediators may only be present on those one or two days when there are family law matters being heard. Smaller or older courthouses also tend to lack appropriate and accessible space allocation for the FLIC and the provision of private mediation services. In some cases, the working space of the IRC/Mediator has no permanent location or is very hard to find (see further discussion below regarding the issues with space allocation in the section on Family Law Information Centres). The sum total of these issues is that the IRC/Mediator is both difficult for potential clients to find as well as other court staff.



The lack of space and lack of respect for mediation was described by this mediator in the online survey:

*Often the buildings are too small to have sufficient space to allow for privacy. Conducting mediation was something that wasn't considered when some of the venues within the rural areas of Ontario had court venues selected. It is not uncommon to begin mediation and only be asked to leave by lawyers who are working at the Family Court because they feel they have a greater right to space/privacy than a Mediator. I recently assisted in a larger city...to provide mediation services. The lawyers present in court that day, Duty Counsel and others, made it clear that mediation was not something that was needed/wanted (online: 5.6).*

The lack of adequate office space also translates to the lack of adequate space to conduct mediations in some court sites. Not all sites have easy access to a designated space, with adequate privacy (no walls, or paper-thin walls), or even internet service (e.g., relegated to the basement without internet service, which is a challenge when one is trying to do online calculations through software, such as DivorceMate). In many instances, mediators are jockeying for spaces that are shared with lawyers. This also means that there isn't always space to do shuttle mediation, requiring that one client sit in the hall as the mediator talks to the other party. These are not only frustrating for the mediator, but compromise the ability to offer private, confidential, and timely service to clients.

### Recommendations for inclusion of mediators

1. To all Family Justice Professionals: Relationships are the cornerstone of good service provision. There should be greater endorsement and relationship building to bridge the gap between service providers and all other court site family justice professionals, including lawyers, judges, and court staff.
2. To the Judiciary: Judicial endorsement of mediation is critical; it brings greater legitimacy and uptake of the service and sets the overall tone in a court site about the valid presence of mediators.
3. To MAG/Court Services Managers: The court site and all associated court professionals should accept mediators as a legitimate member of the family justice team. For example, this should include full access to court site amenities (e.g., lunch room, staff washrooms).
4. To MAG/Service Providers: Greater efforts should be made to align mediation service provision with court sittings, while respecting funding/staffing parameters associated with each court site <sup>39</sup>.
5. To MAG/Court Services Managers: Ongoing efforts should be made to find appropriate space for the conduct of confidential mediation services that also permits access to required tools (e.g., WiFi) and facilitates different modes of service (e.g., shuttle mediation).<sup>41</sup>

### Mediator Training, Qualifications, and Accreditation

Generally, mediators on the rosters for the publicly funded on-site court-annexed and off-site services have undertaken specialized courses, internship training, and, finally, become accredited when the requisite criteria have been met.<sup>42 43</sup> Despite the extensive educational, training, and

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<sup>41</sup> It is recognized that accessing appropriate space is an ongoing issue for many court-based service providers where age of the courthouse and its design are a limit as to what can be done.

<sup>42</sup> See OAFM (<https://www.oafm.on.ca>); FDRIO (<https://www.fdr.io>); FMC (<http://www.fmc.ca>); and ADRIO (<http://adr-ontario.ca>).

accreditation standards, concerns were expressed about various aspects of whether the training is comprehensive enough for complex financial matters and whether the training opportunities are egalitarian enough. This section delves into this contentious issue.

One of the dominant tensions about mediator qualifications is whether the mediator has sufficient legal background to handle more complex financial, property, and support issues. This was brought to the fore in some of the judicial interviews, but was also identified by online survey participants and key informants.

Some mediators are lawyer/mediators who are generally viewed as having the necessary expertise to handle legal matters associated with a mediation file, although they may have less experience when it comes to handling a parenting plan. Those mediators with a background as a social worker or mental health professional are generally considered to be particularly qualified to handle parenting plans and conflict, with reservations expressed whether the required 3-day training course in family law is sufficient to acquire the necessary legal expertise to mediate more complex financial and property matters.

The judicial interviews identified that the courts are sometimes receiving mediated agreements that have not been negotiated within the law, and therefore they are unable to issue court orders or grant requests for divorce judgments, or the judge must send the file back for further mediation in order to rectify the deficiencies. The overall impact is that judges and lawyers are understandably reluctant to refer where there are concerns that the mediator lacks the necessary knowledge to properly handle the file.

One key informant, a private mediator, was told by a lawyer with whom they work closely that the lawyer had received a Memorandum of Understanding from a mediator from out of town and that the quality was severely lacking. The expressed concern is that the lack of quality in the final product “doesn’t help our brand at all” and contributes to an overall lack of confidence in the skills of mediators (KII\_27).

Another related concern was expressed that the most qualified rostered mediators are not necessarily staffing the on-site mediation services, leaving this area to be staffed by lower paid and/or newer mediators who are still acquiring experience. A concern is that on-site mediation is fast paced and requires a high degree of experience, rather than less. The concern was voiced that on-site mediation is often used to train interns who are the lowest paid and not fully qualified. This also dovetails with the concern that such low pay results in less skilled mediators and high rates of mediator turnover, thus compromising credibility with the bench and bar (online: 6.4 comment).

Some mediators question the accreditation requirement, suggesting that education and experience should be the only “hoops” to jump through. On the other hand, one might counter-argue that legal professionals providing services are required to be accredited (e.g., lawyers and paralegals), and that it is important that standards are in place for those performing the service at a required level of competence. It also provides “legitimization” to the profession when accreditation standards are met.

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<sup>43</sup> For an overview of concerns around the licencing of mediators in Ontario see Madsen, L. (2011). More than ‘hanging out a shingle’: Qualifications for Family Mediators in Ontario. *Canadian Family Law Quarterly*, 30, 49–70.

Some private mediators have specialized training in the financial aspects of divorce. This advanced training and certification<sup>44</sup> allows people to learn the complex knowledge to help couples consolidate financial information and provide future projections (e.g., one person keeps the house, capital gains, depreciation, incorporation, etc.). This type of analysis, for example, can take the question beyond what an appraiser values the home, to whether or not the party keeping the house can get a mortgage and will have the cash flow to afford to maintain the home. Mediators who do these complex financials do not decide for the clients, but as they note, they can ensure that individuals have the necessary information to make their own decisions.

This issue was canvassed with key informants who identified some important points of practice that are generally followed:

- Mediators have a professional and ethical obligation to not practice outside their expertise.
- Service providers/Supervisors have an obligation to assign files to ensure the issues in the file match the expertise of the mediator. Therefore, the typical pattern is to see cases with parenting matters in dispute referred to mediators with a social work /mental health background, and cases with more complex financial matters be assigned to mediators with a legal background. This assumes that the service provider has a roster of mediation professionals to meet these demands.
- Some mediators, who are not lawyers, have acquired considerable legal expertise over time. The lawyer/non-lawyer divide can be misleading. Some lawyer-mediators, particularly newer calls or lawyers without a great deal of family law experience, often lack the background and practice experience to handle complex files as well.
- Most mediators can handle what is often dubbed T4 child support matters, which addresses employed individuals without complex employment income (e.g., the self-employed) where it is essentially an issue of ascertaining the table amount based on the reported income on the employment document.

Training and internship opportunities. Concern was also expressed about the availability and allocation of internships (accreditation requires upwards of 100 hours of apprentice training). The concern is that if an individual takes training from one company, that there is not full acceptance by the court contracted service provider at another site to allow trainees to intern at their site. The frustration is that there is a conflict of interest in that many of the contracted service providers who hold the MAG contracts for on-site and off-site mediation also run their own professional mediation training companies that charge many thousands of dollars to access the required mediation modules that are one part of the required educational steps to become an accredited mediator. This key informant outlined their concern:

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<sup>44</sup> Advanced training in learning about the complex aspects of financial issues associated with divorce (e.g., lump-sum spousal support [not tax deductible] versus periodic spousal support (deductible), self-employment, whether some can afford to keep the matrimonial home, non-matrimonial home properties) can be acquired through Institute for Divorce Financial Analysts (IDFA) where one can become CDFA trained as Certified Divorce Financial Analyst. <https://institutedfa.com>

*How the internships are flowing through...that has created some discomfort in the community, in the ADR community and it's been there for quite some time. There are mediators who have taken training with the court providers, with the service providers and they can move up into an internship with them. However, there are mediators who have taken their training with another company, not with the service provider, and they're not permitted to get on the roster...That has been a concern for quite some time just because of the monopoly that's created, and also, the lack of diversity and the quality of the roster (KIL\_9: 551–558).*

## Recommendations regarding mediator training, qualifications and accreditation

1. To Service Providers: Service providers should make clear to judges and other referrers the qualifications and areas of the mediator's expertise.
2. To MAG/Service Providers/Accreditation Agencies (e.g., OAFM): Expertise to mediate in an area should not be related solely to whether someone is a lawyer or a mental health professional; all mediators regardless of "legal" credentials should be assessed for competencies. This means that newly called lawyers who are mediators may need further training. This also means that long-time experienced mediators who are not lawyers may in fact be ably experienced to handle property and financial matters.
3. To MAG/Service Providers: Service providers should be required to ensure that they have sufficient capacity in their mediation roster to address issues of some financial complexity.
4. To MAG: Accreditation should continue to be the expectation for all rostered mediators.

## CONNECTING THE PUBLIC TO FAMILY JUSTICE SERVICES: ADVERTISING, FLICS, & THE MIP

### Getting the Word Out: What is Mediation?

Mediators were asked to identify impediments to families using mediation. The primary impediment identified was lack of awareness about mediation on the part of clients. It appears that this can be further broken down into two aspects: 1) a general lack of awareness about the availability of publicly funded mediation services; and 2) confusion about what mediation is and does.

*Lack of awareness about mediation services.* There was considerable frustration expressed by mediators about the general lack of public understanding about the availability of publicly funded mediation services as an alternative resolution process. The current practice is largely to educate individuals one at a time, mostly as they cross the threshold of the courthouse.

The current practice of largely trying to educate the public only through courthouse-annexed supports and services are viewed as limitations to educating individuals outside the court process. There is logic in the current model. The provision of services that are strongly tied to the courthouse provides an obvious point of contact for those who are seeking resolution of a family law matter. That being said, seeking out legal advice via lawyers are likely the first avenue people think of when they have a legal issue, with the courts closely linked to seeking legal resolution. Once individuals are in the court system there can be a reluctance to endorse another method because they don't want to disrupt the matter they have started, unknowingly thinking that they will get a much speedier resolution than actually happens. The concern is that linking access to information through the courthouse may be "catching" people too late in the process. Currently, there are limited means to inform people of other alternatives, before they start an application or see a lawyer.

A province-wide public service media campaign was suggested as a possible mechanism to resolve this issue. Similar to raising the public conscious about domestic violence or putting on snow tires,<sup>45</sup> some online participants and key informants thought that efforts to raise public consciousness about alternative dispute resolution options is critical. It was noted that some contract service providers have made efforts to employ various media like radio and busses/billboards, but that this really only works, and is only financially feasible, in large urban locations that reach a large population. Most contractors do not have a budget line in their contracts, nor population size, to make such efforts viable.

*Confusion about mediation services.* The lack of understanding of what mediation is and can do for couples was relayed in both the survey and key informant interviews. As one mediator noted, only in more recent times have people stopped confusing mediation with “meditation.” That said, there are still misperceptions about the role of mediation. Some clients resist mediation because they think the goal is to try to get the couple back together, confusing it with some type of reconciliation or couples counselling. For people who have found their way to the courthouse to dissolve their relationship, this can be off-putting as this is not the outcome they are seeking. Others think mediation allows them to negotiate outside the law rather than understanding that compromises still need to fit within reasonable parameters of the law. And still others think that mediation involves a judge-like solution or decision that will be imposed upon them as opposed to “owning” the task to come up with their own solution.

*Cultural impediments to courthouse access.* Concerns were expressed that in some cultures, staying away from the courthouse is paramount. Even in the face of critical family law matters being seen at the courthouse would be highly disapproved. It was suggested that there should be future efforts to create community-based FLIC-type resources that would allow individuals to have access to information and services without having to “go to the courthouse.” It was also expressed that over time this might encourage more individuals to access mediation services before filing, thus also decreasing the impact on court services.

In Ontario, an accessible, online alternative to the MIP is specifically designed for Indigenous families: the Aboriginal Family Law Information Program. The video was developed to help Indigenous families learn about the effects of separation on children and adults and the options available to them to resolve their disputes. It also covers topics such as navigating the separation process, family law issues, alternatives to litigation, and the court process. This culturally specific information exemplifies the type of ongoing program development that should be instituted to address cultural diversity in Ontario.

## Recommendations for raising the profile of mediation

1. To MAG: A general province-wide media campaign initiated by the Ministry of the Attorney General to raise awareness about court-connected publicly funded mediation services and to get society thinking about their options for addressing family law matters.
2. To MAG: MAG should consider, where geographically and culturally appropriate, to find ways to expand the FLIC model and MIPs to reach those areas with a culturally diverse population who are likely to be reluctant about accessing services in a courthouse, but

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<sup>45</sup> Key informant (KII\_10: 255–257) noted “there’s probably more provincial advertising to get people to put snow tires on than there is to get people to think about their family and what options there are.”

require access to important family law information. Local libraries and community centres were identified as effective avenues for this type of service delivery.

3. To MAG/Court Clerks/Service Providers: Appending FLIC/Mediation service brochures/bookmarks to the filed applications and responses was deemed effective by those court sites currently utilizing this practice. Efforts should be made to make this a practice enacted by all court sites. This will require cooperation from court staff and court managers.

### The Family Law Information Centres (the FLICs) and the IRC Role

This project was not specifically asked to comment on the Family Law Information Centres (FLICS) that are found at nearly every courthouse in Ontario, but it became clear that the physical space allocated to the FLIC has an impact on how accessible the FLIC resources are to individuals, particularly access to the IRC and hence information about mediation and other community and family law services.

The eight courthouse site visits<sup>46</sup> revealed stark diversity in FLIC implementation. Some FLIC sites have a clearly identified space with adequate allocation for the variety of services that are provided (IRC, mediation, court staff) and have cohesive and accessible spaces. Clearly labelled doors are easy to locate and provide the type of one-stop-shopping that was envisioned.

This isn't true of all FLICS. Many have been introduced in an ad hoc way such that the services are quite hidden away, particularly in older court sites making them less publicly visible. As one key informant noted about their location: "There is a sense of separateness, isolation from the system here in this building" (KII\_2: 83–84).

It is acknowledged that in many court sites space is at a premium. The results are telling: the FLIC might be found at the end of a long unmarked hallway or the "office" is a moving roller cart with a printer and some supplies that is hauled to an available room, such as a lawyer/client meeting room. The researcher who conducted the site visits (Whitehead) experienced some of the challenges in finding some of the FLICs, even when she was quite clear about what she was looking for. This comment is made to highlight that it must be even more challenging for individuals without that knowledge.

In other instances there is confusion as to allocation of the FLIC space. It would seem that the optimal first person of contact should be the Information and Referral Coordinator (IRC). This role was conceived to be a point of first contact with the knowledge and ability to help triage individuals' needs — need for external community resources, need to complete documents and forms, need for referral to legal advice, need for mediation services, etc. In some sites, the FLIC office is used by the Advice or Legal Aid Duty Counsel and the IRC is relegated elsewhere, often quite hidden from public view.

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<sup>46</sup> The court sites visits included: Guelph, Sudbury, Newmarket, London, Windsor, and in Toronto: 393 University, 47 Sheppard, and 311 Jarvis.



One key informant highlighted the extraordinary skill set and connections that the IRC needs to call upon to do this demanding, high-stress role:

*Personality first and foremost. The IRC has to have a really strong service orientation; the IRC has to come from a place of real commitment to helping people solve their problems...[have] all of the best qualities of a good mediator, right, they have to be completely non-judging, they have to be very knowledgeable as well, obviously about the system, because most of the questions that they respond to deal with “how do I do this,” and “how do I do that.” They’re quasi court staff in some respects, but, they’re really supposed to be there as resource specialists; so, to me, the most valuable IRC is somebody who knows not only the court system, but, also, all the agencies (KII\_18:186–188; 194–200).*

One of the important roles the IRC undertakes is to provide individuals with a private consultation during the client’s time of high stress. It is the “privacy” aspect that is so highly variable from courthouse to courthouse. There are many FLICs where the IRC has an office with walls and a door. Many FLICs also have no walls and no doors. Thus, it can be challenging, if not impossible, for the IRCs to carry out their mandate to provide confidential services.

It was also discussed by IRCs that their role requires that they learn to be assertive. This includes actively working to build relationships with others such as Legal Aid lawyers, court staff, and court clerks to help them learn about the role and responsibilities associated with the IRC, and to establish a working trust so that there can be a reciprocal exchange of questions, assistance, and referrals. As a result of these efforts, one IRC reported how the clerks and staff know that the IRC can be accessed at any time: “I think when we work together as a team and you can see people are helped” (KII\_6: 556–7).

The assertive role of the IRC also continues when working to connect with clients/litigants in the courthouse. It was noted that leaving the (typically remote hard to find) office with their official name badge and, in some cases, a clipboard, and roaming the halls and waiting rooms is key to connecting with individuals who need assistance. One IRC noted that their strategy is “to not look like a lawyer...I have to be a little more relaxed. I have to be approachable. Not scary...people come to the court and they don’t know what’s going on. They’ve never been here. They need to be able to ask somebody something” (KII\_6:50–53). One of the ongoing challenges is getting the message out to all, including citizens and other court staff, that the role of IRC is to refer to a wide array of family law professional services, one of which is mediation. For the IRC, the first step is to get individuals to connect and complete an intake so they identify the array of needs and then refer accordingly.

*Signage.* Part of FLIC access is also about whether there are clear, visible signs directing people to the FLIC. Understandably, current protocols require that sign placement must be approved by the Manager of Court Operations; one does not want too much clutter. As a key informant acknowledged, it can become the “battle of the colourful paper” when too many signs are posted (KII\_2: 208). Nevertheless, it does mean that service providers are not free to label and direct as they feel is appropriate. And as noted earlier, some current FLIC signage takes someone to legal advice and not the IRC.



## Recommendations for the FLICs and IRCs

1. MAG/Manager of Court Operations/Service Providers: Need for a front desk/Service counter: Consider instituting and coordinating with court managers ways to create a visible “front desk” or “service counter” near the courthouse entryway for those sites without a highly visible and accessible FLIC (see 311 Jarvis for an example). While this type of FLIC setup lacks privacy, it would allow for an easier connection to clients, with the use of a more remote “private” office/meeting space to discuss matters once they have been “triaged.”
2. To MAG/Manager of Court Operations/Service Providers: Proper Signage: Make the FLIC more visible and easier to navigate to in every courthouse. Court managers should be encouraged to facilitate improved signs. One suggestion is a movable sign that could be placed prominently when the FLIC is open/IRC present but then be stored on other days.
3. To MAG: Implement a cohesive provincial plan for allocation of FLIC spaces. There is confusion when Advice or Duty Counsel is housed in the space named the FLIC in some courthouses, but not in others. Advice/Duty Counsel who has current space labelled as the FLIC should be renamed as Advice/Duty Counsel with all FLIC locations containing the Information and Referral Coordinator.
4. Consider ways to stagger hours to make the FLIC more accessible to those who work (particularly in FLICS where they traditionally close up quite early (e.g., 2 p.m.).
5. Service Providers/MAG: Focus increased education to bring greater clarity around the holistic role that IRCs play in helping to assess and refer individuals to family law services across the spectrum — legal assistance, social and mental health services, mediation, and domestic violence services is needed amongst courthouse staff.

## The Mandatory Information Program (The MIP)

Much like with the FLIC, this research project did not specifically undertake a review of the MIP program. Yet, similar to the FLIC, the MIP was widely viewed by research participants as one of the most important opportunities to educate individuals about litigation alternatives, such as mediation. The concern is that the MIP, as currently conceived and implemented, may not be achieving its purpose. Given the comments in the preceding section about lack of knowledge about mediation, the MIP warrants some discussion.

*What is the MIP?* The MIP is an in-person program that is offered approximately two to four times per month at each courthouse, depending on volume. Ideally there are two presenters: a lawyer and a mental health professional/social worker. During the MIP the presenters take turns reading from a prescribed script, deferring to their areas of expertise. In most instances there is a PowerPoint with slides that accompanies the verbal reading. These slides are provided to attendees, in some sites on paper and at other sites they can be accessed online. Typically, the presentation runs approximately two hours. The first 90 minutes address the legal and social issues that are likely to have some relevance to all attendees. The last 30 minutes is only required for those individuals who have children that will be the subject of the parental separation.

The MIP becomes mandatory once someone has filed an application with the court. Upon filing, the applicant is given a MIP notice by the court clerk outlining date, time, and location. At the time of filing, a MIP notice is also issued for the respondent and appended to the court application. Per Family Law Rules 8.1(5), the applicant must then serve the respondent with notice of date, time, and location of the respondent’s MIP along with the application.

Technically, anyone can attend a MIP; as such, an individual can contact the IRC and ask to be added to the list even if there is no application pending. The reality is that most people only become aware of the MIP following the issuance of the notices that are issued with the filed application.

Attendees are typically scheduled to either an “Applicant” session or a “Respondent” session to ensure that the parties do not attend the same MIP session. The MIPs are held in the courthouse in a courtroom. Under the current mandate, in-person attendance is required, unless permission has been sought from the court to be either exempt from attendance or to utilize some other format (e.g., the Family Law Information Program [FLIP] through Legal Aid Ontario<sup>47</sup>). Not surprisingly, not all MIP attendees are pleased with the requirement to attend. That said, key informants report that most soften by the end once they have had a chance to hear the material.

The IRCs are central in coordinating and assisting with registration and rescheduling of the MIPs. Most IRCs<sup>48</sup> attend the MIP to manage the attendance and signing of MIP attendance certificates, handing out resource pamphlets, and providing water (the only beverage allowed in the courtroom). IRCs are also the frontline people who face the anger that some MIP attendees express. Questions about relevance and comments like “this is stupid” are the type of pushback that IRCs manage. The IRCs are often called upon to reassure attendees of the value of the MIP.

*Offering the MIP earlier in the process.* Overall, the MIP attendees give positive feedback for the program, according to the MIP providers. MIP attendees have given the important feedback that they wish they had known about the MIP content long before filing in the courts. This is a conundrum, as it has been noted that one of the important roles that mediation can play is to help “clients understand their ADR options prior to entering the court system” (survey respondent at Q6.4), but MIP recruitment only happens, and is made mandatory, after one of the parties has filed their application. As a result, the general public is not informed of alternatives, or given clear direction that they can divert the matter from court to other services, such as a mediation.

One innovative family law practitioner offers monthly family law information sessions at local libraries; these sessions allow people to access information before filing; allow people to bring a support person<sup>49</sup>; and allow couples, for whom this is appropriate, to attend together (rather than the automatic separating and scheduling of MIP attendance accorded to applicants versus respondents).<sup>50</sup> Getting this information so people have time to consider other options needs to happen before people have filed their applications and responses and the accompanying affidavits with their accusations. As this key informant noted, there is a “light bulb” moment for most individuals who have the thinking that court is their only option:

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<sup>47</sup> <https://www.legalaid.on.ca/en/getting/flip.asp>

<sup>48</sup> Per the service contract the MIP responsibilities outlined above are to be carried out by the presenters, but many sites use their IRC.

<sup>49</sup> This is allowed at the MIP as well, but is less known.

<sup>50</sup> It is important to affirm that the practice of separate scheduling of Applicants and Respondents is an important safety measure, particularly for couples with high conflict or there are concerns about IPV/A and safety.

*We continue to be surprised by the aha moment that almost everybody without a doubt gets to during this information session because most people, ninety percent of the crowds that are coming through, the groups that are coming through the session are thinking, are certain in fact that they have to go to court, in order to resolve their family matters. So, when they hear that they don't have to go to court if they choose not to and here are some out-of-court options and, and we go through all of them, they are absolutely astounded, astounded... so, we catch them a lot earlier in the process; when conflict has not yet escalated to a degree where they feel they have to get into a more adversarial process (KII\_9: 196–207).*

The focus on court-based resolution also is not consistent with the fact that most family law matters will settle. Part of the MIP education program might also encourage separating couples to understand this fact and that mediation “empowers people through assisted self-determination. Many people want their day in court...when they can use their voice in mediation” (online, 6.4). Efforts to engage in mediation may be thwarted by friends and family who may fan the flames of anger and retribution and insist on court versus mediation. This is another area where wider community education (e.g., via doctor’s offices, libraries, community centres) could assist. In sum, greater efforts and consideration need to be given to mandating MIP attendance before an application is filed (with provision that emergency applications are exempted).

*In-Person versus Online Educational Programming.* Currently those required to attend a MIP must attend in-person, unless they have specifically sought a court order to access the MIP online (e.g., the Legal Aid Ontario FLIP). Some participants in this research advocated making this program available online. Those who could most use an online format may have work, childcare, mobility issues, or geographic distances that make attendance much more challenging.

The other challenge is that the MIP schedules are not always flexible — some are only offered during the day (during traditional work hours), others in the evenings. For individuals who have transportation and live in close proximity to other courthouses, there is the option (albeit not widely publicized) that one can attend at a different courthouse if that MIP schedule works better for the attendee.

The current reality is that most individuals look online for information. This was highlighted in a recent Law Society of Ontario panel where the executive director, Julie Matthews, for the Community Legal Education Ontario (CLEO) spoke about this trend. Moreover, she noted that increasingly people expect “customized and specific information.”<sup>51</sup>

CLEO has released an online innovative program called Steps to Justice, which has a “guided pathways” program to assist people with completing family court forms for simple and joint divorces.<sup>52</sup> What makes this program accessible and customized is the individual is asked a series of easy-to-read and understand questions that prompts additional questions that are specific to their situation. And if there is the need for legal information to help complete a particular section, there is an option to click on a “learn more” button. The program is continuing to be developed and will eventually include information for those who have children that are subject of the separation.

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<sup>51</sup> Law Society of Ontario “Addressing the Access to Legal Representation Gap in Family Law” (October 23, 2018). Read about it at [https://www.thelawyersdaily.ca/family/articles/7646/breaking-down-organizational-barriers-helps-access-to-justice-panel-says?nl\\_pk=8a186d0e-9a4c-44eb-896c-3c4f05c8df4b&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=family](https://www.thelawyersdaily.ca/family/articles/7646/breaking-down-organizational-barriers-helps-access-to-justice-panel-says?nl_pk=8a186d0e-9a4c-44eb-896c-3c4f05c8df4b&utm_source=newsletter&utm_medium=email&utm_campaign=family)

<sup>52</sup> Funding for the Steps to Justice program is provided by the Ministry of the Attorney General.

*MIP Revamp.* In its most idealized format, the value of in-person MIP attendance is praised because of the opportunity for attendees to ask questions of the presenters or the IRC, be connected to additional resources, and to seek additional information about services, such as mediation. That said, it was also discussed in some interviews that some individuals attending the MIP may come with the impression that they can ask lots of questions about their case. In actuality, general questions are permitted, but case/fact-specific questions are not. This is explained at the MIP.

The MIP is quite dry, particularly when it is delivered by essentially reading off the uniform mandated script. Pedagogically there are issues. There are accompanying slides but they are all words, no pictures or diagrams. The information is delivered continuously with a great deal of content and information being pushed out to the attendees. These are the observations of one of the authors (Whitehead) who attended two MIPs to understand the content and the experience. While many attendees are paying attention, it is worth noting that many others are on their phones or look unengaged. The content is long, and does not shift much in tone and content, even with two presenters. It is also quite didactic — all talking by the presenter(s), all listening by the MIP attendees. Moreover, this is not easy information for the lay public to hear and understand. There is no opportunity to replay a section that might be particularly relevant to an individual or to truly seek clarification given the pace of delivery. And most individuals are likely to be quite uncomfortable asking questions in front of strangers.

The MIP needs a revamp. It has been suggested that the adult brain can listen for about 20 minutes before it disengages. The MIP lasts for two hours, with a short break if you are leaving after the first 1.5 hours before the other 30 minutes begins. The ideal that the in-person will be interactive and allow for questions does not appear to happen in all sites, and whether that is even appropriate is a question for debate. It was suggested in interviews that some locations are much more interactive and willing to take questions. This had not been largely observed and deviates from other suggestions that the MIP must be offered in accordance with the script and without offering legal advice. Where some questions have been asked it has been observed that participants can be quite factually specific about raising their issue, looking for assistance that ought to be discussed more privately, and lacks a general interest focus that might be more widely relevant to most of the other participants. There are also concerns that individuals without legal representation may be willing to divulge personal information to strangers in the hope to obtain some type of legal assistance.

It was also expressed that the MIP messages about mediation and other alternative dispute resolution processes is quite sparse and easily lost in the flood of information. It was also identified that the MIP does not present clear information about the average timelines that they are likely to face in the courts. It was suggested that if potential litigants were presented with realistic estimates about how long their matter is likely to take when pursuing the court avenue as compared to other alternatives, such as mediation, it would allow potential litigants to make a more informed choice.

*MIP Volunteers and Compensation.* The delivery of the MIP relies heavily on professionals, many who volunteer their time. Ultimately, having a sufficiently large and reliable roster is really about the significant efforts that the service providers and their staff (e.g., typically the IRC) undertake to both cultivate and positively sustain those connections. This often means using other community meetings and events to recruit and then carefully manage scheduling so that it goes out early enough for

presenters to reserve the dates. Even with these efforts, things happen (e.g., illness, family care issues, broken car) and the MIP providers have to be ready to fill those gaps on short notice, including stepping in to present themselves.

What was striking to learn was how differently MIP presenters are compensated. In some cities MIP presenters provide this service for free. Many lawyers are very generous with their time, from new calls looking to gain experience and connections to well-established practitioners.<sup>53</sup> In other cities, MIP presenters are paid an honorarium for their time as a way to retain a full roster of presenters. If there are not sufficient volunteers, service providers must find this money in their tight budgets for an item that is not currently a MAG-allocated budget item. That said, the service providers make the situation work to ensure they have presenters. Ultimately, this may be a way in which pro bono services help serve the public. For others, the expenses associated with travel or other issues may require that MAG and the service providers work together to revisit this issue with a frank discussion about why the practice varies from one locale to another.

*Attendance Options Need to be Prominent on MIP Forms.* Part of the flexibility of the MIP that is understood by the MIP providers, but not clearly noted on the MIP form is that one can, with a simple phone call, change the location of where they are to attend a MIP. This needs to be clearly and prominently outlined on the MIP notice — that a person can attend at a locale that may be more geographically convenient, or at another location that may offer a date and time that better accommodates a work schedule or family/caregiving, etc.

## Recommendations for the MIP

1. To MAG/Service Providers: Find ways to make it a viable option for individuals to attend a MIP much earlier in the process to give individuals access to information. Efforts would be needed to find ways to advertise this as a public service (such as through the FLIC, MAG website).<sup>54</sup>
2. To MAG/Service Providers: Consider offering the MIP to those who are at the courthouse looking for forms and suggesting attendance before they complete and file so that they can be more informed.
3. To MAG: MAG should give consideration to having the MIP revised by a pedagogical expert, and find ways to make the presentations more engaging with items such as short quizzes, a video followed by a discussion, and other interactive opportunities.
4. To MAG: There are some limited opportunities for individuals to access an online MIP, but this is reported to be the exception. Consider producing and more extensively delivering the MIP through online formats. This would provide greater access and could be produced in a highly interactive format that serves the public better than the current in-person MIP. The younger generation is used to learning in this manner and would be highly receptive. It also allows for additional versions to be created that respond to cultural issues or provide language translations. This would also be cost effective and require far less reliance on soliciting and retaining MIP presenters.<sup>55</sup>

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<sup>53</sup> Lawyers may claim their hours as a MIP presenter to satisfy Law Society of Ontario requirements for Continuing Professional Development (CPD) hours. A maximum of 6 hours may be claimed for teaching. If the same content is taught more than once in a calendar year, CPD Hours are only available for the first delivery of that content. Teaching is an eligible activity only if it is undertaken on a volunteer or part-time basis. See <https://lso.ca/lawyers/enhancing-competence/continuing-professional-development-requirement/eligible-educational-activities>

<sup>54</sup> This recommendation is optional and would not require a change to 8.1 of the Family Law Rules. O. Reg. 439/07.

<sup>55</sup> This suggestion would require a coordinated effort with the Judiciary, who are currently required to enforce MIP attendance in person per 8.1 of the *Family Law Rules*.



5. To MAG: MIP documents should clearly outline alternatives to attend a MIP so that participants can manage to attend in a more convenient location or a location that has a presentation at a time and date that is more convenient for work/family.

### Independent Legal Advice and Unbundled Services for Mediation Clients

Accessing independent legal advice (ILA) from a lawyer is an important part of the mediation process. ILA serves as legal protection, because the mediator, even if trained as a lawyer, is not permitted to give legal advice as part of the mediation process. Fundamentally, access to legal advice allows parties to negotiate an agreement based on information about rights and obligations, and an assessment of various outcomes, to fully consent to a negotiated settlement. As Madsen (2013a) discusses, parties are more fully able to discuss outcomes when they understand the legal principles that underscore their decisions.

The importance of ILA was strongly emphasized and reaffirmed by respondents in the online survey. ILA can be sought at any point: prior to beginning mediation in order to better understand one's legal rights and obligations; and at any time during the process, which can include having a lawyer present, or putting the mediation on hold so information can be sought from Duty Counsel, advice counsel or a privately retained lawyer. One of the most critical times for the obtaining ILA comes at the end of the mediation process, when the mediation agreement has been reached and parties seek advice before it becomes a legally binding document. It is important to note that the mediated agreement/mediation report is not legally enforceable — that only comes when the agreement is “converted” into a signed separation agreement or incorporated into a court order.

The online survey sought feedback from both mediators and referrers to mediation to understand their experiences of their mediation clients accessing legal advice, more generally, as well as specifically seeking to learn about the availability of limited scope retainers, also known as unbundled legal services.

*ILA Encouraged.* The mediators in the online survey indicated a dominant approach whereby they encourage clients to seek legal advice. Most mediator respondents (88%) indicated that they “always” recommend that clients seek advice once they have a mediated agreement and before the clients sign it. Many mediators (62%) also noted that they encourage their clients to seek legal advice during the process of drafting the agreement that takes place during the mediation session(s). It may be that these two activities are very closely related but nonetheless suggest that ILA is deemed to be most important and encouraged at the end stage of the mediation process. This is closely in line with encouragement to “always” seek advice before the mediation (63%). There is less inclination to suggest ILA during the mediation process (49% “always encouraging” with 25% only “sometimes encouraging”).



*Why All Clients Don't Seek ILA.* This referrer summarizes the many challenges that they perceive in both why ILA is important and why it can be challenging to obtain, both due to lack of finances and the perception that lawyers may not always respect the mediation process:

*It's imperative that clients have this option. Often, like court, mediation can feel like a whirlwind and by the time the day is over, everyone's head is spinning and they may not remember what they agreed to and/or why. While my preference is that clients mediate without counsel present (in most instances), the draw-back of mediation is that many clients do not seek ILA pre-during-or-post mediation and end up with agreements that are unenforceable or imbalanced. They have neither the time nor the money (in most instances), and waive their right to ILA - which more often than not leads to more problems. If they do seek ILA, they run the risk of being encouraged by counsel not to sign an agreement (which may or may not be favourable), because they've been convinced that they stand to do much better in court. So, there are some potential drawbacks as not all counsel are as settlement oriented as the clients.*

As one online referrer respondent noted, clients often don't see the value of ILA:

*There are many lawyers in my jurisdiction who are willing and able to provide ILA - the challenge is that the parties to the draft Agreement/Minutes of Settlement do not see the value in receiving ILA, particularly if they did not have to pay their mediator or pay anyone to assist them with their pleadings. Thus, having regard to the risk involved for the lawyer, there can be a disconnect between the fee that the lawyer perceives to be reasonable for ILA and the fee that a prospective client is willing to pay.*

While the importance of ILA is understood and highly respected by both mediators and lawyers, clients can have different perspectives including:

- Not wanting to incur an additional expense in seeking ILA.
- Not sure where to find a lawyer who will provide unbundled services (easier when they are provided with a list, but more often it appears that most clients do not have anything more than a suggestion that unbundled services are available, but they must find a lawyer who will provide the limited service).
- Clients are tired at the end of the process and seeking ILA is not high on their priority list, particularly when they may view the mediation settlement as an end to the matter, and they do not wish to pursue things further (NOTE: it should be emphasized that this is not the advice that mediators give. Mediated agreements have a front page sheet outlining the limitations of the mediation agreement, and advising that ILA be sought and that the agreement be converted into a legally binding separation agreement or court order in order to be enforceable).

The online survey and key informant interviews largely identified that mediation clients are faced with a short supply of legal advice that is "affordable, reliable, and settlement-focused, client-centred legal advice to help them complete agreements." Further, respondents emphasized that ILA needs to be provided by lawyers who understand the mediation process and are not merely interested in rewriting the agreements or working to engage clients in litigation.

*Availability of Unbundled Services.* Among mediator respondents to the online survey, 38% (35/92) affirmatively replied that their clients had trouble accessing a lawyer to provide limited scope retainer work (i.e., provide legal advice for mediation only). In contrast, amongst referrers to mediation, 77% (30/39) reported that clients had difficulty finding lawyers who are willing to do unbundled/limited scope retainer-type work.

Reasons for challenges in finding limited legal advice included:

- Cost/lack of financial resources for even limited legal advice/service can still be expensive.
- Don't know what happens after clients have left with an agreement; mediators are not typically informed of what happens.
- Few lawyers trained to do this work.
- Small communities have small number of lawyers.
- Some lawyers are not mediation "friendly"/don't work with mediators.
- Some lawyers "scoop" clients into litigation.
- Perception that lawyers are simply not willing to do it.

One key informant noted the frustration for clients who have gone through the mediation process with full financial disclosure and financial statements, and then finding that their clients can't get lawyers who are willing to provide unbundled legal advice, often due to great reluctance in not having been a part of the process from the beginning:

*When they go for independent legal advice lawyers are turning them away because they haven't been there. It's a very frustrating, very frustrating because on the one side we're telling them well, you have the ability to sit down, put your best foot forward. Let's figure this out. You have the ability to create an agreement that is customized to your family situation and your vision of post-divorce and reorganization. But, in the end, you may encounter this which is...I can't explain to you how many families have commented, "No lawyer will take me for independent legal advice" just because they didn't, they weren't there from the beginning... (KII\_9:750–757).*

Key informants offered further depth about why clients find it difficult to obtain unbundled services.

- Some lawyers are uncomfortable with limited retainer work associated with giving advice about a mediated agreement. The Law Society of Ontario and LawPro sanctions the provision of limited scope retainers,<sup>56</sup> yet it appears that some lawyers may be uncomfortable in stepping back from taking a positional approach in simply providing that limited advice. As a result, some lawyers undertake further negotiations of the mediated agreement.
- It was noted that there may be concerns with liability issues (Errors and Omissions) and how to protect the lawyer who may have concerns with the agreement, but the client chooses to sign the agreement anyway. Some lawyers may also be of the opinion that the mediated agreement has overlooked some crucial aspect exposing them to liability if the client chooses to proceed, even in the face of legal advice that has expressly noted a concern.

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<sup>56</sup> See Rules of Professional Conduct, Law Society of Ontario, Section 3.2.1A re Limited Scope Retainers.

One lawyer referrer respondent in the online survey noted the tension between lawyers who may not fully understand the mediation/ADR process and feeling the potential for liability if unbundled legal advice is provided:

*One of the biggest drawbacks to finding lawyers who “do this type of work” is that many lawyers do not have the ability to step back from a positional approach. Perhaps this is a lack of ADR training across the profession, but in my experience, it is more often than not a personality thing, combined with a view that the work of mediators are not as worthwhile as the work of litigation. I also believe that there are a number of lawyers who are concerned with the liability issues of providing ILA. While we can protect ourselves, when we have given advice that an agreement is not in the client’s best interest and they choose to sign anyway, there is always a concern that they might sue us in the future. For this reason, there are a number of lawyers that, once interviewing a client and reviewing their mediated agreement, refuse to sign the certificate of independent legal advice because they don’t believe the client will sign.*

Most mediators are aware of lawyers’ concerns. This key informant shared their perspective about lawyers’ unwillingness to offer unbundled services:

*I think it’s really wonderful, creative, but having said that there are a lot of lawyers who are leery to offer unbundled services. They are worried that they are going to be liable in some manner or in some facet and many of them are reluctant to do that [offer unbundled services]...speaking to a number of lawyers they say “they don’t want to bother.” I think they will only bother when they feel the need to diversify their practice (KII\_23:695–700).*

There is a new initiative in development. The Ontario Family Law Limited Scope Services Project was not in operation at the time of this research. Discussed at a recent Law Society of Ontario event,<sup>57</sup> the program is developing an online roster of lawyers who are trained to provide unbundled services and can be located through a website. Collaborative development that includes all courts, as well as the Law Society of Ontario, the legal insurer (LAWPRO) as well as other related associations should help address the issues outlined in this project regarding accessibility and lawyer training/concerns.

This is a positive development when viewed in light of recent research by the Canadian Research Institute for Law and the Family that examined the use of unbundled services by clients and the provisions of unbundled services by lawyers in Alberta.<sup>58</sup> Overall, family law was the number one area for which assistance was sought by clients and provided by lawyers, highlighting the high demand for services. Most clients reported a positive impact from receiving unbundled services for work they were unable to do themselves, and that the legal fees were reasonable and gave them access that they could not have otherwise afforded. Lawyers reported offering unbundled services to enhance their own practice, in many cases charging their usual hourly rates, and in other cases

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<sup>57</sup> Law Society of Ontario “Addressing the Access to Legal Representation Gap in Family Law” (October 23, 2018). Read about it at [https://www.thelawyersdaily.ca/family/articles/7646/breaking-down-organizational-barriers-helps-access-to-justice-panel-says?nl\\_pk=8a186d0e-9a4c-44eb-896c-3c4f05c8df4b&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=family](https://www.thelawyersdaily.ca/family/articles/7646/breaking-down-organizational-barriers-helps-access-to-justice-panel-says?nl_pk=8a186d0e-9a4c-44eb-896c-3c4f05c8df4b&utm_source=newsletter&utm_medium=email&utm_campaign=family)

<sup>58</sup> Boyd, J.P. (2018). Client and lawyer satisfaction with unbundled legal services: Conclusions from the limited legal services project Canadian Research Institute for Law and the Family. Available at [https://prism.ucalgary.ca/bitstream/handle/1880/107805/Unbundled\\_Legal\\_Services\\_Report\\_-\\_Aug\\_2018.pdf?sequence=1&isAllowed=y](https://prism.ucalgary.ca/bitstream/handle/1880/107805/Unbundled_Legal_Services_Report_-_Aug_2018.pdf?sequence=1&isAllowed=y)

less than they would normally charge. Many were motivated by altruism to make legal services more widely available to improve access to justice. Most lawyers reported satisfaction with unbundled service provision and planned to continue this practice.

*Develop a Roster of Willing Lawyers.* For those doing private mediation, it was articulated during key informant interviews that some mediation practitioners have worked hard to develop a list of lawyers to whom they can send clients for ILA. Those mediation practitioners who have this type of list noted that they have a good and trusting professional relationship with lawyers who understand the mediation process and, in turn, are comfortable and competent at providing ILA, particularly when clients are referred to them with a mediation agreement in hand.

A significant part of the relationship building is that the lawyers respect the work that the mediators do and, in turn, the lawyers provide the appropriate ILA without unnecessarily reworking the agreement reached in mediation. One mediator discussed that the “solution” to finding ILA was to refer to lawyers who are also mediators or collaborative lawyers, because they understand the work and product that mediation produces (KII\_25:186). In turn, there is a mutually respectful reciprocation of referral work to lawyers when there is a file that isn’t amenable to mediation. Therefore, while the unbundled service of providing ILA may generate a “small return,” it is not unusual for the lawyers to get real estate work associated with selling a property (like the matrimonial home), will drafting, or a request for a prenuptial agreement when one of the parties re-partners.

This practitioner noted, “we have, over the years, altered our roster with lawyers that are really respectful of our process and believe it’s the right thing to do and are not taking advantage of that and saying, ‘I’m going to do ILA on this and I’m going to turn it into a major file’” (KII\_4: 567–570).

*On-site Mediation and the Role of Duty Counsel.* Access to ILA is generally better for clients participating in on-site mediation. Legal Aid Duty Counsel is available at every courthouse, and often plays a critical part of the ILA process for mediation clients who are accessing on-site services. Generally, Duty Counsel is available to on-site clients throughout the process and most notably at the end of the mediation when the parties are looking to have the mediation agreement formulated into a court order. Mediators noted that many clients utilize this free and accessible legal resource.

One key informant noted the highly collaborative and receptive Duty Counsel at their courthouse, noting their availability when they are mediating self-represented litigants who don’t have much knowledge and the fact that mediators may not give legal advice. This mediator described the process: “I send them mid-mediation, go upstairs, talk to Duty Counsel, understand this issue, where you should sit [on the issue] and then come back and let’s talk about it” (KII\_8: 661–663).

One of the challenges that some mediators face is whether the hours of the Duty Counsel align with the hours of the mediation service. In some court sites, Duty Counsel leave mid-day, leaving the mediation clients without immediate access to legal advice. In other court sites the practice is that Duty Counsel remain at the courthouse so long as the mediator is there. That said, the availability of Duty Counsel can be limited in many court sites — some Duty Counsel have short hours that finish before mediation for the day are completed thus limiting access to Duty Counsel for advice at the end or requiring that clients return another day, a challenge for many to seek additional time off of work or are managing child care or other challenges. In many SCJ sites, Duty Counsel is not available.

As this KII noted, “we don’t always have our legal advice support through till the end of the day. We have to work to really condense the early part of the morning so if we get a late referral we may find ourselves not being able to send them off for some legal advice before they go back to court, which is awkward” (KII\_2: 161–164).

### Recommendations regarding independent legal advice ILA

1. To the Law Society of Ontario: The Rules of Professional Conduct have officially allowed for limited scope retainer/unbundled services since 2011<sup>59</sup>, but greater and more specific practice direction by the Law Society of Ontario and LawPro is needed to educate lawyers on how to provide ILA to reduce concerns that they will incur practice problems requiring a claim against their professional liability insurance.
2. To MAG: Ideally, the availability of Duty Counsel should mirror the availability of mediation services at all court sites to facilitate access to ILA.
3. To Service Providers: Service providers should consider developing a roster of Duty Counsel (many of whom are private/sole practitioners) that would be available to provide ILA outside of their court assigned duties.
4. To the Law Society of Ontario/Lawyers: Lawyers should be encouraged to view the provision of unbundled, limited scope retainers as a potential growth area of practice. Collaborations with mediators generate ILA opportunities as well as opportunities for other legal work.

### The Role of Legal Aid and How This Affects Mediation Uptake

Tied to the availability of independent legal advice is the role and availability of legal aid to low-income individuals to support their access to legal advice and justice. As a general practice, Legal Aid Ontario (LAO) provides vital services to individuals who are unable to afford legal representation and who qualify according to low-income guidelines. Services are rendered by three methods: 1) on-site Duty Counsel who provide limited legal advice services to individuals on the day in which a person has a matter before the court, including the provision of legal advice for those who have accessed on-site mediation services; and 2) the issuance of a “traditional” legal aid certificate to assist with identified areas of required service<sup>60</sup>; and 3) service-specific legal certificates that assist clients with a defined area of advice. Currently, for family law there are two primary types of assistance available: i) 10 hours of legal advice with a lawyer to negotiate and prepare a separation agreement<sup>61</sup>; and ii) 6 hours of legal advice, provided by a lawyer on the LAO family panel, to provide independent legal advice before, during, and at the end of mediation (hereinafter referred to as the LAO Mediation Certificate)<sup>62</sup>.

*The LAO Mediation Certificate.* The creation of the 6-hour legal aid mediation certificates is an initiative available through Legal Aid Ontario that allows individuals using mediation to access independent legal advice.

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<sup>60</sup> <https://www.legalaid.on.ca/en/getting/eligibility.asp>

<sup>61</sup> [https://www.legalaid.on.ca/en/getting/separationagreement\\_certificates.asp](https://www.legalaid.on.ca/en/getting/separationagreement_certificates.asp)

<sup>62</sup> [http://www.legalaid.on.ca/en/info/familylawservices\\_ilaformediationclients.asp](http://www.legalaid.on.ca/en/info/familylawservices_ilaformediationclients.asp)

The 6 hours include services to:

- better understand the mediation process and options
- prepare for mediation
- get a court order or binding agreement to enforce the terms of the mediation agreement
- support in custody, access, child, or spousal support matters
- customary care agreements
- voluntary care agreements
- parenting or separation agreements
- change existing agreements or orders

Currently, the LAO website mentions the ILA certificates for those undertaking mediation but makes no direct connection to the MAG contracted mediation services (to differentiate from private mediation). Perhaps this is to not favour one type of mediation service or another, but individuals seeking LAO certificates, who are not able to afford private mediation fees, would likely be prime candidates for the free on-site and/or user fee-scaled off-site mediation services.

*LAO Settlement Conferences.* Some mediators, in key informant interviews, identified that LAO Settlement Conferences appear to be another avenue for confusion for some family justice clients. Mediators described that some of their clients were claiming they had attended a mediation when they had, in fact, attended a settlement conference (facilitated through Legal Aid). LAO Settlement conferences and mediation employ different approaches to reaching an agreement. Settlement conferences most resemble a judicial case conference where parties lay out the issues and some attempt is made to assess what can be settled, what cannot be settled, and an opinion expressed as the likelihood of success on the issues. This is in contrast to mediation where legal information may be given, but not legal advice, such as an opinion about a possible outcome. Furthermore, mediation encourages the identification of non-legal interests (e.g., hurt, betrayal, parenting concerns, communication style between the parties) along with identifying legal issues. As mediators will attest, non-legal interests can often be the emotional linchpins that need to be addressed for people to resolve the hurt and anger in their relationship before they are able to move forward to a resolution.

The concern is that some Legal Aid lawyers and judges may be overlooking mediation as a viable option to help manage and settle busy court dockets:

*I think that mediation should be mandatory to start...I come to assignment court with Justice X. [In] assignment court they'll have a legal aid person and myself and we're set to schedule or book [files that they can take on]. [In] assignment court, they are assigning trials. So there can be 25–35 cases on the docket at least, sitting there for two hours. The judge will call up each case and wants to talk to the lawyer. Have you tried mediation? Have you tried Legal Aid settlement conferences? This seems to be the thing now is the Legal Aid settlement conferences. So the lawyers, because they can use their certificate, and they can attend. Now I don't know if the lawyers don't know that they can come and participate in mediation or don't want to...it's always Legal Aid. Like Legal Aid will get 15 and I [the mediator] get one. Sometimes I walk out of there with nothing (KII\_6:271–280; 293).*



*Self-represented litigant vs. Legal Aid represented litigant.* One of the other tensions that has been identified is the lack of uptake for mediation when one individual is represented by a Legal Aid lawyer and the other individual has no legal representation, because they neither qualify for Legal Aid nor have the funds to hire a lawyer. Mediators suggest that in some instances, the unrepresented party can be quite keen to try mediation but may be thwarted by an ex-partner who has access to legal resources that support their efforts to more easily access court litigation.

*The remedy?* There are large gaps in providing legal advice to clients who do not qualify under the LAO income guidelines but have low incomes, an issue that is particularly acute for those living in larger urban centres with much higher costs of living. One of the biggest gaps may be for those clients accessing off-site mediation. Participating in off-site means they are unable to access Duty Counsel, but one or both parties will often not qualify for legal aid assistance.

One key informant suggested a possible remedy:

*We have these certificates for two hours of legal advice if you're at a shelter. The best system might be that you could have four or five hours of legal advice if you were going through the family centred mediation, and that there would be a financial requirement or maybe it would be a very limited requirement, so, if you make under fifty thousand (KII\_26: 401–405).*

This suggestion is formulated on the idea that a collaborative approach between Legal Aid and mediation could benefit many more people. And in many ways, this matches the intention behind the 6-hour legal aid mediation certificates. It is proposed that a higher ceiling/relaxed financial eligibility threshold for legal aid certificates would help to assist a lot of people who are outside the current low-income levels to qualify and enhance the use of mediation services. This also puts clients onto a timely path to resolution rather than the much lengthier wait associated with getting a trial date, which can be many, many months.

### Recommendations for Legal Aid Ontario

1. That the 6-hour legal aid certificates to assist with mediation be used for that specific purpose.
2. LAO should specifically direct recipients of 6-hour mediation certificates to consider the free on-site and user fee scaled off-site mediation services.
3. As much as possible, Legal Aid lawyers should be available on a timetable that coincides with the provision of on-site mediation services.

### Recommendations about ILA for the Mediators

1. Encourage mediation clients to get legal advice before and during the mediation, so that they understand their rights and obligations as the background to the mediation process.
2. If mediators have a concern that an issue under discussion may generate a “resolution” outside the scope of the law or are at an impasse because they lack insight about how the law applies, suggest that the parties take a break and obtain legal advice before moving further.
3. Develop a list of lawyers in your community who are supportive of mediation services and will provide advice to clients that have arrived at an agreement in mediation.

## THE CHILD'S VOICE IN THE MEDIATION PROCESS

With increasing interest for how to incorporate the child's perspectives in the outcomes associated with their care and upbringing following parental separation and the development of Voice of the Child reports (Birnbaum, 2017; Birnbaum & Bala, 2017), this research study sought information about whether mediators are including the child's voice and/or perspective into the mediation process and how that is being done.

Pursuant to section 3 of Ontario's *Family Law Act*, there is provision for the inclusion of the child's perspective in the mediation process, where it is considered appropriate by the mediator.

(3) The mediator shall confer with the parties, and with the children if the mediator considers it appropriate to do so, and shall endeavour to obtain an agreement between the parties.  
R.S.O. 1990, c. F.3, s. 3 (3).

Amongst the 95 mediators who responded to the online survey, 22% regularly include the child's voice in the mediation process, 28% do not, and 50% include it sometimes. The predominant methods were:

- A letter or report about the child's view from another professional (30%)
- Parents sharing information about the child's views/preferences with the mediator (22%)
  - Many respondents noted that they encourage parents to give consideration to their child's perspective and the impact that their actions and decisions will have on the child.
- A child-only session with the mediator (19%)
- A child and parent session (7%)
- Child provided a letter to the mediator (3%)
- Other means (19%) that most typically involve a professional third party:
  - Use of the OCL (Office of the Children's Lawyer).
  - Enlisting a trained social worker/therapist or other trained professional.

In open-ended responses about why the child's voice/perspective was not included, the respondents identified some important issues:

- Most mediators do not have specific training in this area and report not being sure how to conduct these interviews and how to do it safely without causing further harm to the child. Some acknowledged that this is an evolving area worth consideration, but they acknowledged their lack of specific skills to do this appropriately.
- The mediator is, and must be seen to be, neutral by the parties in the mediation process. Acting as the conduit for the child's voice was seen to detract from the neutrality needed as a mediator.
- It was noted by some participants that soliciting the child's voice is prohibited by the service provider for whom they work (often due to the reasons outlined above).
- The on-site mediation process is limited to only 2 hours and does not allow for such an opportunity, nor does funding permit two mediators or a third-party expert.
- Age of the child was also raised, with most responses just generally alluding to the idea that the age of the child was a factor to be considered in whether or not to include the child's voice. Most respondents did not indicate an age, but where specific age considerations were noted, it was generally in the 10- to 12-year age range.

The key informant interviews allowed for greater depth to explore the concerns that mediators are expressing about including the child's voice. Two key themes emerged, mirroring the concerns expressed by the online participants: 1) lack of training; and 2) mediator neutrality.

*Lack of Training.* A mediator's professional obligation is to practise only within their areas of training and the scope of their expertise. The lack of appropriate training and skill to conduct these types of sessions was the primary reason why mediators said they do not conduct child interviews/assessments. Many mediators reported that without proper training, they are concerned that they may do more harm. Most indicated that when the child's voice has been sought, they retained a third-party mental health professional to speak with the child and do not speak to the child directly.

Participants in the online survey identified that child's voice might be particularly useful when the parents' perspectives about what is the child's best interests are at odds, which presents challenges in arriving at a parenting plan. For instance where there is "heightened bickering and posturing [of the] child's wishes," "one or more of the children are caught in the parents' fight," "high conflict situations where child is reported to have expressed opinions/preferences re the parenting plan which are at odds with what one or both parents want and/or is refusing to see one parent." One of the concerns is the operationalization that children should be seen to have a voice but not the choice or responsibility for adult decision-making. Many respondents were aware of this tension and the challenge in making sure that the child's perspective may be needed but wanting to protect them from the fallout of disagreeing parents.

One experienced mediator openly acknowledged their desire to one day conduct these interviews, but only with specialized training:

*It's the mediator's responsibility to find a way to bring those views into the process and I guess every mediator will do that differently depending on their philosophy and their skill set. For me, I'm not trained. I'd loved to be trained, some day I will get trained. For now, I rely on people who are trained to explore with the parties whether it would be helpful for this family that a professional meet with the children for giving them an appropriate voice and then reflecting back to the parents and to me, the mediator, whatever they, in their judgment and/or, the children direct them to report back. We do that in our court connected program, [and] we certainly do it in our private practice as well (KII\_18:436–443).*

The issue of potential harm to the child reflects the concern to protect a child's safety in the mediation process. In some cases, the information obtained by the mediator may not be brought back to the parents where it has been deemed that it will violate the safety of the child due to parental manipulation or distortion, or particularly where one parent feels disadvantaged by the information. And there is also harm that can come to the child by simply having participated in the interview process. Enormous care and training are required to manage all of these possible negative outcomes.

*Loss of Mediator Neutrality.* Even with training, many mediators indicated that it would be inappropriate for them to be directly involved in soliciting the child's voice and then being the conveyor of that information back to the parents. Most mediators adhere to the principle that their role is one of neutrality. The issue of concern is that once the mediator assumes the additional role

of obtaining the child's perspective and then must relay that information to the parents, the mediator may no longer be viewed as neutral in the process, particularly where the information is seen as more overtly negative about one parent. Most mediators prefer the two-professional model in which they retain a trained third party to undertake the interview with the child and not themselves.

Many mediators are highly reluctant to be the one to conduct the interview about the child's perspective as it leaves the mediator in the role of conveyor of information that may be difficult for the parents to hear. The challenge is to have heard this information but still needing to maintain a neutral position. One mediator described the situation as follows:

*My thinking is that children will also have things, will always have things to say that will in some way upset both parents. It may not be the same thing, so, they may have different things to say about each parent, but, somehow each parent may experience upset in hearing things either they weren't aware of, or they had minimized, or ignored from their children. And I think it can be extremely difficult for parents to hear that from someone and then have to continue to face that person and feel like they're still a competent, caring, loving parent when that person is aware of children's, for lack of a better word, criticism of them (KII\_25: 560–567).*

Some mediators are willing to solicit the child's voice. One key informant, who only does private mediation, reported being willing to include the child's voice on a case-by-case basis depending on the child's age and in those situations where the parents are at odds about the living arrangement (e.g., where one adamantly wants 50/50), or disagreement about the level of extra-curricular involvement (e.g., one parent wants the child to play a sport at an elite and intense level). This mediator, with both parents' consent and involvement, meets with the child alone. Part of the discussion with the child is that this mediator is very clear that only the information that the child wants divulged will be shared. This mediator reported liking the opportunity to interview children because it often lets them know if they are on the "right track" when mediating (KII\_23).

Overall, however, most mediators stated a preference for a two-professional model that allows for another individual, ideally with the requisite skills and ability in this area, to collect the information and present it to the parents, allowing the mediator to remain neutral with helping the parents to hear and manage the information.

The issue of the necessity of parental consent and, in some cases, the reluctance of parents to include children because they don't want to involve the child (and this can be simply because they don't think it is appropriate and want to shield their child, not solely because a parent is seeking to hide or obstruct their involvement) is an important aspect that needs further consideration. In addition, that information needs to be clearly articulated to mediators and to the professionals that are retained by mediators in the provision of voice of the child reports.

## Recommendations for Voice of the Child

1. To Service Providers/Accreditation Agencies: Discussions with parents should include how and whether children's voices could be heard and how their voice would be brought into the mediation process.
2. To Service Providers: Mediators should be independent when including the child's voice in the process.

3. To Service Providers/MAG/Accreditation Agencies: Given the recent initiatives around Voice of the Child Reports, mediators are hearing more about inclusion of the child's voice. Outside of whether mediators are explicitly trained and certified as Voice of the Child experts, more training should be considered for mediators generally so that they understand how, when, and why it might be important to solicit the child's voice. This should also include information about child development and implication for the child's age, as this was repeatedly identified as a consideration but without a sense at what age it would be appropriate or how the information might be solicited at different ages and stages.
4. To MAG: Retention of a trained third party will require an additional user fee/expense. The MAG should consider providing additional resources and funding for Voice of the Child reports in mediation.<sup>63</sup> No funding mechanism is currently available for publicly funded mediations.

### Inter-partner violence and abuse: When is mediation appropriate?

In Ontario, all MAG-funded mediators are required to conduct screenings for the presence of inter-partner violence and abuse (IPV/A) and/or the existence of power imbalances prior to the commencement of on-site or off-site mediations.<sup>63</sup>

The Ministry of the Attorney General mandates adherence to the following goals when it comes to the provision of mediation services in cases involving family violence/abuse:

1. The identification of violence/abuse in the family.
2. The safety of victims of violence/abuse in the family.
3. Ensuring that mediation is offered only when it is truly voluntary.
4. Permit appropriate safeguards such as shuttle mediation and support persons.
5. To give clients who have been disempowered by violence/abuse in the family the support and safety they need to refuse to mediate.
6. To identify cases which are not suitable for mediation and to refuse to mediate in these cases while suggesting to the parties other means of resolving their dispute and ensuring safe termination.
7. To encourage assertiveness of victims of violence/abuse in the family.
8. To provide clients with information about community resources which can be of assistance to them and their children.

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<sup>64</sup> This mediation training and screening is per the requirement as outlined by the Ministry of the Attorney General as set out in its Request for Proposals as part of the service provider bidding process for service provision.

<sup>65</sup> <https://www.attorneygeneral.jus.gov.on.ca/english/family/policies.php>

Mediators accredited through the Ontario Association of Family Mediators (OAFM) (and other accreditation agencies) must also comply with screening mandates before mediation.<sup>66</sup> Screening is a mandatory part of the mediation process for all on-site and off-site mediation services. Furthermore, the screening process is not just the completion of a screening tool, but the use of professional training, judgement, and experience to ascertain whether mediation is appropriate for the parties. The screening process is also used to assess the capacity of the parties to mediate by identifying issues that may contra-indicate mediation or require mediation modifications such as anxiety,<sup>67</sup> mental health issues, or substance abuse.

Lawyer and mediator Hilary Linton (2018) defines “screening” as:

*A triaging process that has been used by mediators for years to help them provide safe and balanced mediations. The mediator meets separately with each party, before agreeing [to] take the case, and elicits specific information that will help the mediator “diagnose” their complex relationship dynamic. The main purpose is to ascertain whether bringing the parties together in mediation could put either of them or any child at risk of physical or emotional harm. The secondary purpose is to assess whether and how the parties can best negotiate at an even table. It is important to note that screeners not ask parties to incriminate themselves; they only ask each party what their concerns are about the other person and the process (p. 23).*

Trainers in IPV/A screening, such as Linton (2018), have noted that the same professional should screen both parties as the most effective way to understand the dynamics of the relationship. The screening is done separately with each person to allow for full disclosure.

The screening process aligns with the basic principles of good mediation practice: participation must be voluntary, safe, do no harm, and is an informed process that is self-determined. When one or both parties do not meet all of these benchmarks, mediation is contra-indicated.

The requirement to screen for IPV/A may also yield information that other legal professionals may not have due to the explicit training that mediators receive. This key informant described the outcome of screening:

*We have done so much work on looking at cases that have gone awry in sort of the background. And the lawyers have said, “I had no idea” because we find people don’t tell their lawyers this kind of stuff because they’re not asking the right questions...lots of times this stuff is very hidden to the judges and lawyers. Until all hell breaks loose (KII\_17: 471–475).*

One of the areas of inquiry of this research was to seek understanding as to what circumstances and using what best practices a mediator might use to make the decision to proceed having identified that IPV/A or a power imbalance might be a concern. This has been a controversial area of practice:

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<sup>66</sup> <https://www.oafm.on.ca/about/standards/policy-on-intimate-partner-violence-and-power-imbalances/>

<sup>67</sup> One key informant discussed having a male client who had very high anxiety, such that when overwhelmed he was more likely to concede. Understanding the challenges this presented in the mediation process, the mediator worked to provide more breaks and a separate room for him to gather his thoughts (KII\_8).



some choose no mediation services if IPV/A is flagged. Other mediators may choose to proceed with having screened further to ascertain the nature of the IPV/A and upon request and consent of the parties proceed, with necessary modifications to the mediation (e.g., shuttle, safety plan, staggered entry).

This divide in the “no mediation ever, in the face of IPV/A” versus mediation when carefully assessed and deemed appropriate reflects a heightened awareness of the power imbalances and safety concerns that prevent adherence to mediation principles (voluntary, equal power, self-determination), particularly for women, with an emerging recognition that mediation can, at times, be effective and better than proceeding through the courts (Madsen, 2012).

A growing body of research has identified that there are various categories of abuse. Kelly and Johnson’s typology (as outlined in Madsen, 2012) includes: 1) Coercive controlling violence; 2) Violent resistance; 3) Situational couple violence; and 4) Separation instigated violence. Researchers have identified that coercive controlling violence and violent resistance are not appropriate for mediation due to the extensive pattern of physical battering and intimidation. In contrast, mediation may be quite appropriate for couples involved in situational couple violence or separation instigated violence, with implementation of best practices. Furthermore, research has noted that amongst couples in these last two categories who chose mediation, there is not likely to be post-separation violence (Ellis as cited in Madsen, 2012).

There appears to be an emerging consensus that the act of separation and divorce can be a risk factor, particularly for women, but that mediation is not the culprit. Most critically, mediation can be seen to ameliorate the conditions that make the court system challenging for parties by offering a process that is generally quicker, less expensive, less adversarial, and allows for the parties to have direct involvement to articulate needs thus achieving desired outcomes.

This divide in perspective of the always say “no” versus “it depends” appears to be playing out in the field. This research study found that it is more likely to be referrers who always say “no” to mediation if there is a history of domestic violence. One key informant noted that typically, many agencies that serve individuals who are dealing with some level of domestic violence take the approach that “mediation was absolutely not to be offered, not to be discussed, not to be promoted...because of the power imbalance it won’t work (KII\_24:129–130).”

This is in contrast to mediation practitioners, many of whom appear to be adopting the more nuanced approach of “it depends,” bringing to bear their professional judgement and best practices to make a deeper assessment as to whether mediation might be appropriate.

In 2013, OAFM updated their Policy on Inter Partner Violence and Power Imbalances.<sup>68</sup> The key premise remains unchanged since 1994: “mediation in cases of domestic violence is probably inappropriate.” In particular, there is strong advice for new and insufficiently trained mediators strongly noting that they must refer these cases to more trained professionals:

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<sup>68</sup> <https://www.oafm.on.ca/about/standards/policy-on-intimate-partner-violence-and-power-imbalances/>

*Family mediation cases in which there is or has been domestic violence are complicated and can be dangerous to the participants and the mediator. Therefore, beginning mediators and mediators not trained or experienced in domestic violence should not accept referrals of these cases, but rather should refer them for screening to a more appropriate resource (such as a lawyer or woman's advocate) or to an experienced mediator who has considerable professional experience in dealing with cases involving domestic violence.*

Whether more experienced mediators may proceed and utilizing what standards and best practices has been outlined by OAFM in its policy.

#### *OAFM Standards for Assessing Whether Mediation May be Appropriate*

1. Prior to commencing mediation, all clients must be screened for any occurrences of abuse and/or power imbalance to determine which cases are inappropriate for mediation, which require additional safeguards, in addition to, or instead of mediation, and which should be referred to other resources.
2. The issue of voluntariness is critical when it comes to creating a safe place for couples to meet and negotiate.
3. Clients should be strongly encouraged to consult with lawyers prior to mediation and certainly before an agreement is finalized.
4. Mediators must be knowledgeable about abuse. Training for mediators needs to include the following:
  - o Issues related to physical and psychological abuse and its effect on family members;
  - o The impact that abuse (including witnessing abuse) has on children;
  - o Effective techniques for screening, implementing safety measures, and safe termination;
  - o Referral to appropriate resources, in addition to, or instead of mediation;
  - o Sensitivity to cultural, racial and ethnic differences that can impact the mediation process that may be relevant to domestic violence.
5. Where a decision is made that mediation may proceed, mediators need to meet standards of safety, voluntariness, and fairness. When mediators have concerns, they should inform their clients that they are not neutral about violence or safety.

#### **OAFM Procedural Guidelines (reproduced here)**

1. Obtain training about abuse and become familiar with the literature.
2. Never mediate the fact of the abuse.
3. Never support a couple's trading non-violent behaviour for obedience.
4. Set ground rules to optimize the protection of all parties.
5. When appropriate and possible, arrange separate waiting areas and separate arrival and leaving times, permitting the victim to arrive last and leave first with a reasonable lag in time for safety purposes.
6. Use separate meetings throughout the mediation process when appropriate, necessary, and/or helpful.
7. Consider co-mediation with a male/female mediation team, as an option.
8. Allow a support person to be present in the waiting room during screening, and/or during the mediation session.

9. Maintain a balance of power between the couple, and, if this is not possible, terminate the mediation process and refer the couple to an appropriate alternative. Such alternatives might include shelters, therapists, abuse prevention groups, and attorneys.
10. Where fairness of outcome may be an issue, the mediator should refer the clients to their counsel, financial advisor, support person, or other relevant resource for information and advice.
11. Terminate the mediation if either of the participants is unable to mediate safely, competently, and without fear or coercion. Precautions should be taken in terminating to assure the safety of the parties. For example, the mediator should not reveal information to one party or to the court that could create a risk for the other party.
12. Consider offering a follow-up session to assess the need for a modification of the agreement.

### What are Ontario mediators using to screen for IPV/A?

In the online survey, 71% (67/95) of mediators reported that they use a standardized screening tool to assess IPV/A. For many mediators this is the first screening phase where they are looking for “red flags” and possible issues.

Respondents were asked to identify the tool being used. Overall, they reported that their professional practice is to use some type of validated assessment tool that comes from a variety of sources:

- The Mediator’s Assessment of Safety Issues and Concerns (MASIC) (n=12)<sup>69</sup>
- A tool provided by employer/site contractor for court annexed resources (not specified) (n=15)
- Assessment tool obtained through domestic violence training (n=3)
- Ministry of the Attorney General tool (n=8)
- Validated tool (not specified) (n=7)
- Own screening tool the mediator has developed (n=5)
- Clarke & Murphy (n=2)

The most reported approach was a hybrid assessment — an adaptation of a validated tool that the mediator has revised or added to based on their professional experience (n=18). This suggests that even validated tools are not perceived as sufficient on their own. This begs the question as to how much this approach is discussed as a part of domestic violence training. Most critically, validated tools have gone through multiple iterations with statistical analysis to ensure they have internal and external validity. Further research should be undertaken to understand the types of “adaptations” that are being introduced, and whether they detract or enhance the assessment process and the ability to screen for IPV/A and power imbalances.

Adaptations may also speak to the experience of the mediator and the professional judgment that is a necessary part of the screening process. The ability of the mediator to understand vague answers that may require more specific follow-up, non-verbal and body language, or understanding that certain responses are indicative of the presence of IPV/A likely goes beyond the simple administration of a screening tool and speaks to the time, experience, and professional acumen of the mediator to deal with a complex situation.

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<sup>69</sup> Not all of the 95 respondents chose to provide a response to this question.

Having identified that the initial screening is revealing some issue of IPV/A, mediators were asked to identify how often (as a percentage of total mediation cases) were concerns about IPV/A and power imbalances identified. Overall, 24% of cases identified IPV/A concerns and 41% identified concerns about power imbalances.

Having flagged IPV/A concerns in phase one, mediators were asked in the online survey how they proceed in conducting a more detailed screening and what tools are used. The responses indicate that for the next phase of screening the predominant approach is to use their own developed best practice:

- Using own developed best practices (n=64/119; 54%)<sup>70</sup>
- Using a specific validated screening tool (n=35/119; 29%)
- Other (n=15/119; 13%)
- Not conducting a further screen (n=5/119 4%)

Respondents were asked to describe their “own best practices.” Mediators described the practice of having private, candid conversations and asking questions of the person for whom the initial screen had generated concern. Mediators identified seeking both verbal and non-verbal indications that IPV/A and/or power imbalances may warrant not proceeding with mediation by:

- Asking open-ended questions that require more than a yes/no answer
- Asking more direct/pointed questions
- Watching for hesitation/body language of discomfort
- More specific questions to get information on coercion, harassment, finance abuse, in-law interference
- Seeking information about police engagement
- Seeking information from legal counsel/lawyer
- Providing time for individual to be more comfortable/open up

Amongst those using a validated tool, these were the most items by respondents in the open-ended question:

- The Mediator’s Assessment of Safety Issues and Concerns (MASIC)(n=16)
- Domestic Violence Evaluation (DOVE) (n=2)
- Ontario Domestic Assault Risk Assessment (n=1)
- No tool/Ask questions (n=9)
- Barbara Landau Screening tools (n=1)
- Antoinette Clarke and Darlene Murphy Tool (n=1)
- Tool from the Ministry of the Attorney General (n=1)

The predominant screening tool identified by survey participants was the MASIC: the Mediator’s Assessment of Safety Issues and Concerns (Holtzworth-Munroe, Beck & Applegate, 2010). Holtzworth-Munroe et al. created this screening tool as there was a growing consensus that mediators should screen for intimate partner violence and/or abuse but lacked a measure by which to do so. Their 2010 article contains a copy of the MASIC in the appendix, and the authors made this publicly available for use with no concerns about copyright.

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<sup>70</sup> Respondents could select more than one response hence the result that there were 119 answers by 95 mediator respondents.

The development of the MASIC was also motivated by concerns about myths associated with mediation practice amongst the practitioners — particularly that the voluntary nature of mediation must mean that partners were comfortable and that IPV/A was not a problem. As the authors noted, in their practice, even with sensitivity and training to screen for IPV/A, it was being consistently under-identified.

When the MASIC was introduced in 2010, it had not yet been validated, although it is worth highlighting that the items in the MASIC tool built on previous IPV/A screens that had been standardized and validated. The lack of validation for the MASIC has been tentatively addressed. In 2014, results from efforts to investigate the reliability and validity of the MASIC were undertaken. Overall, the tool was found to provide excellent internal consistency (Pokman, Rossi, Holtzworth-Munroe, Applegate, Beck & D’Onofrio, 2014). In addition, further analysis confirmed that the MASIC assesses seven types of IPV/A: psychological abuse, coercive controlling behaviours, threats of severe violence, physical violence, severe physical violence, sexual, and stalking.

The last page of the MASIC provides space for the mediator to make notes about whether the case is appropriate for mediation, and to provide reasons if it is not. In particular, the MASIC does not automatically exclude the use of mediation in the face of IPV/A but offers “safety considerations that can be discussed with the parties during the mediation” (Holtzworth-Munroe et al., 2010, p. 651). On the final page of the MASIC, the screener is encouraged to give consideration to additional factors beyond safety risk including: “balance of power issues, the possibility of coercion, the mediator’s ethical duty not to facilitate involuntary and/or unconscionable agreements, and the mediator’s ethical duty to remain impartial” (Holtzworth-Munroe et al., 2014, p. 661). Along with choosing not to proceed with mediation because it is deemed inappropriate, the MASIC also provides a list of potential accommodations to the mediation process to allow it to proceed including the use of shuttle mediation, separate sessions with different arrival and leaving times for each of the parties, retention of a lawyer, referral to domestic violence services/shelter, and telephone/online mediation.

### When is mediation appropriate despite a positive IPV/A screen? What are current best practices?

Having screened for IPV/A and having positively identified that there are concerns about IPV/A, the next step is for mediators to consider what to do with this information. Should they automatically terminate and refer to court? Or are there circumstances under which a mediator might proceed? If they do proceed, what are best practices? This is a complicated question with many nuances in the answer.

While it is universally expected practice in Ontario that mediators screen for IPV/A, there is less consensus on what should occur if there has been domestic violence. As Pokman et al. (2014) articulate, the debate focuses on two critical concerns: 1) there is concern that mediation in the presence of IPV/A could result in control or manipulation by one party; and 2) passing over mediation services due to some concerns about IPV/A might deprive the parties of a functional opportunity to acquire conflict resolution skills and lessen conflict, rather than potentially escalate matters as can happen in litigation. Furthermore, mediation may allow for a more thoughtful opportunity to put other safety measures in place, such as supervised exchanges.

This online survey respondent articulated the framework for proceeding with mediation despite domestic violence:

*A good mediator, properly trained, can ensure that the process is fair and adjusted to suit the needs of the separating family. The overwhelming danger in screening away any matter that has an element of domestic violence is that the mediator is denying the victim their personal autonomy to choose their process. If a victim wishes to use litigation and to file a complaint with police, we respect that right. Should we not also respect her right to choose a non-litigious dispute resolution system, so long as that system can be both safe and balanced? Mediation seeks to restore autonomy and decision-making power to people, not strip it away and hand it to a third-party decision-maker. So long as the mediator completed a proper screening, puts in place a safety plan for all concerned when necessary, and can design a mediation process that addresses any safety or power imbalance concerns, I would argue that mediation is the best option for families going through a separation (online: 5.1).*

In Ontario, mediation practitioners must complete a course on screening for domestic violence. One of the primary accreditation agencies noted by the online survey participants for their own accreditation was OAFM (Ontario Association for Family Mediation) (n=82/143, 57.3%).<sup>71</sup> As outlined in the OAFM requirements for accreditation, individuals must complete Domestic Violence training:

*Applicants are required to have taken twenty-one (21) hours of education/training for Screening for Family Violence, Abuse and Power Imbalance within two (2) years of their Application. If the training was taken more than two (2) years prior to the application for accreditation, an additional seven (7) hour refresher course is required. This refresher can be completed by requesting to take any one day of an available three (3) day training, or any Professional Development Day focussed on Intimate Partner Violence.*

*The OAFM considers Screening for Family Violence, Abuse and Power Imbalances training to be a critical and essential component of a family mediator's training. This training must be taken in person, in successive, intact sessions and include role-plays.*

While concerns about IPV/A are real, some respondents (online) mentioned that they had not experienced any severe cases or that it was rare to have that level of concern. Ultimately, these are often difficult judgement calls, which often get better with time and experience. When a mediator has decided not to proceed because they have assessed that the file isn't appropriate, the mediator must provide the vulnerable party with their options on how to proceed, such as helping the individual locate legal services, safe housing, and services of a support worker. As this key informant noted, "we are not the arbiter of truth as to whether or not there was domestic violence; we are only here to manage the process and to make it fair to both parties because there could be instances where people are lying" (KII\_8: 500–502).

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<sup>71</sup> Respondent mediators could select all that applied. It appears that many of the 95 mediators who completed the survey have multiple accreditations as the total number of responses was 143: ADRIO (n=18/143; 13%); FMC (n=6/143; 4%); FDRIO (n=19/143; 13%); and Other (n=9/143; 6%).



For many individuals, one of the challenges is that there may be issues with IPV/A, but delays with the court process can also mean there is very slow resolution of issues. This can cause further distress when what is being sought is financial resolution, especially for the payment of child support or an access order/parenting plan. This story was told during an interview to illustrate the issue:

*I had a woman here before, several years ago. She was a victim of domestic violence, but she had absolutely no money. No money. Like she had \$20 in her bank account. She frankly says, "I have no other option than to possibly go to a shelter cause I have no money. He's not giving any money." They were sent down to mediation and frankly I had a choice, I said "Do we mediate?" Or what is the option for these people, when I say "no," right! And when I say "no" they are going back to the judge but they don't get an order. So then what? So... I chose to mediate and she ended up with a consent order for child support and it happened, but it has to be very carefully managed (KII\_8: 554–561).*

Overall, most online participants who answered the open-ended question suggested that, in appropriate cases, mediation might still be appropriate despite domestic violence. One of the key challenges for anyone working with families in these situations can be to identify what is conflict versus what is fear. Many families are engaged in some level of conflict during separation/divorce. Lack of agreement, inability to communicate, and different positions are to be expected. This is precisely what family justice professionals actively work to address. This is different than fear. Individuals in conflict who are also fearful require different acknowledgments, supports, and services. This is also the threshold that is determined through the screening process.

This survey respondent summarized this thought process and the continuum of the options available in the face of IPV/A:

*My view is that most matters can be safely mediated. The issue is designing an appropriate process to address the specific concern raised. I modify the process whenever necessary. There is a whole spectrum of modification available. At one end, a power imbalance may exist simply because one partner has been less involved in the financial affairs for the family. This can be addressed by ensuring that party obtains ILA during the mediation before attempting to reach any consensus on the financial issues. At the other end of the spectrum may be significant IPV. Depending on the circumstances, it may be possible to address safety concerns through shuttle mediation, even if that includes having one party participate by telephone (online survey).*

In interviews with key informants, proceeding with mediation was discussed as a better way to manage negotiations between parties; it was seen as an intervention that had a better chance of decreasing conflict than the court process. As this survey participant noted, "Many women who are in such a situation fear the alternative court process and would like to stay in mediation if possible."

This online respondent noted:

*It is my belief that the mediation process can be more supportive for victims of IPV than the regular court process. Mediators are trained to look for and screen for IPV. Also, it is my belief that mediators from a social work background (experience and training) are more skilled than lawyers to create a safe environment and to understand the nuances of IPV. I rarely screen out cases due to IPV but will always modify. At times, I will use shuttle mediation. I will ensure that exits/entrances are staggered. Often, I will have the clients bring a support person to sit with them during shuttle. I strongly encourage IPV victims to get ILA so that they feel empowered and informed before entering into mediation.*

And yet, as one key informant discussed (K11\_7), some community information service providers are telling clients that their disclosure of domestic violence means that they must go to court. This completely circumvents the opportunity to undertake a more thorough assessment process to determine if mediation might be an option in the particular circumstances.

Overall, survey respondents largely endorsed that the presence of IPV/A and/or a power imbalance was not sufficient reason alone to not proceed with mediation. Relying on professional judgment coupled with client consent/desire to proceed with mediation was key in choosing to move forward with mediation. That decision was closely linked to strategies used to ensure that the process was appropriately handled. These modification strategies were identified:

- Shuttle mediation in separate rooms (sometimes referred to as caucusing)
- Staggered entry and exit from the building by the parties (noted as a key element to how shuttle mediation is often carried out)
- Safety plans created
- Consent and acknowledgement regarding adherence to mediation safety rules (e.g., staggered entry)
- Lack of a court order preventing contact
- Conference/Video or Telephone mediation
- Third party/Lawyer/Support Person present
- Shifting to use of lawyers/court system if there appears to be duress (signalled by too many/too great concessions by one party)
- Conducting mediation at the courthouse with its attendant security personnel
- Independent Legal Advice (ILA)

Finally, while not all judges see mediation in the face of situational IPV/A as appropriate, some judges accept that position, as reflected in the comment of one judge:

*You know, we've got to get our heads around the fact that you know, in the tough cases, there might have been a little violence, there might have been a little pushing and shoving...but there's gradation to all of these things you know, and people are not at their best all the time...when they're separating. I know we got to be careful about violence, but going to an intake to listen to what is the process, even a victim of minor domestic violence might say, we can sit down and do this or we can do this by shuttle, or we can do this by conferencing and my lawyer can be there (J9, 177–184).*

The scope and mandate of this research project did not permit a full evaluation and discussion of the issue of whether, and how, mediation might be appropriate in the presence of IPV/A. It has been identified that there is a lack of agreement as to best practices that reflect the divide outlined at the beginning of this discussion: some practitioners and referrers working with the framework that any IPV/A requires that mediation not be tried, in contrast to what appears to be mostly mediators who have taken considerable training and continuing education in this area, who practice within the framework that mediation may be suitable with additional screening and implementation of safe practices. This divide frames the recommendations.

### Recommendations regarding mediation and IPV/A

1. To Service Providers/MAG/Accreditation Agencies: This topic should be a primary area for further continuing education so that ongoing training and dialogue can continue as to best practices between all family justice professionals: judges, lawyers, mediators, and family court support workers.
2. To Academics: More detailed research is needed on the practice of adapting validated screening tools with mediators' own "best practices" to better understand what is being done and whether it enhances or detracts from the use of the primary validated screening tool.
3. Academics/Service Providers: Reach out to domestic violence agencies to educate that any level of IPV/A should not carry the same advice of "don't mediate," but rather efforts should be made to find ways to educate that IPV/A exists on a continuum and that mediation, which includes screening, may in fact be effective. A one-size-fits-all approach may be unduly screening out cases that would benefit from mediation.
4. MAG/Service Providers: Consider developing a specific pamphlet for courthouse distribution by IRCs and/or placed on the information shelves about how mediation options in the presence of IPV/A may be available where appropriate and that the free mediation intake process is an important step in assessing the feasibility of mediation.

## CONCLUSION

Mediation is now accepted as part of professional family justice services in Ontario. Many things are going well — services are available province-wide and, in many instances, are positively endorsed by judges. Furthermore, mediation is seen to play an important role in not only diverting cases from court, but also providing individuals an opportunity to address their issues in a more collaborative way that, ideally, enhances understanding, communication skills, and outcomes for children.

Unfortunately, one of the striking aspects of this research in 2018 is to compare the findings with Madsen's (2013b) one-year review conducted in 2012, and to realize how similar the findings are. Most critically is to note how the challenges and issues identified in 2012 have remained virtually unchanged six years later. There has been virtually no change in concerns about mediator qualifications, uneven acceptance by bench and bar, the low rate of remuneration and high rates of precarity, lack of space allocation to mediation services and the FLICs, uneven access to legal advice, and the ongoing uncertainty about funding coupled with low levels of funding relative to the high expectations of services. From a researcher's perspective this is unexpected. Even more concerning is that Madsen's research reflects on the recommendations of the Mamo, Jaffe, & Chiodo research of 2007, identifying many of the same challenges.

This research provided an important opportunity to hear from the family justice professionals who provide mediation services or refer. The next phase of research should focus on those who have used mediation services, including those individuals who may be in need of mediation services but have not yet heard or participated in using the service. Most critically, there needs to be a longitudinal study to follow mediation participants over time to assess the longevity of agreements. In addition, understanding client satisfaction is a most needed element for evaluating the impact of mediation over the long term.

One of the most important findings of this research is to note the extraordinary dedication that those working in this field bring to their work and to helping clients realize a better outcome for themselves and their children. Being a mediator is not a job that generates fame or fortune, and requires considerable personal time and expense to qualify, pursue further required training, and in many instances work diligently to knit together work across many different locations and domains to make it financially feasible to continue. Why do they do it? Because it matters to them that families have an efficient, cost-effective, and collaborative way to navigate one of the most emotionally difficult and challenging times they face.

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## APPENDIX A: MAG REQUIREMENTS FOR MEDIATION TRAINING AND CREDENTIALS (pre March 31, 2019)

In accordance with the current MAG service contracts (expiring March 31, 2019) all mediators that provide services in our family courts must have the following:

is:  
Accredited by the OAFM (ACC. F.M.); or  
certified by FMC (FMC Cert. FRM), or (FMC Cert. FFM), or (FMC Cert. CFM); or  
certified by the ADR Institute of Ontario (Cert F. Med).

**-OR-**

has:  
a university degree, or equivalent (ten (10) years of relevant directly-related work experience in the human services field);  
a minimum of 60 hours of training in family mediation (a basic and advanced level course);  
a minimum of 14 hours of initial domestic violence education or training; and,  
a minimum of 100 hours of supervision including a minimum of 5 cases mediated to the point of Agreement where an Ontario Association for Family Mediation (OAFM) Accredited Mediator or a Family Mediation Canada (FMC) Certified Mediator or an ADR Institute of Ontario Certified Mediator has provided supervision and/or consultation.

**-OR-**

a Law degree or a Master Level degree in one of the following: Psychology, Social Work, Mediation, or Conflict Resolution;  
a minimum of 60 hours of training in family mediation (a basic and advanced level course); and  
a minimum of 14 hours of initial domestic violence education or training.

And if a Law degree:

Practiced law for ten (10) years, of which five (5) years with a focus on family law cases; and  
Mediated twenty-five (25) family law cases to the point of agreement.

Or if a Master Level degree:

Practiced in their field for ten (10) years, of which five (5) years include a practice focus on services to individuals or families experiencing a relationship breakdown, separation or divorce; and  
Mediated twenty-five (25) family law cases to the point of agreement.

## APPENDIX B: MAG REQUIREMENTS FOR MEDIATION TRAINING AND CREDENTIALS (post April 1, 2019),

Specifically require:

the Mediator:

- (A) has completed a minimum of sixty (60) hours of family mediation training, which includes a basic forty (40) hour course and an advanced twenty (20) hour course;
- (B) within the last five (5) years, has completed a minimum of twenty-one (21) hours of intimate partner violence education or training including, but not limited to, intimate partner violence screening;
- (C) has provided three (3) references to the undersigned and such references are to the undersigned's satisfaction, acting reasonably; and
- (D) is:
  - (1) accredited by the Ontario Association for Family Mediation ("OAFM") as an Accredited Family Mediator (Acc. F.M.);
  - (2) certified by Family Mediation Canada ("FMC") as a Family Relations Mediator (FMC Cert. FRM) or Comprehensive Family Mediator (FMC Cert. CFM);
  - (3) certified by the ADR Institute of Ontario ("ADRIO") as a Certified Family Mediator (Cert.F. Med); or
  - (4) certified by the Family Dispute Resolution Institute of Ontario ("FDRIO") as a Certified Specialist in Family Mediation (FDRP Med);

**-OR-**

(E) has:

- (1) a university degree;
- (2) completed a minimum of one hundred (100) hours of hands-on mediation work experience supervised by a mediator, who has been accredited or certified as a family mediator by OAFM, FMC, FDRIO, or ADRIO;
- (3) mediated at least five (5) family cases to the point of agreement under the supervision of a mediator who has been accredited or certified as a family mediator by OAFM, FMC, FDRIO, or ADRIO; and
- (4) within the last five (5) years, completed a minimum of twenty-one (21) hours of education or training in family law;

**-OR-**

(F) has:

- (1) been called to the Law Society of Ontario and is in good standing with the Law Society of Ontario;
- (2) practiced law for at least ten (10) years with a focus on family law cases for at least five (5) of those years; and
- (3) mediated at least twenty-five (25) family law cases to the point of agreement;

**-OR-**

(G) has:

- (1) a Master Level degree in psychology, social work, mediation, or conflict resolution;
- (2) practiced in their field of training for at least ten (10) years and for at least five (5) of those years focused on services for individuals or families experiencing relationship breakdown, separation, or divorce;
- (3) mediated at least twenty-five (25) family law cases to the point of agreement; and
- (4) within the last five (5) years, completed a minimum of twenty-one (21) hours of education or training in family law;

**-OR-**

(H) has:

- (1) at least ten (10) years of relevant directly-related work experience in the human service field, including, but not limited to, ADR, social work, and psychology;
- (2) completed a minimum of one hundred (100) hours of hands-on mediation work experience supervised by a mediator, who has been accredited or certified as a family mediator by OAFM, FMC, FDRIO, or ADRIO;
- (3) mediated at least five (5) family cases to the point of agreement under the supervision of a mediator who has been accredited or certified as a family mediator by OAFM, FMC, FDRIO, or ADRIO; and
- (4) within the last five (5) years, completed a minimum of twenty-one (21) hours of education or training in family law.