

A Descriptive Survey of Family Law Mediators
on Influences on Outcomes in Family Law
Mediation in British Columbia

by

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ABSTRACT

A survey of family law mediators in the Province of British Columbia, Canada, revealed outcome rates and reported mediators' attitudes towards numerous factors that influence outcome in family mediation. The survey was restricted to lawyers certified by the Law Society of British Columbia to practice mediation; all 327 lawyer mediators in the Province were surveyed and 85 mediators responded. These mediators reported a 75.38% success rate (defined as a signed separation agreement or a consent order) which was achieved in an average of three to four sessions. Single issue mediations were reported to be more difficult to resolve than multiple issue mediations.

The mediators ranked the levels of difficulty of ten common issues in mediation on a Likert scale with access reported to be the easiest to resolve and spousal maintenance reported to be the most difficult.

Thirty-five factors that are believed to influence outcome were also ranked in order of significance showing that the clients' commitment to mediation is the most significant factor and whether or not the clients are common-law or married being the least significant.

The results indicated that mediators believe men have no particular advantage in mediation due to better negotiating skills, higher income and assets or being more competitive. The results did indicate that mediators believe that mediation affords women a greater opportunity to express their views than other

forms of dispute resolution and that they tend to be more satisfied with the process than men.

Sixteen forms of power commonly seen in mediation were ranked in terms of difficulty to balance, with information and knowledge being the easiest to power balance and assertiveness and self-esteem rated the most difficult.

The results of this study will give practicing mediators contextual background data on these factors which will allow them to better predict outcomes in given fact situations.

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Dedication

To my wife Nancy, and my stepdaughters Lia and Chandra

CHAPTER ONE

INTRODUCTION

Statement of the Problem

The adversarial system of resolving family matters in our society is in serious trouble. Historically, the adversarial justice system was designed to deal with complex matters of facts and law, such as commercial disputes where the balance of power between the disputants was more or less equal and where there was no necessity to have a post-trial cordial relationship. The justice system we now have was designed and developed in and for an era when divorce was rare and relationships between men and women and children were quite different than they are today. In spite of the numerous changes in our society relating to these relationships, disputes are basically handled by our justice system in a way that is not dissimilar from a century ago. In our traditional legal system, parties are considered adversaries, and if one wins, the other loses, and in general disputes are resolved through the application of a rule of law to a problem by a third party.

Mediation, a relative newcomer to the legal stage, has fundamentally different assumptions. The first is that all parties can benefit through a creative solution to which each agrees, and the second is that each situation is unique, and therefore cannot be governed by any general principle except to the extent that the parties accept it. (Leonard Riskin, 1982, p. 165)

In addition to the above basic differences in philosophy, mediation has the advantage of being flexible enough to take into account that divorce occurs on several levels, including legal, financial, emotional, psychological and social. The adversarial system was not designed for, nor does it function well in resolving family matters, and tends to intensify the level of animosity between the parties. A typical custody case, for example, exchanges sworn affidavits which generally humiliate and demean the opposing parties in an effort to prove that the other parent is completely unfit, leaving the judge in the unenviable position of making a decision based on this evidence. The laws of evidence severely restrict what information is available to a judge, and therefore they must make a determination based, not on the multiplicity of factors that could be used, but rather on the legally acceptable evidence before them. A mediator on the other hand can and does spend many hours with the couple interacting with them can observe the body language, voice tone and method of spousal interaction as well as what they actually say. Virtually all interlocutory actions relating to family matters are done on the basis of affidavit evidence alone. This includes interim custody and maintenance applications, which are critical to the outcome of the trial. In such applications neither spouse is present and usually neither lawyer has met the other spouse. The actual parties (the parents and children) are not seen by the judge at all in these types of applications. The resulting decision may fail to satisfy the needs of the

parents or their children or both, and most importantly, does not directly involve them in the process.

The nature of the post divorce relationship is not one which concerns lawyers and judges, and this omission has serious consequences for the couple, the children and society. Folberg and Taylor (1984) write "the legal system is not able to supervise the fragile and complex interpersonal relationships between family members . . . that may continue after the immediate dispute is resolved."

One of the major problems of having a third party impose a decision is that there is no sense of ownership of the solution by the parties, and this tends to result in covert non-compliance with court orders.

A divorce often is one of the most painful and traumatic experiences in life, and its aftermath can have long lasting psychological impact. A system which revolves around proving right and wrong, finding fault and emphasising winning tends to result in poor compliance rates (Bautz & Hill, 1989) and exacerbates the custody situation by influencing a couple's feelings, attitudes and behaviours toward each other in negative directions (Kruk 1992). Pearson and Theonnes (1988) determined in their research that 13 percent of divorce mediation clients sought modifications to their agreements within two years of the agreement as compared to 35 percent of adversarial clients. This seems to indicate a higher level of client satisfaction, which is generally believed to be a result of the active participation of the clients in the process. In spite of the fact

that divorce is largely an emotional experience, our legal system goes to great lengths to strip the emotional component away from it and attempts to repackage it into components of fact and law.

A major advantage of mediation reported in the literature is the high rate of compliance, compared to traditional Court orders. For example, in one study (Bautz and Hill, 1989) showed a 19.8% non-compliance rate with child support payments with the traditional process and only a 1.2% non-compliance rate with mediated child support payments. This high compliance rate in mediations is common throughout the literature and is attributed to a sense of ownership and participation in the agreement by the spouses.

Mediation has been introduced in the last decade to help resolve matrimonial and family disputes, particularly involving children (Maida, 1986). Mediation can be a non-adversarial, collaborative process where the parties are assisted in determining their own agreement (Folberg & Taylor, 1984; Moore, 1986; Haynes, 1989). It works well when the parties are emotionally stable, articulate, informed, assertive and trustworthy (Burdine, 1991). It can be defined as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement in the issues in dispute" (The Canadian Bar Association Task Force Report, 1989).

Since family law mediation is in its infancy, (as compared to labour mediation which has been established for many years), the public is still largely unaware of it, and many jurisdictions have no regulations concerning it. In British Columbia the Law Society (the governing body for lawyers in this province) recognises the need for mediation and has passed specific rulings permitting lawyers with specialised training to mediate, dealing with confidentiality, conflict of interest, independent legal advice for participants, and other related matters. (Ruling 12, Family Law Mediation, Professional Conduct Handbook, Law Society of British Columbia).

There is considerable debate about whether mediation should be done by lawyers, therapists or volunteers with specialized training and qualifications and requirements vary widely (Hughes, 1988). In British Columbia mediation has not been widely used to this point for numerous reasons, including some resistance and misunderstanding by the established legal system, lack of clarity as to what training or qualification is necessary, and the reluctance of potential referral sources, such as physicians and counsellors, to use an unknown resource.

The main value of mediation is that it places the power and responsibility with the parties to resolve their differences and determine future arrangements. The weaknesses of mediation include: the inevitable social biases of the mediators; the risk of power imbalances affecting the agreement; the lack of protection for women in cases of domestic violence; time pressures in court related publicly funded programs; and

lack of training and qualifications for mediators (Burdine, 1991). Feminist writers suggest mediation cannot adequately deal with gender power imbalances they believe to be inherent in our society (Brittain, 1991).

In spite of these criticisms, there is considerable evidence that mediation is an improvement over the existing adversarial system. The Denver Custody Mediation Project, (Pearson & Theonnes, 1982 and 1984) showed high rates of satisfaction with mediation, willingness to recommend mediation to others, greater satisfaction with agreements, greater compliance with agreements, less re-litigation, improved communication and understanding between spouses, more joint custody agreements, more visitations with children, savings in time, and lower costs, both publicly and individually. Other studies show similar findings (Bautz & Hill, 1989).

Ideally, mediated parties develop a plan of action coming from a position of self-determination and self-satisfaction. It is especially appropriate for disputants involving long term ongoing relationships since it enhances understanding between the parties and promotes collaborative problem solving. With the emphasis being on the present and future, rather than the past, blaming and fault finding are minimized, along with the resulting tensions and emotional wounding (Burdine, 1991). The process is one of empowerment of the parties, instead of abdication of their power to someone else.

Factors that Influence the Outcome of Mediation

Despite support for mediation and the growth of court sponsored programs, the disputes best suited for the intervention are not well described in literature (Emery & Wyer, 1987). The research shows that there are some general areas that influence the outcome of mediation.

1. the skills, training, experience, education, background, personality and style of the mediator (Gentz, 1994; Neilson, 1994);
2. the issues that are brought to the mediation (Whiting, 1992);
3. gender influences (mediator and clients) (Stamato, 1992) and (Neumann, 1992);
4. power imbalances within the mediation, (Davison Salem, 1984);
5. the dynamics of the relationship between the spouses (Mathis and Yingling, 1990).

In addition, some research has been done that measures clients' perceptions and satisfactions (Kelly & Gigy, 1988), and an attempt has been made to develop a family mediation assessment instrument (Tan, 1988). However, the need remains for a descriptive survey of mediators to see if there are any guidelines that can be used to predict specific outcomes. For example, if it was known that a certain variable predicts a low success rate in mediations, these cases could be referred to existing traditional family court delivery systems. Mediators, at this point, can only predict that a couple in

mediation has a good chance of coming to either an agreement or at least a narrowing of the issues (Camplair & Stolberg, 1990), but cannot accurately make further predictions because the information is not available. If further background information about factors was available to mediators it would be tremendously valuable. As discussed above, research has been done to point to the areas that are likely the most fruitful in predicting outcomes and it is from this information that the general survey can be designed. Since the study will involve a specific professional group, namely the family law mediators certified by the Law Society of the Province of British Columbia, a survey of their attitudes and opinions in these matters will be extremely useful since they are the people doing the mediations on a day to day basis.

Purpose of this Study

The purpose of this research is to provide a broad descriptive survey of family law mediators certified by the Law Society of British Columbia to determine their attitudes and opinions with respect to selected factors believed to influence the outcomes in mediation; and to rank and otherwise analyse and organise this information in a form useful to practising mediators.

Rationale for this Study

Practising family law mediators have very little information to rely on, apart from their own personal experience, to guide them as to what types of couples will do well or poorly in mediation, in terms of overall outcome. In addition, they have little

information as to what types of issues or situations in a family law mediation will produce the desired outcome. When a couple presents with a spousal maintenance issue and another with a valuation of property issue, the practitioner has no accurate information or data base to rely on as to which couple is most likely to resolve, or how best to resolve their issues in mediation. The information received from the survey will provide a much broader base of information to help in decision making and predicting outcomes.

Although it is generally believed about 75 percent of mediations will result in a "successful outcome" (see definition section below) the empirical data for this comes mainly from other jurisdictions, principally the United States. A general survey of the type proposed of British Columbia family law mediators has not yet been done. The 75 percent statistic seems to be repeated in articles on mediation and by mediators in the province, but a survey would provide additional data to support the conclusion of whether or not this statistic is applicable in this province.

Some research points to the level of training and experience of mediators as a factor and the Sloan survey of B.C. mediators done in 1991 shows that a relatively small percentage of qualified mediators do the bulk of the mediations. It was speculated in that study that many qualified mediators do not practice mediation because of problems in post qualification practical training and a lack of an articling or mentorship system to allow novices to gain experience. Mediation differs from the

general practice of law inasmuch as with one client in the office it is difficult to make things worse but with two, often angry and hostile spouses together in the same office, the situation, if improperly managed can quickly escalate into a hardening of positions.

Research and experience reveal a number of areas that are likely influential in mediation and a significant sample of mediators' attitudes toward these influences would be a useful data base for the profession. For example, if the survey showed that most mediators experienced no difference between multiple issue mediations and single issue mediations in terms of resolution, this information could be related to clients who may fear that they have too many issues and therefore mediation will not work for them.

Another area of general interest is the types of issues mediators believe to be the easiest or most difficult to resolve. For example, it is generally believed by mediators that spousal maintenance is a more difficult issue to resolve than custody and access. If this turns out to be experienced by a majority of mediators this information will be valuable to clients who may incorrectly perceive that their custody and access difficulties are unresolvable in mediation. Conversely, if most mediators believe spousal maintenance issues are difficult, it may be that they are better resolved by the traditional court system. Consensus data by mediators in this area will be helpful to practitioners to allow greater predictive capacity as specific issues are presented.

One of the most important skills mediators are required to perform is known as "power balancing" between the spouses. This means the attempt to "level the playing field" in order to achieve a fair agreement. It is usually done with certain skills and techniques, learned in mediation training courses, and is aided by the fact that spouses usually have strengths in one area of power and weaknesses in another. For example, the income and assets possessed by one spouse can be balanced by better relationship skills in the other. Some of these areas are probably gender influenced and vary from one culture to another. An opinion from mediators as to what they believe are the most influential areas of power to be balanced will be highly useful. The questionnaire will be designed to show how significant the mediators believe these power issues are.

A most significant part of this survey is to obtain mediators' opinions as to the factors that are believed to affect the outcome in mediation. A rating of the level of the importance and influence of these selected areas will aid mediators in predicting outcomes before the mediation begins. One of the most frustrating experiences mediators have is not knowing at the outset whether or not a particular set of facts and circumstances is more or less likely to result in success, apart from their own personal experience. Since mediation is not always successful, clients want to know whether their particular situation is likely to result in the desired outcome (usually a signed separation agreement or consent order). The survey will be designed to address this lack of data and give the individual mediator, and through them the general public, the

general consensus of mediators in these areas as to this present state of mediation in this province.

No general survey of this type has been done in British Columbia and few have been done elsewhere. Only one previous study of family law mediators was done in the Province of British Columbia and this was an informal survey relating to training and practice patterns of mediators after graduation in B.C. Law Society Training Course. Part of the proposed survey will update the existing survey in those areas to see if anything has changed in the last four years. A survey such as the one proposed, is exciting pioneering research and I anticipate a great interest among the mediators being surveyed, which hopefully will result in good return rates and great interest in the published results.

Research Questions

1. **What are the characteristics of British Columbia family law mediators in terms of geographic location, practice size, practice volume and gender balance?**
2. **What are the attitudes of mediators towards their qualifications, training and experience?**
 - Corollary a) **Do mediators believe mediation should be restricted to lawyers qualified by the Law Society of British Columbia?;**
 - Corollary b) **Do mediators believe existing Law Society qualification standards are adequate?**
3. **What types of selected fact situations do mediators believe should not be mediated?**
 - Corollary a) **Does the level of mediator experience make a difference to these decisions?**
4. **What percentage of family law mediations performed by a mediator certified by the Law Society of British Columbia result in a successful outcome?**
 - Corollary a) **What is the usual number of sessions required to achieve that result?**

5. **What is the level of directiveness for Family Law Mediators in this Province?**
6. **Which family law issues do family law mediators believe are the most and least difficult to resolve?**

Corollary a) Are mediations with one central issue more difficult to resolve than mediations involving multiple issues?

7. **What do family law mediators believe are the most important influences on the outcome of family mediation?**
8. **What are Family Law Mediators' attitudes towards the influence of gender in mediation?**

Corollary a) Is mediation gender neutral?

9. **What forms of power do mediators believe are the most and least difficult to balance between spouses?**

Definition of Terms

"Adjudication" is when a judge makes a binding decision relating to a case before him or her.

"Adversarial Process" (also called traditional court process) refers to the process whereby the Plaintiff and Defendant each retain their own lawyers who act as advocates and resolve the dispute using negotiation, or litigation before a judge, to reach a decision.

"Affidavit" means, for these purposes, a document sworn by a party that is designed to be filed in court as evidence (as opposed to direct oral evidence).

"Arbitration" differs from mediation inasmuch as the third party arbitrator makes a decision that is binding on the disputing parties.

"Caucus" is a procedure whereby the mediator sees one of the spouses in the absence of the other.

"Child" means a person under 19 years old.

"Conciliation" refers to a situation where a third party acts as a go between (the parties to not meet face to face) for the two parties in order to re-establish a relationship and/or arrive at a resolution to the problem.

"Court" means the Provincial Court of British Columbia.

"High Experience Mediator" means a mediator who has done more than three family law mediations.

"Interlocutory matter" means a decision relating to a case before the final hearing, often used in matrimonial cases.

"Judge" means a judge of the Provincial Court of British Columbia.

"Lawyer Negotiation" means when the spouses' lawyers resolve the dispute on behalf of their clients.

"Litigation" means being involved in any adversarial court process with or without using lawyers.

“Low Experience Mediator” means a mediator who has done fewer than three family law mediations.

"Mediation" means the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement in the issues in dispute.

"Mediator" means a family law mediator certified by the Law Society of British Columbia.

"Negotiation" means when two or more persons resolve their own dispute without assistance.

"Parent" includes mother or father, guardian, step-parent, a person who has been granted custody or access to the child, a person who is in a parental relationship to the child and has supported, maintained or cared for the child.

"Power Balancing" is a skill used by mediators to offset individual areas of power possessed by one spouse or the other.

"Re-litigation" involves returning to court to have any previous decision re-heard or to have part of a decision appealed or amended.

"Successful Mediation" means a mediation where a separation or other agreement is executed or which results in a consent order.

"Successful Outcome" means a mediation which results in a signed separation agreement, a consent court order, or substantial narrowing of the issues.

CHAPTER 2

REVIEW OF RELATED LITERATURE

The Overview

"I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realised that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the fifteen years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul." - Gandhi, An Autobiography.

These words neatly outline the universal and timeless appeal of the art of mediation. Mediation as a distinct discipline with a strong research base is, however, relatively new and almost all research relevant to this study is less than twenty years old. Most of the scholarly research has been done in the area of divorce and custody related mediation and the focus of much of the early research was on comparisons of mediations to existing court systems. Early research seems to have been done with a view to establishing the area and developing it as a viable and credible alternative to the court process. More recent research is beginning to move beyond this and is starting to look at how and why mediation works as opposed to whether it works at all.

In order to provide a comprehensive background for the survey, I will discuss research on divorce mediation in general, and then move on to the research directly related to the areas that are the subject of the survey.

With respect to the general research, I will concentrate on the comparison studies and studies showing the validity and benefits of mediation as an alternative to the traditional court process. I will emphasise actual field research rather than articles, books or theory.

Research done on areas that form the basis of this study will be outlined with a view to providing a rationale for the questions I will be asking the mediators. Every question has as its basis existing research data and where possible the same or similar questions will be asked for the purposes of comparison.

Review of the Literature

Enthusiastic claims on behalf of mediation for significant benefits to clients continue to be made, but few of the claims have been thoroughly examined. It is generally believed that mediation will produce more satisfied clients than those using lawyers within the traditional adversarial process to obtain their divorces and related matrimonial agreements. This becomes significant if this greater satisfaction is linked to lower rates of relitigation and higher rates of compliance with agreements, particularly for matters such as child support payments.

Kelly and Gigy (1988) did a study with 122 respondents who mediated their divorce issues using a scale they developed called the Client Assessment of Mediation Services Scale (CAMS) which asked clients to rate six factors relating to client satisfaction. The six factors were effective/sensitive mediator, empowerment, adequacy of information, mediator impartiality, focus on issues, and impact of spousal relationship. On a scale of one to seven from 'strongly disagree' to 'strongly agree' (4 being neutral) mediation mean scores showed that clients reacted positively on all six scales and particularly highly on the areas concerning impact on spousal relationship and sensitive/effective mediator. This test was found to have good construct validity and adequate reliability.

In a direct comparison study between mediation and the traditional method, Bautz and Hill (1988) examined issues of child support, child custody, satisfaction with the final divorce agreement, nature of the post divorce relationship, and perceptions of fairness of the divorce settlement. They hypothesised that couples who used mediation would (1) make joint custody decisions (2) agree to make equitable child support payments (3) perceive the post divorce relationship as harmonious, and (4) perceive the final divorce agreement as fair. Five hundred couples were randomly selected, two hundred and fifty from each divorce type. The results were that (1) more joint custody decisions were made by the mediators than the litigators (2) 97 percent of the couples who used mediation made all of their child support payments, as opposed to 63 percent

of the litigated couples (3) an analysis of variance indicated that couples who used mediation were more satisfied with the final divorce agreement than couples that had used traditional methods. The Chi-square results indicated that couples who had used mediation described their post divorce relationship as more cordial. Conversely, couples who used the traditional method had strained relationships more often.

An analysis of variance showed that the mediators tended to describe their settlement as being very to somewhat fair, while traditional couples were more likely to report the settlement as being somewhat fair to very unfair.

These are important results, since they imply mediation is much more adept at dealing with emotional family disputes than is traditional litigation. The macroeconomics of a 97 percent payment rate of child support payment is staggering when projected onto a national scale.

A frequently reported study is the Denver Custody Mediation Project (Pearson, 1980). Six hundred and sixty-eight cases were randomly referred by the Denver Domestic Relations Courts, and another two hundred and twelve cases were assigned to a control group. The study examined the willingness of the parties to participate in mediation, the success rates (production of a consensus based agreement), the costs of litigation for parties in these disputes, their satisfaction with the process and, in a follow-up study, their compliance with mediated agreements and court orders.

The Denver study found that 43 percent of the referral cases were inappropriate for mediation, and of those who were offered free mediation, thirty-six did not wish it. The mediations were conducted by male/female mediation teams, comprised of a lawyer and mental health professional. The control group (N=54) was interviewed three times: when divorce papers were filed, at promulgation, and six to twelve months later. The mediation group (N = 125) was interviewed four times: prior to the start of mediation, immediately after mediation was concluded, at promulgation, and six to twelve months later. The mediation group was subdivided into two groups, those who completed mediated agreements, and those who did not. The report concluded that fully 80 percent of people who were offered and accepted mediation produced consensus based agreements before their court hearings. Eighty-five percent of the mediating couples surveyed one year later found complete satisfaction with their agreements within one year, whereas 70 percent of the litigation couples expected to go back to court and make changes within the first year (Pearson, 1980, page 505). The study also found that the mediating couples tended to reach agreement nearly two months faster than the litigating couples.

One of the most significant findings of the study, which has also been found in other studies (Bautz & Hill, 1988) was that after one year, 71 percent of the mediating couples with monetary settlements were abiding by their arrangements, compared to

only 34 percent of adjudicated cases. Lawyers fees were also examined in the study, and litigated agreements were considerably more expensive than mediated ones.

The social significance of these results was examined by W. Richard Ewerts, (1988) who took the results in the Denver project and applied them to the U.S. Bureau of the Census (1981) statistics and projected savings of 355.5 million dollars saved in legal costs, 551 million dollars gained in child support payments, and a staggering twelve billion dollars in potential savings in court costs. Joan Kelly (1990), a frequent contributor to published research in mediation, examined the area of cost savings and found that in a 1984 study in the California area, couples obtaining divorces using the adversarial process averaged 134% more in fees than couples using a comprehensive divorce mediation process.

To examine the effect of mediation on child related disputes, Camplair and Stolberg (1990) did a study involving seventy-six divorcing couples who were randomly assigned by court intake officers to either mediation or litigation interventions to resolve child related disputes.

The mediations were from one to five sessions, and the subjects in both groups completed a number of questionnaires (co-parenting questionnaire, the O'Leary-Porter Scale of Overt Marital Hostility, the Family Awareness Scale, the Dyadic Adjustment Scale, and the Family Adaption and Cohesion Scale). Sixty-nine percent of mediation couples reached agreement in one or more unresolved issues and one-third resolved all

of their disputes. Post mediation adjustment data suggested psychological gains in family and dyadic functioning and reductions in hostility. Couples' success rates varied as a function of the content of the dispute, and the importance of the dispute to the parties. Other interesting findings in this research showed that couples and individuals with fewer and less troubling disputes tended to choose litigation, which runs counter to the belief that mediation is suited for situations with fewer and less severe disputes (Emery & Wyer, 1986b).

Power Imbalances in Mediation

Power imbalances are a part of all mediations and for the purposes of this discussion power can be defined as the "ability to control or influence others" (Davis & Salem 1984). Some authors, (Auerbach 1983) contend that "without legal power, the imbalance between aggrieved individuals and corporations or government agencies cannot be addressed"(p. 145). Others, (Davis & Salem 1984) suggest "the essential values and characteristics in mediation make it a particularly effective means of dispute resolution in situations where power imbalances play a role" (p. 18).

Beliefs that power imbalances cannot be effectively addressed do not seem to be supported by the empirical research, which suggests that mediation is as effective as other forms of dispute resolution in terms of the equity of the agreements (Davis & Salem 1984).

Davis and Salem (1984) make numerous arguments in favour of mediations' ability to effectively balance power, summarized below:

1. All persons have some kind of personal power.
2. Mediation is inherently empowering to individuals by treating them with dignity, respect and trusting in their ability to resolve their own problems.
3. Mediation fosters the exploration of options.
4. Mediation recognises and allows emotions to be expressed.
5. Mediation is impartial and confidential.
6. Mediation reaches voluntary rather than imposed agreements.
7. Mediation is simple to understand and informal.

Mayer (1987) attempts to categorize the forms of power into ten types (p. 78) and gives many suggestions to mediators about how they can use their own power in addressing imbalances. One of his main conclusions is that mediators should not deny or avoid power imbalances and should use their own influence to empower individuals as the need arises.

All family law mediations (of heterosexual couples) bring an unavoidable male/female power imbalance. Some argue that the great disparity in power between the more powerful, income producing husband and the less powerful, caretaking wife results in the husband winning a greater share of the marital assets. Others argue that

mediation can effectively address the power imbalance between such traditional divorcing spouses and that the mediation process can result in a fair settlement (Neumann, 1992).

The findings that mediations result in fair settlements and have high satisfaction and compliance rates indicate that in practice, this inherent power imbalance is likely effectively addressed. This may be due to the fact that the male/female power imbalance is not as significant as believed, may be subordinated by other power imbalances occurring at the time of the divorce, or it may be that mediation is quite effective in dealing with these imbalances.

There does not seem to be any research relating to the particular issues that are the most difficult to power balance and a scale or ranking of the most common factors would be very valuable to practising mediators. Such a scale would be helpful as background or contextual data for determining the difficulty of a mediation or “red-flagging” a particular issue such that special care and attention is devoted to it. Obviously, such a scale would have to be taken as only general background information, since all individuals and therefore all mediations are unique.

Gender Factors in Mediation

"Feminists have longed cautioned women in traditional marriages against the use of mediation to resolve support and property issues in divorce". (Neumann 1992) p. 227.

“An examination of mediation must focus on the impact of power, particularly gender related power, on the process. The state of sexual politics in America today is such that, even in theory, mediation is not appropriate or desirable. Most women are not equal to their male partners in bargaining power and experience, or financial resources”. (Lefcourt 1984, p40)

“Feminists assume that mediation does not affect the existing power imbalance between men and women which results in the more powerful male spouse winning more than an equal share of the matrimonial assets.” (Neuman 1992)

These criticisms of mediation are generally based on the assumption that since power imbalances between men and women exist in our culture generally, mediation, being a microcosm of our culture, will thus perpetuate this imbalance.

There is also concern that because women are socialized to be accommodating and co-operative while men are socialised to be autonomous and competitive (Gilligan 1982), which automatically results in unequal ability to bargain. In addition to different socialization between men and women, some writers believe men and women enter mediation for different reasons.

“Women enter mediation in order to avoid hostility, whereas men enter because they will get a better deal...women usually have fewer bargaining chips in divorce mediations because they have less money.....they may not know their husband’s true assets, and they may want custody so desperately they will bargain away even the money needed to support those children if necessary.”

(Beer and Stief (1985, p. 27)).

Adrian Rick (1976) suggests that males possess superior power in this society and balancing power between the genders is impossible until society fundamentally changes. Schulman (1983, p. 3) suggests that "the average woman is not equal to her husband in bargaining power".

Watson and Kasten (1989) report that "women were less effective negotiators than men, particularly when negotiation is viewed as a co-optive win-lose gain rather than a problem solving endeavour that seeks resolution at no sacrifice to continuing relationships".

Notwithstanding these criticisms it may be that the practice is substantially different than the theory.

In a study conducted by Pearson (1991) mediation fared as well as any other form of dispute resolution. In that study three hundred and two divorced individuals who had used various methods of resolving their separation and divorce issues were interviewed by telephone. The respondents all had some agreement in one or more

issues in the divorce and had used lawyer negotiation, the courts, mediation or it simply settled on their own. The study also included public and private mediation programs.

The results can be summarized as follows:

1. Child and custody visitation. In this area there was a slight tendency for mediation to result in joint residential custody, otherwise all forms were similar inasmuch as the mothers most often ended up being the residential parent (59 to 80 percent of the time).
2. Child support. Private mediation resulted in the highest child support orders and resulted in up to an astounding 114 percent of the total child support being paid in the previous month. The lowest compliance rates were with court orders at 87 percent.
3. Division of Property. There was little difference between the various forms here with wives receiving an average of 52 percent of the matrimonial property.
4. Alimony (spousal support orders). The incidents of awards was highest (80 percent) in private mediations and judicial decisions and significantly lower (6 percent) in agreements negotiated by the parties themselves.
5. Satisfaction and fairness ratings. Mediation produced the highest satisfaction levels in custody arrangements, (even with the non-

custodial parent) property agreements and child support. The author explained this by the reduced stress and conflict usually associated with mediation.

This study showed both private and public mediations to be at least equal and in some cases preferential for women compared to the other available forms. Mediation was also the least expensive being 28 to 48 percent lower than agreements made by lawyer negotiation or in court.

A similar conclusion was reached in a large Canadian survey by Sloan and Greenway in 1988 (p. 344) "our data support that in most respects, outcomes in mediation are as good, and sometimes better, than what occurs in the strictly legal process and, the same data undermine the concern of the critics of this approach."

If in fact the end results of mediation show little difference between mediation and other forms of dispute resolution, either the assumptions are false, or something occurs in mediation to offset these gender power imbalances, or perhaps the culturally inherent power imbalances also exist in all other forms of dispute resolution. Another explanation is that couples who self-select for mediation may have more egalitarian relationships.

Neumann (1992) suggests that the person with the most power in the room is the mediator and if that person is aware of the gender issues, power can be balanced effectively by the mediator alone.

If the power imbalances described in the literature exist then it seems logical that they are also endemic in all forms of conflict resolution since lawyers and judges are part of the culture as well. Mediation, in fact, may fare better in this area than forums where decisions are made by third parties since mediation is generally a process of empowering the clients to deal with their own problems, which, in itself may assist power balancing.

The law can go a long way to balancing gender. The Family Relations Act, R.S.B.C. 1979, C .21 and the Divorce Act , R.S.C. 1985 C.3, together with the case law, require an equalization or redistribution of wealth, meaning that the power of having most of the assets is effectively cancelled.

Other factors not directly related to mediation may also have an impact. Neumann (1992) suggests that psychological factors relating to the divorce may actually be used to help balance power. “Divorce creates a breakdown in the usual personality defences. Clients’ increased vulnerability allows the mediator to effectively use her or his power to strategically intervene in the power dynamics between them” (p. 236). Also, in spite of gender power differences, other forms of power may have more significance during a divorce. The spouse wanting out of the relationship more may have more power than the other or less power due to guilt over an affair.

Although the empirical data reduces the credibility of arguments suggesting gender related power imbalances, (in the sense that they assume that unfair agreements

will result), the issue of gender in power balancing almost certainly has some impact and it will be valuable to examine the attitudes of mediators in the province towards these issues.

Mediator Training and Certification

The area of mediator training and certification is subject to considerable debate. In British Columbia the field is unregulated except for lawyer mediators, who must be certified by the Law Society of British Columbia. To qualify, family law mediators must be members of the Law Society of British Columbia (in other words, licensed to practice law in this province), have a minimum of three years experience in family law and take a forty hour course specifically related to family law mediation. Some mediators also have additional training in counselling, social work, nursing, teaching, sociology and psychology; the survey will shed some light on how many mediators have such additional training. In any event, for lawyer mediators the combination of minimum requirements mean that ten years post-secondary training, education and experience are required

A survey of lawyer mediators was done in British Columbia in 1991 by Sloan and Campbell and found that in B.C. (1) mediators are evenly gender balanced; (2) they tend to practice in small firms (less than five lawyers); (3) only 38 percent have mediated more than ten cases; (4) that an estimated 4,500 family law mediations had occurred in British Columbia up to that time; (5) 79 percent of mediators were satisfied

with the mediator training course. In addition, the study showed that mediators desire more training concerning managing the emotional climate in mediation and training to deal with balancing power disproportions, and improving communication skills between the spouses. Since mediation is a rapidly growing field, part of the present survey will be addressed to updating this data and adding to it.

Some research suggests extensive training for mediators may not be required. Bautz and Hill (1989), in their study, used volunteer mediators who had taken a one week course and achieved results similar to professional lawyer mediators or therapist mediators

Other research, however, suggests that much more extensive training may be required. Taylor (1994) suggests four foundations for training. (1) Mediation, conflict resolution, and negotiation processes. (2) Legal and financial knowledge and processes. (3) Adult, child and family development (historical, normal and assessment). (4) Helping professional skills (communications, interviewing, referral, case management, collaboration with other professionals, and strategic case planning).

Taylor (1994) also says that a forty hour course such as required by the Law Society of British Columbia is inadequate to produce true competency. She also believes that any short term courses may carry the additional risk of creating a false sense of competency. She postulates that lawyers lack information and skill in human development and counselling skills and therapists lack skills in law, negotiation and

conflict resolution theory. She strongly recommends training include supervision with a more experienced mediator and that proof of competency be demonstrated before mediators hold themselves out to the public as mediators.

In a study done by Neilson (1994), mediators and lawyers in London, England were surveyed to determine their attitudes toward education and training. Most mediators recommended more specialised education and training for new mediators of up to one year full time graduate level training. Interestingly, however, the vast majority of mediators considered personal characteristics more important than acquisition of specialised knowledge or procedural conflict resolution skills (p. 171).

Most of the literature in this area is consistent in promoting the idea that mediation is very complicated and much more training should be required.

As with any newly emerging field, at some point the issue of who should be doing it arises with the complication that many people are already doing it and the idea of increasing the required qualifications, usually involving time and expense, tends to be unpopular. Notwithstanding this, however, it seems that the general consensus of the literature in the field is that the time has come to upgrade and standardize qualifications for mediators.

Mediator Style

There are generally two groups practising mediation, those who have a legal background and those who have a therapy or counselling background. Marlow (1987)

postulates that the lawyer mediators tend to be more directive, more formal, and more reliant on accurate legal information and procedure. Marlow's metaphor for this group of mediators is that of a ship's captain where the couple has determined the destination. The captain's job is to get them there, set the ship in motion, and plot its speed and course. This type of mediator believes that mediation will not get under way without the direction and guidance of the mediator.

On the other hand are the therapist mediators who view the mediation as a interpersonal matter, not a legal dispute. Marlow suggests these mediators believe it is essential to understand the emotional component between the spouses. From this perspective, couples get stuck not because of lack of information, but rather they are overwhelmed by hurt, fear, disappointment and other emotions. The metaphor he uses for such couples is a toy ship floating down a river with the mediator as a helpful person walking alongside, aiding only when the ship is overturned or hits a rock or rough water. This approach is much less interventionist.

A level of mediator directiveness is described by Moore (1987) and can be used in the survey to test whether or not family law mediators (all lawyers) tend to be more directive as Marlow predicts.

Maxwell (1992) postulates a difference in style between male mediators and female mediators. In a study of 724 mediated cases for the Cleveland prosecutor mediator program, he reported the initial outcome of mediation by mediator gender as

follows: Males had an 80.9% settlement rate and females had an 86.6% settlement rate with an overall settlement rate of 82.7%.

This study also showed that agreements mediated by female mediators tended to have higher compliance rates (79.2%) than those agreements mediated by male mediators (64.5%). Apart from the suggestion that men and women inherently use a different style, the precise reason for these differences remains unknown.

Issues in Mediation

This area can be divided into two general categories, the first being whether single or multiple issues affect outcomes, and the second being to what extent does the type of issue affect the outcome.

Number of issues

At first blush it would be easy to assume that more issues would result in more complexity and therefore make the matter more difficult to resolve. One study, however, conducted by Whiting (1992), indicates an opposing point of view. Whiting studied 296 cases and, using interviews and a coding technique to determine whether the mediation was a single or multiple issue, tracked the success rates. Success was defined as a written agreement that was complied with. He discovered that single issue cases failed to produce an agreement 15 percent of the time and multiple issue cases failed to produce an agreement 31 percent of the time. Where an agreement was made the compliance failure rate was found to be 18 percent in single issue cases and only 3

percent in multiple issue cases. When he combined the no agreement and non-compliance rate together, the failure rate for single issue disputes was 43 percent and for multiple issue disputes only 18 percent. These are substantial differences and rather surprising results. In other words, single issue cases seemed to be more difficult to resolve and had lower compliance rates. The explanation for this interesting result was that single issue conflicts (for example disputes over money for services rendered) put people into a situation of simple win lose. If one person gets more the other person gets less. More issues seem to allow for more creative bargaining or trading off a win in one part of a dispute for a loss in another part to result in a net win for both parties.

Types of Issues

In addition to the number of issues brought to a dispute, the nature of the issues also effects outcome (Donohue, Lyles, Rogers 1989). Wehr (1989), cited in Donohue, Lyles, Rogers (1989) identifies four general types of issues.

1. Facts based, or disagreement about the truth or falsity of some perception, judgement, or the experience or non-existence of some phenomena or event.
2. Values based, or disagreement about prescriptions related to policies, relationships, or some other source of conflict.
3. Interest based, or disagreement over wants and the distribution of resources, such as power, privilege, rewards, and so on.

4. Nonrealistic issues, or disagreements originating elsewhere than in these substantive categories, including interaction style, quality of communication, or aspects of the immediate physical setting such as discomfort.

Using this form of issue typology a dispute over the value of the matrimonial home would be facts based, a dispute about suitability of parents for custody and access would be values based, disputes over maintenance would be interest based and deep seated emotional issues about the relationship itself would be nonrealistic.

Donohue, Lyles, and Rogers (1989) studied twenty divorcing couples, ten where agreement was reached and ten where it was not to determine the extent to which issues effected the outcome. Using a coding procedure based on the uninterrupted talking time of the couples they found that:

- (a) the "non-agreement" mediators often chose to process factual disputes without probing deeper into the relational problems underlying these ostensibly factual disputes.
- (b) couples dealing with factual/interest issues were more likely to reach agreement;
- (c) if mediators failed to deal with emotional or relational issues as the mediation progressed they were less likely to reach an agreement;

- (d) letting couples go to see how they interact, particularly with high conflict couples was compared to letting a runaway freight train go making it difficult or impossible to stop.

The general conclusion of the study was that relational issues are more likely to dominate in deadlocked mediation sessions, whereas factual or interest issues are more likely to dominate agreement centred mediations. This is consistent with practical experience, at least to the degree that facts based issues seem to resolve very quickly and if a mediation is destined to terminate or fail during the process it is usually blocked by highly charged emotional states such as anger, fear, blame, etc.

Factors that Influence Outcomes

Several studies have attempted to categorize the factors that influence outcomes in mediation, (Irving & Benjamin 1992); (Tan 1988); (Camplair & Stolberg 1990); and (Mathis & Yingling 1990). The descriptive study by Irving & Benjamin seems the most useful to this study. They divided the factors into (1) sociodemographics; (2) marital relationship; (3) children; (4) parenting; (5) stress; (6) mediation.

1. Sociodemographic factors of clients include age, education, income, person initiating separation, time separated before mediation.

2. Marital relation factors include growing apart, life style differences, spousal emotionality, marital conflict, sexual difficulties, handling money.
3. Children factors included number of children, residential parent, child's level of coping.
4. Parenting factors included parenting ability, discipline, supervision, verbal abuse, kidnapping.
5. Stress factors included financial strain, depression and hostility.
6. Mediation factors include involvement in therapy, previous mediations and previous court applications.

In addition to these the mediation process itself was considered with such factors as the number of sessions, length of the sessions and amount of caucusing. The mediation process was also studied including the amount of active listening, clarifying positions, providing support, exploration of options, reframing, history taking, facilitating communication, providing information, confronting or encouraging the commitment to mediation and factors surrounding termination.

In this study information was gathered from clients and mediators at several points during the mediation and after six months. One hundred and forty-four couples provided usable data and descriptive and interactive effects were explored with a view to predicting agreement and mediation types.

The interactive affects were most interesting and the results (p. 45) will provide comparable information to the proposed survey. A profile emerged of couples most likely to reach agreement and selected examples were that agreeing couples tended to have been married longer, had lower levels of anger, had no new relationship, had not previously been to court, had received some counselling prior to doing mediation and co-operated with the process; when compared to non-agreeing couples.

The mediators surveyed had different perceptions than the clients, for example, the mediators tended to note positive changes in the client behaviour and fewer problems with the service delivery than did the clients and interestingly the clients noted a much lower success rate than did the mediators.

Tan (1988) developed a family mediation assessment instrument and developed seven questions for mediators to ask which included client's level of commitment to the mediation, client's social or psychological readiness for mediation, client's values, compatibility, client's understanding of the mediation process, client skills for mediation, client manageability of the conflict. In this study, the assessment instrument was used to screen out couples unsuitable for mediation and to highlight specific problems and issues that needed to be addressed in the mediation process.

Summary

Primarily due to the fact that mediation is a newly emerging field, there is only a ten or fifteen year history of mediation research, with the most significant research

occurring in the last ten years. Almost all of it is American, which makes its generalizability to Canada limited due to our different divorce laws. The results, however, are quite consistent. Even in cases of mandatory mediation (Saposnek, 1984) the data supports mediation as a positive alternative to the traditional adversarial method of divorce.

Some of the research may actually reflect not so much that mediation is so good, but that the traditional adversarial system is so bad that virtually anything looks good in comparison. Dissatisfaction with the legal system and legal fees was evident in a number of studies (Pearson, 1982; Devlin, 1986; and Kelly, 1987), as well as lack of satisfaction with lawyers and a lack of satisfaction with the legal process.

The literature suggests that mediation can save money for individuals and society, and if some of the studies resulted in changes to the system, the economic impact would be enormous (Evarts, 1988).

A fact which is not generally known to the public, but is of importance is that court orders, particularly in family cases, are often not complied with. The resulting trauma to the intended recipient of payments not made can be extreme, particularly when no other source of funds is available. As many are forced to ask for welfare, the cost to society is also high. For this reason, the high compliance patterns in mediated agreements are particularly interesting to lawyers. In the Bautz & Hill, (1989) study, for example, 97 percent of mediated spouses made their payments, versus 63 percent

for traditional litigated couples. This is also reported in large scale studies, such as the Denver Custody Mediation Project (Pearson & Thoennes, 1982 and 1984).

Relitigation was less frequent in mediated cases than in non-mediated cases (Sprenkle, 1983 and Saposnek, 1984).

One of the strongest and most consistent results in mediation studies was high user satisfaction as compared to litigation. 60 to 90 percent of mediation clients report being somewhat to very satisfied compared to 44 to 59 percent of adversarial subjects (Bahr, 1981a; Pearson, 1982, 1984; Sprenkle, 1983; Saposnek, 1984; Kelly, 1987).

The limitations of the research, apart from the jurisdictional problems include small numbers of subjects in many studies, specialised situations that are difficult to generalize, non-random assignment and unmatched samples. Mediation research is inherently difficult due to its nature, and low rates of return on questionnaires involving clients are the norm rather than the exception.

CHAPTER 3

METHOD

General Procedure

A covering letter (Appendix A), instructions for completion (Appendix B), and the survey instrument itself (Appendix C), together with a return envelope were mailed July 12, 1995 to all 327 family law mediators currently certified by the Law Society of

British Columbia. They were asked to complete Part A if they had completed fewer than three family law mediations and Parts A and B if they had completed more than three family law mediations. They were asked to return the survey in the self-addressed envelope enclosed or fax it to my office. The survey was completely confidential but a coding system was used to track those who had responded for the purposes of follow-up. After the ten day time period had elapsed, all of the non-respondents were phoned and reminded to return the survey. In spite of the fact that the survey was done during the summer months, 85 mediators responded for a return rate of 25.99%. Based on discussions during the follow-up calls, the timing of the survey in the summer and its length, for those who had to complete both parts, were factors that affected the return rate.

Time Frame

The survey was designed as a one-time measure of current attitudes and opinions of practising family law mediators.

Geographic Area

The survey was province wide. There are 327 practising mediators certified by the Law Society throughout the province and they are more or less scattered in large and small centres and in rural and urban communities. One of the questions in the survey was designed to determine whether or not the respondent sample was from all geographic areas. Since the population of the province is concentrated in the lower

mainland and lower island areas, most of the responses were anticipated from these areas.

Sample Size and Group

100% of the 327 family law mediators currently practising and currently certified by the Law Society of British Columbia were sent the survey. Only two surveys were returned as undeliverable and neither mediator could be located.

Survey Instrument

The survey (Appendix C) used primarily closed end questions and simple Likert scales for simplicity of completion and analysis. The survey was divided into five major groups of questions.

- I) Group one deals with background, training and experience.
- II) Group two deals with issues in mediation.
- III) Group three concerns factors that influence outcome.
- IV) Group four deals with gender issues in mediation; and
- V) Group five deals with issues relating to the balancing of power in mediation.

The main purpose of the instrument was to collect data for a broad descriptive analysis relating to the research questions. The instrument was not designed to require sophisticated statistical analysis and in most cases simple percentages expressed graphs or tables will be used to illustrate the descriptive analysis. While the survey instrument

was rather long and required considerable thought, virtually all of the returned surveys were correctly completed and, in a large percentage of the cases, the respondents took time to respond to the subjective questions, sometimes filling the space allotted and in some cases even enclosing notes or letters.

Group I - Mediator Background Training and Experience

The objective of Group I questions was to obtain basic information about mediator practice size, location, experience, training, and attitudes towards further education. Questions one and two relate to practice size and geographic area and were included to determine how the respondent mediator population was distributed throughout the Province. Question 3 asks the gender of the mediator. Questions 4 through 8 have five point groupings designed to identify the general experience of the mediator and focused on time spent, number of cases and hours devoted to mediation each month.

Questions 9 and 10 were used to measure mediator attitudes towards existing qualification standards and additional training.

Question 11 was designed to measure mediators' willingness to proceed with mediation when faced with difficult fact situations.

Questions 12 through 17 were restricted to those mediators who had done more than three family law mediations (hereinafter referred to as "experienced mediators"). Question 12 dealt with success rates and question 12.2 was designed to

determine the average number of sessions required to complete a successful mediation.

Question 12.3 was a replication of a scale developed by Moore, (1987) which was designed to give some idea of the level of directiveness lawyer mediators use in mediation. That question was scaled from (a) through (h) representing higher to lower levels of directiveness.

Group II - Issues in Mediation

Question 13 was designed to determine whether mediators believe single or multiple issues are most difficult to resolve in mediation and the purpose of this question was to compare it to existing research showing single issue mediations are more difficult. Question 14 allowed for the mediators to choose the least to most difficult of a series of ten common issues in mediation. They were asked to rank their choices by putting a 1, 2 or 3 in the appropriate box. In order to provide some explanation for their choices, they were asked in Questions 14.2 and 14.3 to explain why they made their choices. Virtually all lawyers provided an explanation, greatly assisting the analysis.

Group III - Factors that Influence Outcome

Question 15 listed 35 factors that could influence outcome in a mediation and the respondents were asked to rate its level of importance on a simple Likert scale. The purpose of the question was to determine the level of importance of the various factors and rank them in some form of order from most to least important.

Group IV - Gender Issues in Mediation

Question 16 was comprised of 18 statements that mediators were asked to rank on a Likert scale from strongly disagree to strongly agree. Statements 1, 3, 6, 13 and 17 were statements that tend to indicate gender is not a factor in mediation. Statements 2, 8, 11, 12 and 18 were statements that tend to indicate mediation in some way benefits men. Statements 4, 5, 7, 10 and 15 were statements which indicate mediation in some way tends to benefit women and statements 9, 14 and 16 related to statements concerning the impact of the gender of the mediator. The overall objective of the question was to determine whether mediators believe mediation is a process that is affected by gender. Part 19 of the question asked for subjective or anecdotal information about whether or not mediators thought mediation was gender neutral. Almost all mediators provided a response and many wrote explanations. The subjective and anecdotal responses were extremely useful in my descriptive analysis of the results.

Group V - Issues Relating to the Balancing of Power

In this question 16 forms of power were listed and the respondents were asked to rank the three least difficult and three most difficult and then explain the reasons for their choices. The general purpose was to identify the issues most frequently reported to be most difficult and those frequently reported to be least difficult for the purposes of discussion and comparison to existing research and articles in mediation.

CHAPTER 4

Results of the Survey

A total of 85 mediators responded to the survey either by fax or mail. The respondents were fairly evenly divided into those who returned only Part A (44) who were mediators having completed fewer than three family mediations, and those who returned Part A and B (41) who were mediators having completed more than three family law mediations. Part B was much more extensive and covered areas designed for more experienced mediators. This was done due to the fact that previous surveys (Sloan, 1991) and the results of the pre-test had indicated that many mediators who were qualified actually do little or no mediation. The respondents were also fairly evenly divided between men (23) and women (21) who returned Part A, and men (24) and women (17) who returned Parts A and B.

Results of Part A

Part A consisted of eleven questions designed for all mediators, the purpose of which was to provide a detailed profile of mediators in the Province including practice size, geographic location, gender, portion of practice time and volume devoted to mediation, experience and training. Additional questions were asked about Law

Society qualifications and questions were asked concerning mediator attitudes towards additional training and experience. The final question in Part A, number 11 was designed to determine what type of mediation fact patterns mediators would be willing to proceed with faced with difficult fact situations.

Questions concerning background, training, qualifications and experience.

1. Please indicate your practice size: N = 84

1.1	Sole practitioner	38.00%
1.2	1 to 5 lawyers	30.95%
1.3	6 to 10 lawyers	13.09%
1.4	11 to 15 lawyers	9.50%
1.5	Over 16 lawyers	8.30%

2. Tell us about your geographic location: N=85

2.1	Rural area	14.10%
2.2	City under 50,000	11.70%
2.3	City from 50,000 - 100,000	17.60%
2.4	City from 100,000 - 250,000	11.70%
2.5	City of 250,000 or more	44.70%

3. Gender: N=85

Male 55.30%

Female 44.70%

4. How many years have you practised as a family law mediator: N=83

4.1	0 - 3 years	50.60%
4.2	4 - 6 years	15.60%
4.3	7 - 9 years	13.25%
4.4	10 - 12 years	15.60%
4.5	Over 12 years	4.80%

5. What percent of your current practice time is spent doing family law mediation? N=83

5.1	0 - 10 percent	80.70%
5.2	10 - 20 percent	8.40%
5.3	20 - 40 percent	3.60%
5.4	40 - 60 percent	4.80%
5.5	Over 60 percent	2.40%

6. Indicate how many family law mediation cases you have done in the last two years: N=83

6.1	0	25.30%
6.2	1 - 3	31.30%
6.3	4 - 6	12.04%
6.4	7 - 12	15.66%
6.5	13 - 20	9.60%
6.6	Over 20	6.02%

7. How many hours of family law mediation or mediation related work have you done in the last month? N=85

7.1	0 - 5 hours	68.20%
7.2	6 - 10 hours	11.90%
7.3	11 - 15 hours	7.90%
7.4	16 - 20 hours	2.30%
7.5	Over 20 hours	9.50%

8. Indicate any additional mediation training you may have, apart from the Law Society mediation certification course: N=85

8.1	No additional courses	47.05%
8.2	Some courses relating to mediation	40.00%
8.3	Undergraduate degree or diploma in the social sciences	9.40%
8.4	masters level degree in social sciences	3.50%
8.5	doctoral level degree in the social sciences	0.00%

9. Do you believe family law mediation should be restricted to lawyers certified by the Law Society as mediators: N=84

Yes	64.28%
No	35.71%

10. Please indicate your attitude toward the following:

10.1 The existing certification standards set by the British Columbia Law Society are adequate: N = 84

Strongly disagree	1.19%
Disagree	36.90%
No opinion	15.47%
Agree	44.04%
Strongly agree	2.38%

10.2 Mediators should pass a competency test: N=84

Strongly disagree	5.95%
Disagree	10.71%
No opinion	14.28%
Agree	64.28%
Strongly agree	4.76%

10.3 Mediators should have additional training in counselling or psychology related to working with couples: N=85

Strongly disagree	9.41%
Disagree	32.94%
No opinion	16.49%
Agree	32.94%
Strongly agree	8.23%

10.4 Mediators should have an articling or training period with a mentor or experienced mediator: N=85

Strongly disagree	5.88%
Disagree	27.05%
No opinion	12.94%
Agree	44.70%
Strongly agree	9.41%

10.5 Mediators should have more training in helping skills such as communication or listening skills: N=85

Strongly disagree	4.30%
Disagree	15.29%
No opinion	15.29%
Agree	55.29%
Strongly agree	9.41%

10.6 Mediators should have more training in mediation, conflict resolution and negotiation theory in general: N=85

Strongly disagree	2.35%
Disagree	15.29%
No opinion	14.11%
Agree	54.10%
Strongly agree	14.11%

10.7 The personality of the mediator is a more significant factor than knowledge, skills or experience: N=85

Strongly disagree	1.70%
Disagree	44.70%
No opinion	16.47%
Agree	27.05%
Strongly agree	10.58%

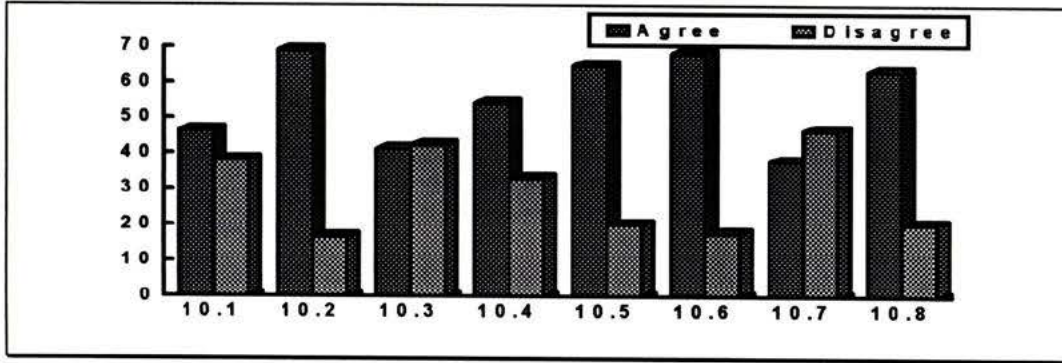
10.8 More training in family law would be an asset to mediators: N=84

Strongly disagree	2.38%
Disagree	17.85%
No opinion	16.66%
Agree	45.23%
Strongly agree	17.85%

FIGURE 1

MEDIATOR ATTITUDES TOWARD TRAINING, QUALIFICATIONS AND EXPERIENCE

% of Mediators



Legend:

- 10.1 The existing certification standards set by the British Columbia Law Society are adequate;
- 10.2 Mediators should pass a competency test;
- 10.3 Mediators should have additional training in counselling or psychology related to working with couples;
- 10.4 Mediators should have an articling or training period with a mentor or experienced mediator;
- 10.5 Mediators should have more training in helping skills such as communication or listening skills;
- 10.6 Mediators should have more training in mediation, conflict resolution and negotiation theory in general;
- 10.7 The personality of the mediator is a more significant factor than knowledge, skills or experience;
- 10.8 More training in family law would be an asset to mediators.
11. **Indicate whether you would proceed with mediation if the initial**

interview revealed the following situations: N=85

Willingness to proceed
Fact Situations

Majority
Opinions

1. Clients have a moderate power imbalance.
2. Clients have a substantial power imbalance.

YES
 NO

3.	There is an allegation by one client of sexual abuse.	NO
4.	There is an allegation by one client of physical abuse.	UNCERTAIN
5.	You suspect one or both clients will not get independent legal advice	YES
6.	Clients are emotionally abusive to one another.	YES
7.	You suspect one of the clients is not fully disclosing assets.	NO

WILLINGNESS TO PROCEED

Figure 2

ALL MEDIATORS

% willing to proceed

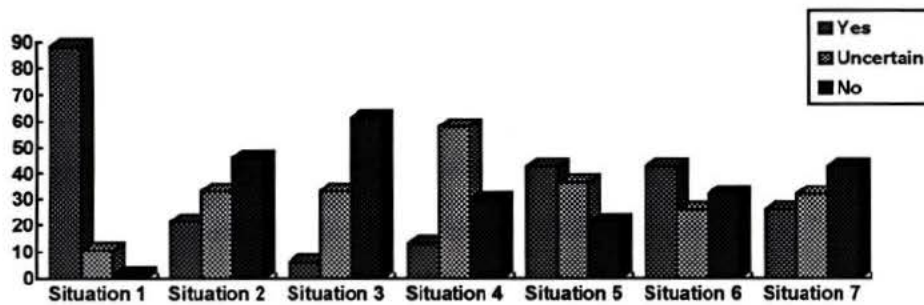


Figure 3

EXPERIENCED MEDIATORS

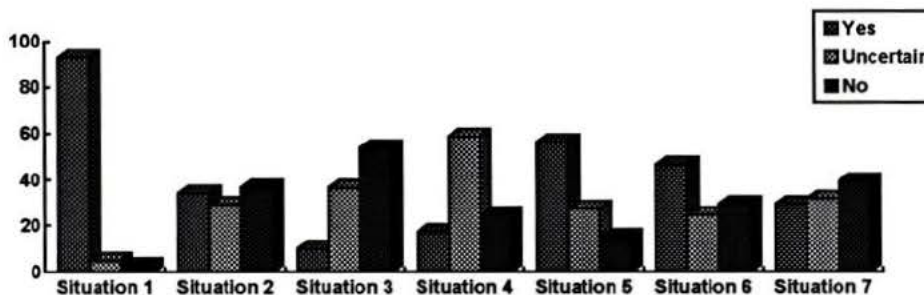
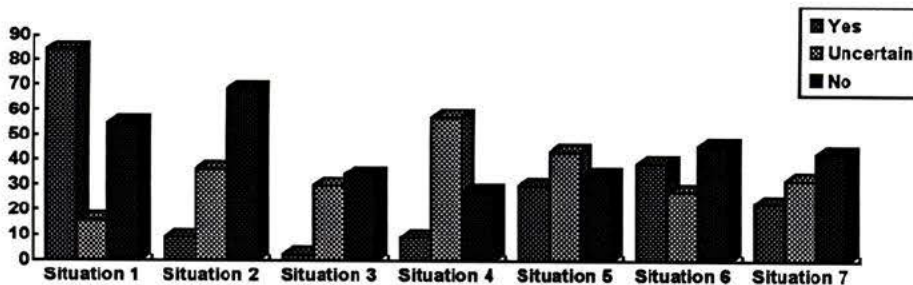


Figure 4
INEXPERIENCED MEDIATORS



Legend

Situation 1	Clients have a moderate power imbalance
Situation 2	Clients have a substantial power imbalance
Situation 3	There is an allegation by one client of sexual abuse
Situation 4	There is an allegation by one client of physical abuse
Situation 5	You suspect one or both clients will not get independent legal advice
Situation 6	Clients are emotionally abusive to one another
Situation 7	You suspect one of the clients is not fully disclosing assets

TABLE 1
COMPARISON OF EXPERIENCED AND INEXPERIENCED
MEDIATORS' RESPONSES

(Scores expressed as percentages of total respondents)

TOTAL EXPERIENCED INEXPERIENCED

	YES	UNC.	NO	YES	UNC.	NO	YES	UNC.	NO
1	88.23	10.58	1.17	92.68	4.87	2.43	84.09	15.90	0
2	21.17	32.94	45.88	34.14	29.26	36.58	9.09	36.36	54.54
3	5.88	32.94	61.17	9.75	36.58	53.65	2.27	29.54	68.18
4	12.94	57.84	29.41	17.07	58.53	24.39	9.09	56.81	34.09
5	42.35	36.47	21.17	56.09	27.26	14.63	29.54	43.18	27.27
6	42.35	25.88	31.76	46.34	24.39	29.26	38.63	27.27	34.09
7	25.88	31.76	42.35	29.26	31.70	39.02	22.72	31.81	45.45

Results of Part B

This portion of the survey was completed by the experienced family law mediators.

1-A Mediator Results TOTAL N=35

12.1 Indicate in percentage terms the number of mediations that:

(a) Have resulted in a signed separation or other agreement or resulted in a consent order

Male Mediators:	72.50%
Overall:	75.38%

(b) Resulted in a substantial narrowing of issues:

Male Mediators:	12.90%
Overall:	9.81%

(c) Resulted in some narrowing of issues:

Male Mediators:	4.95%
Overall:	4.94%

(d) Resulted in termination of the mediation:

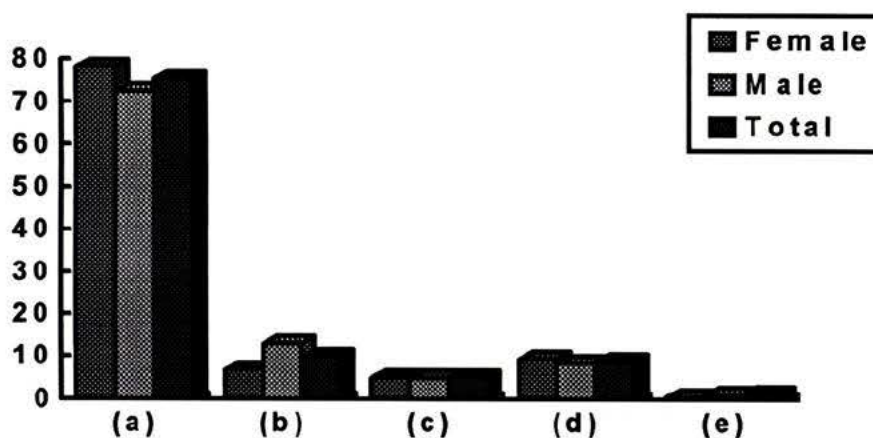
Male Mediators:	8.40%
Overall:	8.86%

(e) Had another result:

Male Mediators:	1.25%
Overall:	1.37%

Figure 5**MEDIATOR RESULTS**

% of Successful Mediations



Legend

- (a) Have resulted in a signed separation or other agreement or resulted in a consent order
- (b) Resulted in a substantial narrowing of issues
- (c) Resulted in some narrowing of issues
- (d) Resulted in termination of the mediation
- (e) Had another result

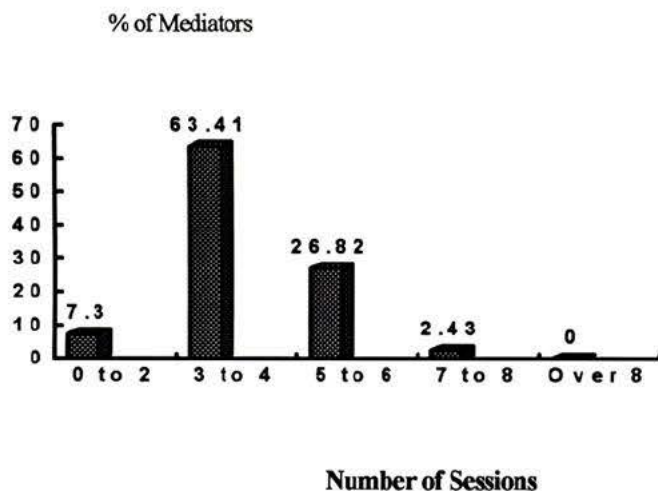
12.2 In those cases where agreement was reached indicate the average number of mediation sessions required: N=41

- | | | |
|-----|----------------|--------|
| (a) | 0 - 2 sessions | 7.30% |
| (b) | 3 - 4 sessions | 63.41% |

(c)	5 - 6 sessions	26.82%
(d)	7 - 8 sessions	2.43%
(e)	Over 8 sessions	0.00%

Figure 6

NUMBER OF SESSIONS REQUIRED



I-B Mediator Style

12.3 Please indicate which most accurately describes your style of mediation:

N=34

(a) I identify the problem and impose a procedural solution:

Female Mediators:	0
Male Mediators	0
Overall:	0

(b) I identify the problem, suggest one procedural solution and push for its adoption:

Female Mediators:	0
-------------------	---

Male Mediators:	0
Overall:	0

(c) I identify the problem, make several suggestions as to procedural options:

Female Mediators:	14.28%
Male Mediators:	15.00%
Overall:	17.64%

(d) I identify the problem, and facilitate problem solving with the clients:

Male Response	30.00%
Overall:	38.23%

(e) I identify the problem, and use Socratic questioning to assist the parties to find a solution:

Male Mediators:	10.00%
Overall:	11.76%

(f) I identify the problems for the clients and let them work out their solution:

Male Mediators:	10.00%
Overall:	05.88%

(g) I question the parties to help them identify the problem and let them work on their own solution:

Male Mediators:	35.00%
Overall:	29.41%

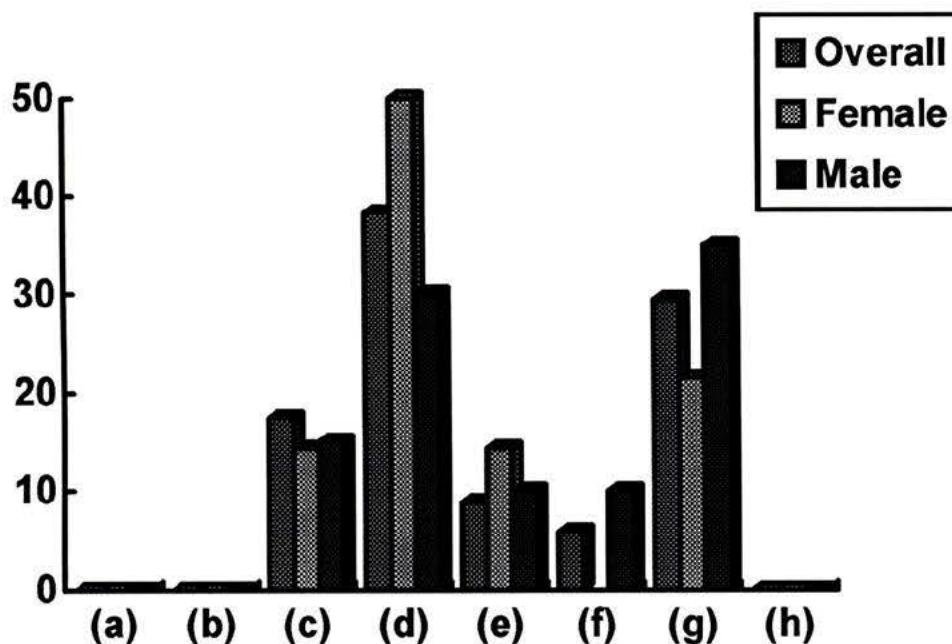
(h) I let the clients work things out on their own:

Male Mediators:	0
Overall	0

Figure 7

MEDIATOR DIRECTIVENESS

% of respondents using this style



High directiveness ----->Low directiveness

Legend:

- (a) I identify the problem and impose a procedural solution;
- (b) I identify the problem, suggest one procedural solution and push for its adoption;
- (c) I identify the problem, make several suggestions as to procedural options;
- (d) I identify the problem, and facilitate problem solving with the clients;
- (e) I identify the problem, and use Socratic questioning to assist the parties to find a solution;
- (f) I identify the problems for the clients and let them work out their own solution;
- (g) I question the parties to help them identify the problem and then let them work on their own solution;
- (h) I let the clients work things out on their own.

II Issues in Mediation N=35

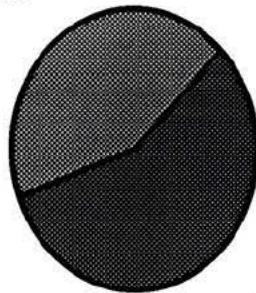
13. Indicate which type of mediation you believe to be most difficult to resolve:

- | | | |
|-----|--|-------|
| (a) | Mediations involving one central issue | 57.2% |
| (b) | Mediations involving multiple issue | 42.8% |

Figure 8

RESOLUTION: LEVEL OF DIFFICULTY WITH SINGLE OR MULTIPLE ISSUES

**Multiple
issues**



**One
Central
Issue**

One Central Issue 57%

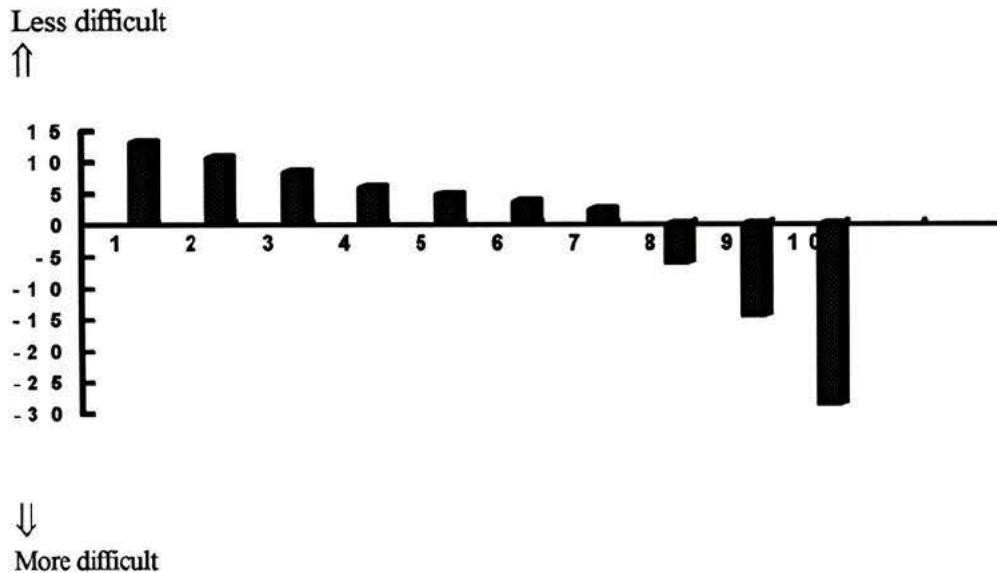
Multiple issues 42.8%

14. Of the issues listed below that could arise in family law mediation, indicate in the appropriate column the three least difficult and the three most difficult issues to resolve.

14.1 In this question the data reported represent the percentage of mediators who ranked the issue either first, second or third in either the least difficult to resolve column or the most difficult to resolve column. They were instructed to make three ranked choices in each. The overall rank of each issue was established by subtracting the most difficult scores from the least difficult scores in order to establish a priority. Accordingly then, rank number 1 indicates that most mediators believed that this issue is the least difficult to resolve and number 10 indicates that most mediators found this the most difficult issue to resolve.

Overall Rank	Issue	Total Number of Mediators ranking this issue least difficult to resolve	Total Number of Mediators ranking this issue most difficult to resolve	Net difference
1	Access	16.66%	3.57%	13.09%
2	Valuation of Assets	11.90%	1.19%	10.71%
3	Disclosure of Assets	10.71%	2.38%	08.33%
4	Child Maintenance	14.28%	8.33%	05.95%
5	Parenting decisions	10.71%	5.95%	04.76%
6	Occupancy of the matrimonial home	09.52%	5.95%	03.57%
7	Payment of Debts	5.95%	3.57%	02.38%
8	Custody	10.71%	16.66%	-5.95%
9	Division of property	8.33%	22.61%	-14.28%
10	Spousal Maintenance	1.19%	29.76%	-28.57%

Figure 9

RESOLUTION: LEVEL OF DIFFICULTY

Legend:

- 1 Access
- 2 Valuation of Assets
- 3 Disclosure of Assets
- 4 Child Maintenance
- 5 Parenting decisions
- 6 Occupancy of the matrimonial home
- 7 Payment of Debts
- 8 Custody
- 9 Division of property
- 10 Spousal Maintenance

14.2 Briefly explain why you chose the three least difficult issues to resolve:

Almost all lawyers provided some explanation of their choices and I have selected the subjective responses which I believe to be most descriptive of the reasons why choices were made. (Responses are reproduced verbatim).

"Generally there is not a problem regarding disclosure of assets unless the parties had a very secretive marriage".

"The resolution for evaluation and disclosure is easy to come by; what would satisfy the other person? The range of options are limited".

"Where the parties have chosen to mediate because they have children, often the child maintenance and parenting decisions are the least difficult. The children are their common ground".

"Disclosure will be required in any event; people know that".

"What is best for the kids, through mediation, they realise (unlike litigation), that it can be a win/win and they are not surprised how close their views are for their kids".

"I don't let clients argue over value - just get the items evaluated independently".

"So far I have not encountered a person in mediation trying to hide assets. Both sides seem to know what the other side has in assets".

"Third party opinion is usually accepted where value not agreed".

"Disclosure of assets just takes explanation".

"Legal principles more closely match middle class Canadian values".

"Very rare to hide assets".

"Clients are willing to recognise children's' connection to the other parent for the most part".

"Evaluation - parties can usually agree on a process to find a value".

"Clients know the child support is payable".

"Clients know access is almost never denied by the Court".

"Clients are usually able to focus on children rather than themselves".

"When all else (agreement) fails, evaluation can always be determined by some independent means (e.g. appraisals)".

"Evaluation of Assets - generally can readily become a neutral issue by involving third parties such as appraisers, if need be".

"Disclosure - I think is generally a non-issue if one is aware of failure to disclose, has the requirements to disclose can be pointed out and presumably if still not full disclosure, mediation would terminate".

14.3 Briefly explain why you chose the three most difficult issues to resolve:

“Men (or the person with the money) can be cheap (wielding of power). Once the child issues are solved, the man usually lightens up. (Women don't realise the power they have over children). That is men feel they will be cut out of lives unless they bankroll the wife”.

“Spousal support really grates on the payer, particularly if the payee initiated the separation”.

“There are no guidelines for spousal or child support so it's hard to give them a framework”.

“Family assets have a wealth of contradictory law regarding division”.

“If parties are deeply divided over custody, it is very difficult to overcome barriers. Frequently differences in parenting styles are due to substantial differences in values or religious beliefs. The other main problem is the highly emotional factors and the easy targets children become in the parents' battles over other issues. Access disputes are often more troublesome than custody”.

“Spousal maintenance is so much all over the map in terms of judicial decisions and peoples' notions of fairness. Also quantum is difficult. There is never enough to go around”.

“Spousal maintenance - generally resented by the paying spouse - quantum often hard to agree on”.

“People resent providing continuing financial support once the reciprocating emotional support has been withdrawn/destroyed”.

“Current state of law regarding reapportionment is confused”.

“Spousal support - law is not clear and men don't want to pay for length of time needed for women to become self-sufficient.”

“Children are used to get back at the spouse”.

“Men hate this (spousal maintenance) obligation and the law is out of sync with middle-class values”.

“Women regard children as part of their own values and cannot accept male legitimacy as a parent”.

“Spousal maintenance is uncertain in law. There is lack of legal guidelines”.

“Custody is very emotional. Issue goes to deeply rooted value systems and view of self”.

“Clearly the most charged issue I have regularly encountered was the amount of spousal support. Various power plays result - need power”.

"Spousal maintenance is often tied to the negative emotions of the break-up. It's hard for the spouses to deal with objectively".

III Factors that May Influence Outcome

N=40

15.1 Below are listed a number of factors involved in mediation. Indicate how important you think the factor is in mediation in general (not any particular mediation) by marking an "x" in the scale to the right of each statement. "Clients" refers to spouses or common-law partners.

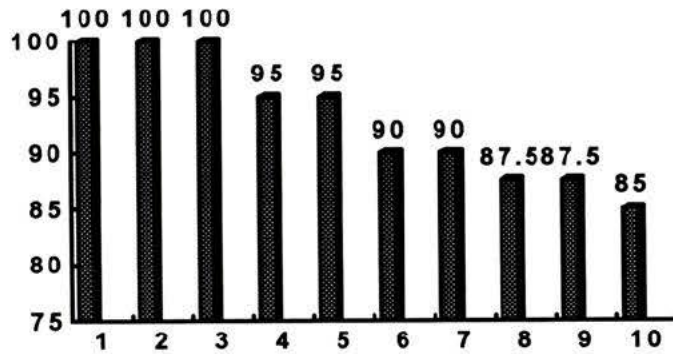
With this data, I have put the scores in percentage terms and ranked the factors by the net score. The net score is the difference between the sum of the very important plus somewhat important scores minus the somewhat unimportant and very unimportant scores, expressed in terms of percentage. Accordingly then, number 1 is the factor that most mediators ranked as either important or very important and number 35 is the factor most often ranked somewhat unimportant or very unimportant.

TABLE 2
TABLE OF OVERALL RANK

Rank	Factor	Net Score**
** (Very important + Somewhat important) - (Somewhat unimportant + Very Unimportant)		
1	Level of commitment of the clients to mediation	100%
2	Level of mental health of the clients	100%
3	Mediator's level of skill	100%
4	Level of trust between the clients	95%
5	Level of hostility of the clients	95%
6	Presence of physical abuse	90%
7	Mediator's level of experience in mediation	90%
8	Influence of third parties on clients	87.5%
9	Level of family functioning	87.5%
10	Willingness of clients to move from positions..	85%
11	Willing to compromise	82.5%
12	Influence of independent legal advice on client	82.5%
13	Presence of addiction	80%
14	Power imbalances	80%
15	Cross cultural influences	67.5%
16	Stage at which mediation occurred	67.5%
17	Court application or other time deadline	62.50%
18	One of the clients being involved in another relationship	57.5%
19	Verbal abilities of the clients	45%
20	Influence of home assessment or parental evaluation	40%
21	Level of intelligence of the clients	37.5%
22	Number of issues to be resolved	20%
23	Whether one or both clients are employed	15%
24	The length of the sessions of mediation	15%
25	The place where mediation occurs;	12.5%
26	Number of years married	10%
27	Level of education of the clients	7.5%
28	Level of income of the clients	5.0%
29	Number of sessions in mediation	0.0%
30	The age of the children	0.0%
31	Gender of the mediator	-20%
32	Number of children	-27.5%
33	Age of the clients in mediation	-37.5%
34	Age of the clients at marriage	-47.5%
35	Whether the clients are married or common-law	-65.0%

Figure 10**TEN MOST SIGNIFICANT FACTORS**

% level of importance

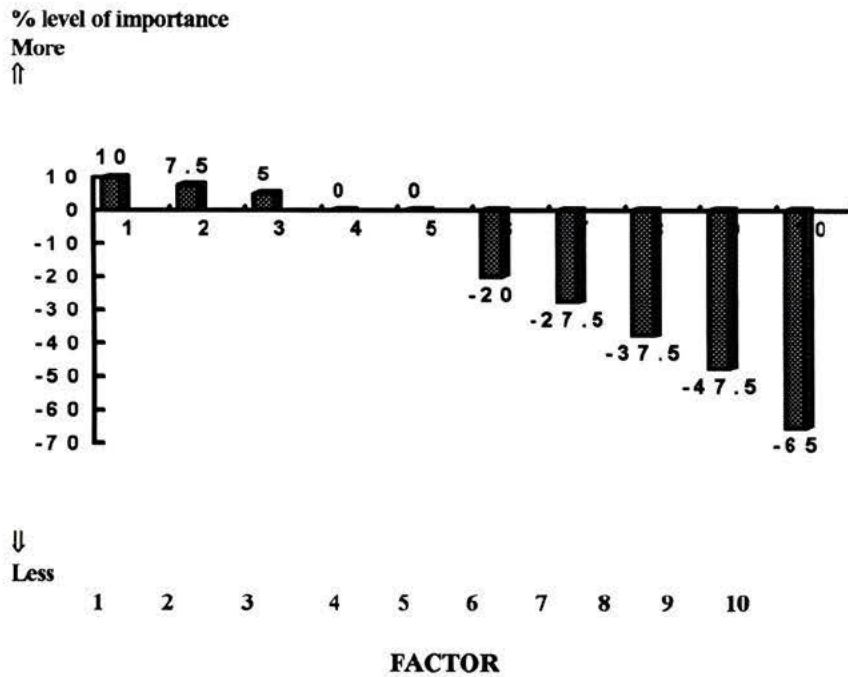
**FACTOR**

Legend:

- 1 Level of Commitment
- 2 Level of Mental Health of the clients
- 3 Mediator's level of skill
- 4 Level of trust between the clients
- 5 Level of hostility of the clients
- 6 Presence of physical abuse
- 7 Mediator's level of experience in mediation
- 8 Influence of third parties on clients
- 9 Level of family functioning
- 10 Willingness of clients to move from positions to interests

Figure 11

TEN LEAST SIGNIFICANT FACTORS



LEGEND:

- 1 Number of years married
- 2 Level of education of the clients
- 3 Level of income of the clients
- 4 Number of sessions in mediation
- 5 The age of the children
- 6 Gender of the mediator
- 7 Number of children
- 8 Age of the clients in mediation
- 9 Age of the clients at marriage
- 10 Whether the clients are married or common-law

IV Gender Issues in Mediation N=41

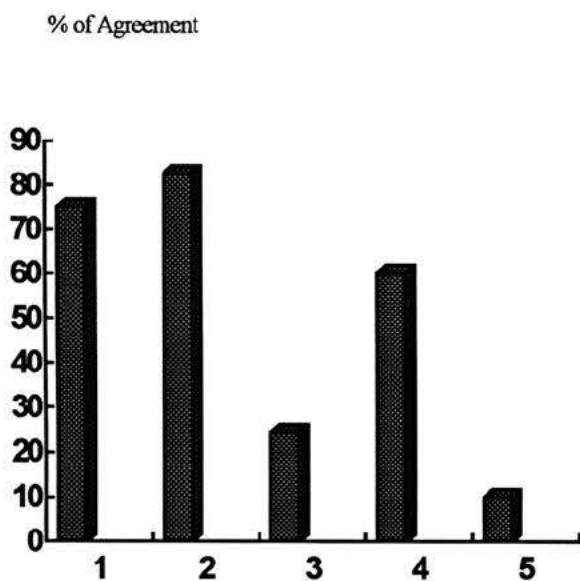
The results of this question are best expressed by dividing the statements into four parts. Part One were those statements tending to indicate gender is not a factor in mediation. Part Two were statements tending to indicate mediation in some way benefits men. Part Three were statements tending to indicate mediation tends to benefit women. Part Four contained statements concerning the gender of the mediator.

Part One: Statements that tend to indicate that mediation is gender neutral:

(Responses are percentages based on level of *agreement* with this statement)

- | | | |
|-----|---|--------|
| 1. | It is possible for mediators to balance power between men and women: | |
| | Agreement | 56% |
| | Strong Agreement | 19.5% |
| | Total: | 75.5% |
| 3. | Power varies from person to person and is not a matter of gender: | |
| | Agreement | 68.2% |
| | Strong Agreement | 14.6% |
| | Total: | 82.80% |
| 6. | Men and women usually have about equal bargaining skills in mediation: | |
| | Agreement | 21.95% |
| | Strong Agreement | 2.4% |
| | Total: | 24.35% |
| 13. | Mediated separation agreements are comparable to separation agreements using lawyer negotiation or litigation in terms of fairness to both genders: | |
| | Agreement | 55% |
| | Strong Agreement | 5% |
| | Total: | 60% |
| 17. | Men and woman of approximately equal personal power tend to be in relationships with one another: | |
| | Agreement | 5% |
| | Strong Agreement | 5% |
| | Total: | 10% |

Figure 12

GENDER TENDS NOT TO BE A FACTOR IN MEDIATION**LEVEL OF AGREEMENT**

Statement

Statement:

- 1) It is possible to balance power between men and women
- 2) Power varies from person to person and is not a matter of gender
- 3) Men and women usually have about equal bargaining skills in mediation
- 4) Mediated separation agreements are comparable to separation agreements using lawyer negotiation or litigation in terms of fairness to both genders
- 5) Men and women of approximately equal personal power tend to be in relationships with one another

Part Two - Statements which tend to indicate mediation in some way benefits men:

(Responses as to the level of *disagreement* with this statement.)

2. In general men have an advantage in mediation because they are more familiar with negotiating:

Strong Disagreement	14.6%
Disagreement	58.53%
Total	73.13%

8. Men have an advantage in mediation because they tend to earn more and have more assets:

Strong Disagreement	7.3%
Disagreement	58.5%
Total	65.80%

11. Men have an advantage in mediation because they are culturally trained to be more competitive than women:

Strong Disagreement	7.5%
Disagreement	75%
Total	82.5%

12. Women are at a disadvantage in mediation because in our culture they tend to be more co-operative than men:

Strong Disagreement	2.5%
Disagreement	55%
Total:	57.5%

18. Men have an advantage in mediation because women attribute men with having more authority:

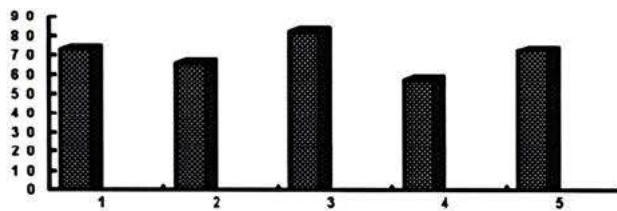
Strong Disagreement	2.5%
Disagreement	70%
Total:	72.5%

Figure 13

MEDIATION TENDS TO BENEFIT MEN

LEVEL OF DISAGREEMENT

% of Disagreement



STATEMENT

Statement:

- 1) In general men have an advantage in mediation because they are more familiar with negotiating
- 2) Men have an advantage in mediation because they tend to earn more and have more assets
- 3) Men have an advantage in mediation because they are culturally trained to be more competitive than women
- 4) Women are at a disadvantage in mediation because in our culture they tend to be more co-operative than men
- 5) Men have an advantage in mediation because women attribute men with having more authority

Part 3 - Statements which indicate that mediation tends to benefit women in some way:

(Responses are percentages based on the level of *disagreement* with this statement)

4. Mediated agreements tend to favour women with respect to property settlements:

Strong Disagreement	7.3%
Disagreement	58.53%
Total:	65.83%

5. Men are at a disadvantage in mediation because they tend to be less comfortable in dealing with strong emotional issues:

Strongly Disagree	2.4%
Disagree	58.53%
Total:	60.93%

7. Women have an advantage in mediation because they tend to be better able to make decisions involving both thoughts and feelings together:

Strongly Disagree	2.4%
Disagree	56.09%
Total:	58.49%

10. Mediation affords women a greater opportunity to express their views than other forms of dispute resolution:

Strongly Disagree	0%
Disagree	12.19%
Total:	12.19%

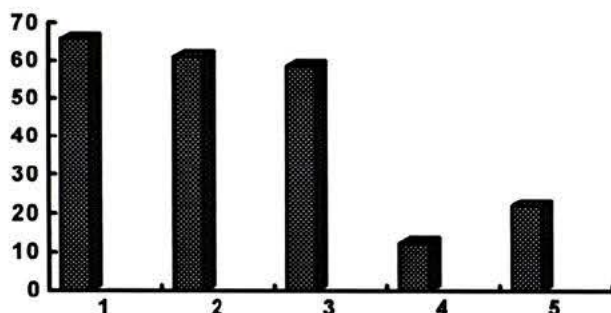
15. Women in general are more satisfied with the mediation process than are men:

Strongly Disagree	0%
Disagree	21.9%
Total:	21.9%

Figure 14

MEDIATION TENDS TO BENEFIT WOMEN**LEVEL OF DISAGREEMENT**

% of Disagreement

**Statement**

Statement:

- 1) Mediated agreements tend to favour women with respect to property settlements
- 2) Men are at a disadvantage in mediation because they tend to be less comfortable in dealing with strong emotional issues
- 3) Women have an advantage in mediation because they tend to be better able to make decisions involving both thoughts and feelings together
- 4) Mediation affords women a greater opportunity to express their views than other forms of dispute resolution
- 5) Women in general are more satisfied with the mediation process than are men

Part 4 - Questions concerning the gender of the mediator:

(All responses included)

9. Male clients are more likely to agree to mediation if there is a male mediator:

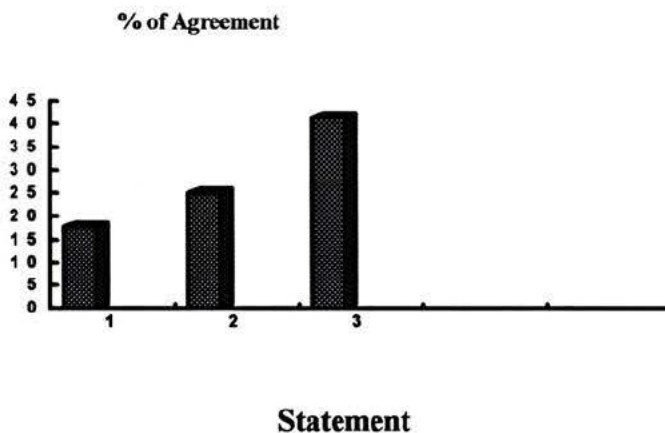
Strongly Disagree	2.4%
Disagree	39.02%
Uncertain	41.46%
Agree	17.73%
Strongly Agree	0%

14. Female clients are more comfortable in mediation if there is a female mediator:
- | | |
|-------------------|-----|
| Strongly Disagree | 0% |
| Disagree | 20% |
| Uncertain | 55% |
| Agree | 25% |
| Strongly Agree | 0% |
16. It makes no difference to the outcome in mediation whether the mediator is male or female:
- | | |
|-------------------|-------|
| Strongly Disagree | 0% |
| Disagree | 9.7% |
| Uncertain | 48.7% |
| Agree | 39.0% |
| Strongly Agree | 2.4% |

Figure 15

GENDER OF THE MEDIATOR

LEVEL OF AGREEMENT



Statement:

- 1) Male clients are more likely to agree to mediation if there is a male mediator
- 2) Female clients are more comfortable in mediation if there is a female mediator
- 3) It makes no difference to the outcome of mediation if the mediator is male or female

16. Do you believe mediation is gender neutral?

Female Mediators:

Yes	41.17%
No	17.64%
Uncertain	13.64%
Cannot or will not generalise	17.64%
No response	5.88%

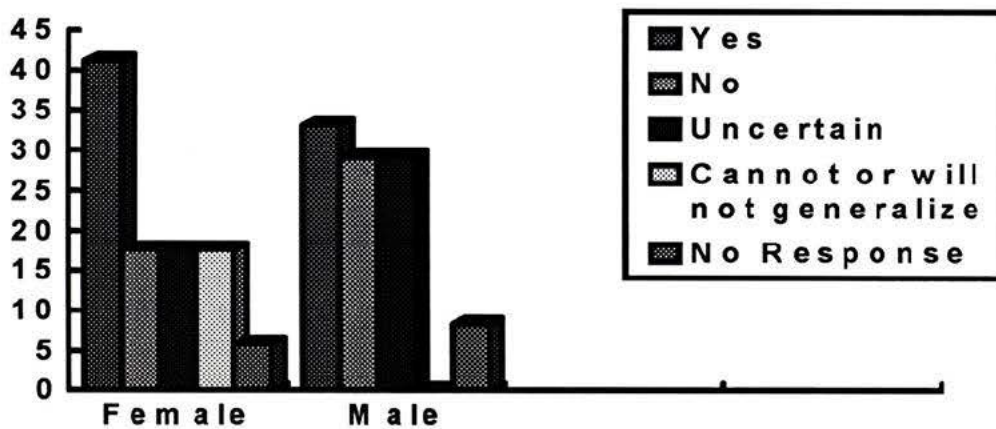
Male Mediators

Yes	33.13%
No	29.16%
Uncertain	29.16%
Cannot or will not generalise	0%
No response	8.33%

Figure 16

(a) Is mediation gender neutral?

% of Agreement



Subjective Responses to Question 19 - "Do you believe mediation is gender neutral?"

"If there is an inequality, it is generally sought by and imposed by the participants themselves".

"I believe neither sex has the advantage in mediation - each sex has a number of advantages, often different ones".

"No human behaviour is gender neutral. Recognise gender differences and deal with them".

"In most cases, no. This is because of traditional roles in the marriage. In a more modern (two working spouses) marriage it is more neutral."

"If not neutral, at least not a decisive factor".

"No - each mediation has some gender issues".

"The gender of the mediator is always a factor. We are not sexless beings".

"It can be if mediation is aware and sensitive".

"No, and it will never be because society's attitudes and general values will never be gender neutral".

"Yes, but women often agree to somewhat less advantageous a settlement in order to meet their interest in a co-operative, quick and affordable solution".

"As much as other forms of dispute resolution".

V. Issues Relating to the Balancing of Power

17. In this question, the results are expressed in terms of overall rank based on the net score. The net score was determined by adding the total of mediators ranking this issue least difficult to power balance and deducting the sum of mediators who ranked the issue as most difficult to balance power. Accordingly, a high positive number indicates that most mediators found this easy to power balance and a high negative number indicates most mediators found this issue hard to power balance.

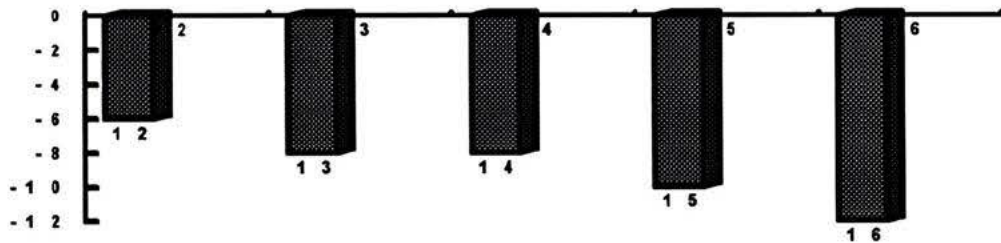
Overall Rank	Factor	Net Score
1	Information	+21
2	Knowledge	+16
3	Income/Assets	+11
4	Education	+8
5	Status or age	+6
6	Ability to display emotions	+2
7	Negotiating skill	-1
8	Neediness	-2
9	Forcefulness	-3
10	Selfishness	-5
11	Personality	-5
12	Ability to make difficult emotional decisions	-6
13	Using the children as bargaining tool	-8
14	Ability to manipulate emotions	-8
15	Assertiveness	-10
16	Self-esteem	-12

Figure 17

FIVE MOST DIFFICULT FORMS OF POWER TO BALANCE

More Difficult

↓



FORM OF POWER

Net Score

Form of Power:

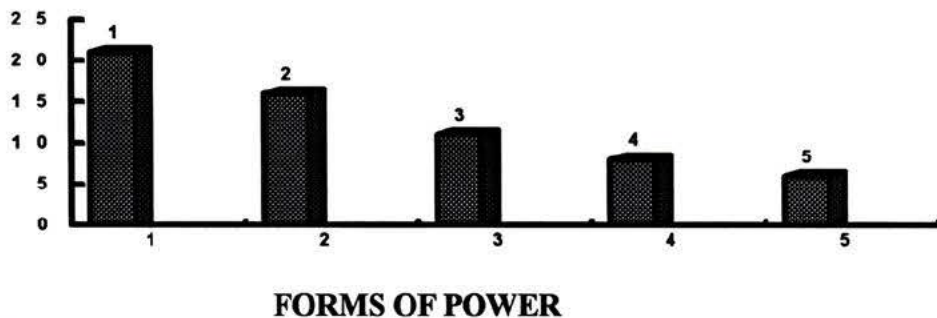
- 12) Ability to make difficult emotional decisions
- 13) Using the children as a bargaining tool
- 14) Ability to manipulate emotions
- 15) Assertiveness
- 16) Self-esteem

Figure 18

FIVE LEAST DIFFICULT FORMS OF POWER TO BALANCE

Least difficult

↑



Net Score

Power:

- 1) Information
- 2) Knowledge
- 3) Income/Assets
- 4) Education
- 5) Status or Age

18. Briefly explain your choices for the most difficult:

"Children as tools - "...parties may accept unfair proposals to ensure relationship with children".

"If children are a bargaining tool, matters have really degenerated".

"Lack of self-esteem has built up over the years and it is difficult to overcome".

"Ability to manipulate emotions - difficult to intervene in an effective and lasting way".

"Self-esteem - poor self-esteem equals victim and is entrenched".

"Assertiveness - arrives out of the rules in the marriage. Usually spouse expects mediator to negotiate for them".

"Self-esteem - mediators are not therapists - or should not be".

"These are matters most personal to the person. It is more difficult to support them in being or acting differently than they would usually act".

"Emotions are the deep pool underneath the thin layer of mediation civility".

"Self-esteem, or confidence or personal power, or lack of it can affect the use of emotional violence a lot".

"Personality and forcefulness is always there. It is difficult to counteract a dominant, forceful personality's influence over the other".

"Using the children as a bargaining tool - this often remains hidden and skews the real issue which is often money."

"Ability to manipulate emotions - Persons who do this are good at it and fighting it takes a lot of energy by the mediator".

"If someone is going to use the children as a bargaining tool, they are not bargaining in good faith"

"Assertiveness - lack of assertiveness may be difficult to detect".

"Self-esteem - it is very difficult to build up a party's self-esteem in a few sessions. This also relates to neediness and ability to make difficult emotional decisions".

"Ability to manipulate emotions - knowing which buttons to push is invaluable to the one who wants to win".

"Using the children as a bargaining tool - lots of fear created - tends to govern dynamic".

"Ability to make difficult emotional decisions - weak client with no ILA very difficult to have commit".

"Ability to manipulate emotions - the control person whose control is covert and not overt".

"Self-esteem - deeply engrained - not amenable to mediation".

"Neediness - powerfully manipulative".

"Assertiveness, forcefulness or self-esteem - I don't know if the client really agrees or is just going along with it".

"Self-esteem - they are usually engrained habits that need real long term therapy to change".

"Self-esteem - these go to deeper personality issues - areas where therapeutic counselling skills are really important and mediation may not be the best choice until some self work is done".

"Self-esteem, negotiating skill and assertiveness - these three powers are integral aspects of the individual. One is mediating with, and although identified by the mediator they are more difficult to address".

"If a person is a control freak, the mediation may simply be a repeat of the relationship".

"Selfishness, ability to manipulate emotions - these factors are personality problems and make resolution of disputes much more difficult".

19. Briefly describe your choices for least difficult:

"Education and knowledge and information can be balanced fairly quickly by proper disclosure".

"Information, income and assets - these go to disclosure which is not too difficult to obtain".

"Part of the mediator's role is to get information and knowledge shared; lawyers can help balance negotiating skills".

"Income and assets - this can be remedied easily with asset division".

"Knowledge - can be 'informed'".

"Information and Knowledge can be provided by the mediator or by independent legal advice".

"Information is part of the mediation process".

"Information can be obtained from many neutral sources".

"Income and Assets are often what is being mediated - one having more than the other as part of the solution".

"Information balancing can be done relatively quickly; so can knowledge".

"Most spouses are willing to inform the other".

"Income and Assets - party with higher income and assets has the greatest risk which helps balance the situation".

CHAPTER 5

SUMMARY AND RECOMMENDATIONS

The overall purpose of the survey was to provide background and contextual data to the mediators of the Province in some aspects of influences on outcome with a view to enhancing their ability to predict outcomes for particular clients in various circumstances. Apart from a small survey (Sloan, 1991) relating to education and training, the type of information provided by this survey has not been available to mediators in this Province, nor for that matter in most of North America. Until now, mediators have had only their own personal experience and possibly that of a few fellow mediators to guide them. The survey was designed to be broad and descriptive and the large amount of data means numerous possible correlations and comparisons could be drawn. I have restricted my summary and discussions to matters relating to the research questions.

1. What are the characteristics of British Columbia family law mediators in terms of geographic location, practice size, practice volume, and gender balance?

From the survey, a profile of mediators can be drawn:

1. Most mediators are sole practitioners or work with fewer than five lawyers;

2. Most practice in a large urban area;
3. There are slightly more male mediators than female;
4. Most mediators have practised less than three years;
5. Most mediators have a mediation practice that comprises less than ten percent of their overall practice.
6. Over half of mediators have done less than three cases in the last two years and spent less than five hours a month in mediation matters.

To give some perspective to these results, Law Society data for the whole legal profession can be used for comparative purposes. The Law Society data is accurate, up-to-date and comprehensive. As far as practice size is concerned, 28.7% of the profession as a whole practice alone and 22.2% practice with a firm of fewer than five lawyers. When comparing this to the mediator data, there is a greater tendency for mediators to practice as sole practitioners or in small firms than the profession as a whole. As far as gender balance is concerned, there are significantly more females in mediation (44.7%) than the legal profession as a whole (27.3%). The number of male and female mediators is almost equal.

With respect to geographic location, the respondent mediators were from all over the Province and came from rural areas and large and small cities with the largest majority (44.7%) coming from larger centres. The Law Society data indicates that

73.3% of lawyers practice in the lower mainland including New Westminster, 8.65% practice in Victoria and 18.05% practice in the rest of the Province. The mediation data indicates 74% of mediators practice in centres with a population over 50,000 and 25.8% practice in the rest of the Province. These data indicate that mediators are distributed within the Province geographically about the same as the general legal profession. These data also confirm that the respondent sample was equally distributed from throughout the Province.

Consistent with the Sloan (1991) survey, mediation tends to be a sideline for most lawyers, comprising of less than 10% of their practice volume and consuming less than five hours per month. 56.6% have done fewer than three mediations in the last two years. Only 2.4% of mediators have mediation as their main area of practice. The Law Society data indicate that mediation and arbitration comprise about 1.2% of total lawyer practice time. Mediation remains a small part of the practice of law, although it seems to be increasing in popularity. Its continuing relatively small impact on the legal profession may be related to the following four factors:

- 1) It is much more difficult work to do, psychologically and emotionally than other areas of law since both parties in conflict attend together.
- 2) It is not well publicized or marketed by the profession or mediators themselves.

- 3) There is some resistance by the profession to a new paradigm or fundamentally different system of conflict resolution that would take away existing business.
- 4) An unshakeable belief in the adversarial system of conflict resolution, notwithstanding that the general public's satisfaction with this process is extremely low. The expense, delay and general indifference to the emotional and psychological aspects of litigation do not seem to loosen the belief in an adversarial system.

Notwithstanding mediation's promise, and notwithstanding that it is spoken well of in most legal circles, its practical impact on the profession ,and therefore the public, remains small.

2. What are the attitudes of mediators towards their qualifications, training and experience?

(a) Do mediators believe mediation should be restricted to lawyers qualified by the Law Society of British Columbia? and

(b) Do mediators believe existing Law Society qualification standards are adequate?

A summary of the data reveals the following:

- 1) Two-thirds of mediators believe mediation should be restricted to lawyers certified by the Law Society;
- 2) 46.42% of mediators believe the existing certification standards set by The Law Society are adequate;
- 3) Two-thirds of the mediators believe a competency test would be appropriate;
- 4) Mediators tend to be evenly split about whether or not additional training in counselling or psychology would be of benefit;
- 5) Most mediators believe that an articling or training period with an experienced mediator would be valuable;
- 6) About two-thirds of mediators believe more training in helping skills such as communication or listening skills would be valuable.
- 7) About two-thirds believe they should have more training in mediation, conflict resolution and negotiation theory in general;
- 8) Mediators tend to disagree with the concept that the mediator's personality is more significant than knowledge, skills or experience.
- 9) Two-thirds of mediators believe more training in family law would be an asset to mediators.

According to Sloan (1991), lawyer mediators in the province are quite satisfied with the existing forty hour course. He suggests “that according to this survey, this course exceeded pre-training expectations. 79% said they were very satisfied with the quality of the training, the remainder saying that the training would have been improved by a variety of specific changes, principally engaging in a practicum”. In this study, 46% believed that the existing qualification required by the Law Society was adequate and 55% either agreed or strongly agreed that mediation should have some form of practicum. According to this research, it seems that although they are satisfied with the training as far as it goes, most mediators think additional training, including a practicum would be useful.

The majority of mediators believe that a competency test would be appropriate, an articling or training period with an experienced mediator would be helpful, more training in helping skills such as communication or listening skills would be valuable and that there should be more training in mediation, conflict resolution, negotiation theory in general, as well as family law. This attitude is consistent with existing literature in the field in the area of research and training of mediators. (Taylor 1994; Neilson 1994; Greeb 1988; and Gentry 1994) Mediators, however, tended to be equivocal about whether or not additional training in counselling or psychology would be of benefit and tended to disagree with the concept that the mediators personality is

more significant than substantive knowledge, skills, or experience. The latter result is inconsistent with Neilson's (1994) research where in London, England the vast majority of mediators considered personal characteristics more important than the acquisition of either substantive knowledge or procedural conflict resolution skills.

It is difficult to speculate why a significant minority of mediators would not want further training, but it may be because they believe experience in the field is more valuable than any type of training. This may be due to the fact that many lawyers believe that the academic training they received in law school seemed to bear little relationship to the skills required in the actual day to day practice of law.

Two-thirds of the mediators believe mediation should be restricted to lawyers certified by the Law Society, which is a result lower than one would expect, given the partisan nature of the respondents. The field is presently unregulated in the sense that anyone can practice mediation and call themselves a mediator, but is regulated for those mediators who are also practising law. The other contenders for territory in the field of mediation are therapists and it may be that one of the reasons that a significant minority (35.71%) of lawyer mediators do not want the restriction, is that they concede that a counselling or therapeutic background may be just as helpful as a legal one. Neilson's (1994) research suggests that there is little evidence that those with particular backgrounds make for better mediators than do others.

Many provinces and states in North America are completely unregulated even as to the lawyer mediators and in this sense British Columbia can be considered to be on the leading edge of the field by at least requiring some training and experience for lawyers in mediation before holding themselves out to the public as mediators. It seems clear most mediators believe more training is required, but it is possible that the amount of training that would be theoretically desirable far exceeds what is available or what is practical considering the time and expense that the additional training would require.

3. What types of selected fact situations should not be mediated?

(a) Does the level of mediator experience make a difference to these decisions?

Mediation is not designed for, nor is it desirable in all cases and this question was designed to test “where the line is drawn” with respect to certain fact situations. It is generally believed that, in cases where there is a substantial power imbalance created by physical or sexual abuse, mediation is impossible, since the negotiation is inherently unbalanced. The difficulty lies in the fact that it is not always clear whether or not such a power imbalance exists or whether or not abuse exists by objective external standards or whether the abuse exists simply in the mind of one of the clients. Few, if any, mediators would attempt mediation with proven physical or sexual abuse.

An allegation abuse of some form, however, is quite common with couples in the process of separating and the difficulty in mediation is to determine the veracity and the degree of severity of such claims. In fact, it may be arguable that at the very least, some psychological and emotional abuse exists in all clients who are separating. To make the questions more realistic and more difficult to make the judgment call, I used the word "allegation" or the phrase "you suspect" . If the questions were framed as a fact, almost all mediators would simply have answered "no". The results showed that most mediators would proceed with a mediation with a moderate power imbalance or if they suspect the client will not get independent legal advice, but in all other cases the majority opinion was that they would not proceed or that they were uncertain. The large percentage of uncertain scores indicates that the questions were difficult to answer in a general way and therefore the results are fairly equivocal. The questions were designed and turned out to be difficult judgement decisions and generalizing, understandably, was difficult for the mediators. The fact that most lawyers would proceed in the situation of a moderate power imbalance or if the clients would not get independent legal advice is probably due to the practical reality that a moderate power imbalance exists in most couples separating and failure to get independent legal advice, from the client's point of view, has more to do with cost than with anything else.

When one compares the responses of the experienced mediators to the inexperienced mediators, an interesting result becomes apparent. In all cases, the

experienced mediators are more likely to proceed with the mediation than the inexperienced mediators. As Figure 2 shows, in a situation of a substantial power imbalance, 34% of the experienced mediators would proceed whereas only 9% of the inexperienced mediators would proceed. Additionally, with the exception of question 4, the experienced mediators were far less uncertain about whether or not they would proceed with a particular situation. A common sense explanation of this is that the more experienced mediators have increased confidence in their skills and are more willing to take on more difficult situations.

Analysis and Discussion of Part B

Part B was filled out only by those mediators who had done more than three mediations in the previous two years (in this study called the experienced mediators), since the answers would have been overly speculative for inexperienced mediators.

1. What percentage of family law mediations performed by a mediator certified by the Law Society of British Columbia result in a successful outcome?

(a) What is the usual number of sessions required to achieve this result?

The definition of a successful outcome in this study was a completed separation or other agreement or consent order, but this definition is arbitrary since it is also useful to have the number of issues in a dispute narrowed for the purposes of future negotiation or litigation. 75.38% of the mediators reported a signed separation or

other agreement with an additional 9.81% reporting a substantial narrowing of issues. If both are added together, 85.19% of mediations could be said to have resulted in a successful outcome.

These results are consistent with other research in the field. Pearson and Thoennes, (1992) reported a 61% agreement overall and Saposnek et al (1984) showed a 75% agreement rate overall. The gender superiority of female mediators was also shown in Maxwell's research (1992) where he reported female mediators settled 86.6% of cases whereas male mediators settled only 80.9%.

Mediators reported that the most common number of sessions is either three to four with few mediations exceeding seven sessions or fewer than two sessions. Ninety per cent of the cases where agreement was reached involved less than six sessions which is consistent with other research that mediation takes less time than lawyer negotiated or litigated results. (Pearson and Thonnes, 1982). Since the average waiting time for a trial in British Columbia can be as long as two years, this increased speed of resolution is significant. Since the length of the sessions nor the time between them was specified, how much less time this involves remains unknown and further research would likely shed some light about the average resolution time in this Province.

5. What is the level of directiveness for family law mediators in this Province?

The scale of mediator directiveness was developed by Moore, (1987), with statement (h) being at the low end of directiveness and statement (a) being at the high end. The results of this survey are represented in Figure 7.

Most mediators either were grouped in style (d) with almost as many in style (g). Moore's research indicated that therapist mediators tended to be at the low end of directiveness and lawyer mediators tended to be more at the high end, however, this study produces equivocal results. About one-third of the mediators questioned the parties and helped them identify the problems and then let them work out their own solution and 38% identified the problem for them and facilitated problem solving with the clients. The principal difference lies in who decides what the problem is, which obviously directs the options for solution. This indicates two styles in general use, one being somewhat more directive than the other. No lawyers let the client simply work things out on their own, nor did any impose or suggest one procedural solution.

As to the matter of the gender of the mediator, the most significant difference is that the female mediators tended to be somewhat more directive in the sense that half of them chose (d) as the statement that most accurately represents their style of mediation. This may assist in explaining their superior results, both in Maxwell's research and in this study. Other researchers such as Kochan and Jick (1978) have

suggested that more directive mediators are more likely than less directive mediators to be effective in getting movement on issues.

6. Which family law issues do family law mediators believe are the most and least difficult to resolve?

(a) Are mediations with one central issue more difficult to resolve than mediations involving multiple issues?

In question 14 of the survey, the respondents were asked to rank their choices for the least and most difficult issues to resolve in mediation and to make this choice more clear I have chosen to rank the results by adding the sum of how many times a particular issue was chosen as least difficult and deducted the number of times it was ranked most difficult to obtain the net number of responses one way or the other. In this fashion, some idea as to the general consensus can be determined and combined with the subjective or anecdotal responses some sense can be made of the rankings.

Using this system, it can be seen in Figure 9 that access was the most frequently chosen factor that is least difficult to resolve and spousal maintenance is the factor most frequently chosen as most difficult to resolve. Since the data towards the centre can be considered to be fairly equivocal, the level of certainty is higher for the

top three and bottom three in the ranking and I will only discuss these. The top three in terms of being most difficult to resolve are spousal maintenance, division of property and child maintenance. The least difficult to resolve are access, valuation of assets and disclosure of assets. When one looks at the anecdotal or subjective comments, some of the reasons for these choices become more clear. Access is not particularly difficult, since few parents would deny that contact with the other parent is detrimental and they are willing to deal with the difficulties of contact with their spouse in order to benefit their children in this way. Disclosure of assets can be done by requirement of law and in many mediations, the disclosure is voluntary in any event. Only in the most secretive of marriages are assets unknown to one another. With respect to the valuation of assets, this can be determined by third party appraisers and in fact is commonly done. It is pointless to have a disagreement over valuation when a simple solution of outside evaluation is available.

With respect to the most difficult issues to resolve, spousal maintenance was considered the most difficult, probably due to the fact that Canadian middle class values do not highly support one adult being taken care of by another. The cases are often inconsistent with statutory legislation in this area. The amounts of spousal maintenance, even in situations where it is appropriate, vary wildly in the case law. With respect to division of property, the law is fairly clear on most aspects of this and in long term marriages where the assets were accumulated during the marriage, it is

usually divided more or less equally. Custody is also described as a difficult issue to resolve since parents can enter into a power struggle about “winning” the children and the custody issue often has a great deal to do with letting go of power and not what is in the best interests of the children. It is very difficult for parents to separate what is in their best interests and what is in the best interests of the children, even in situations where to an outside observer it is quite obvious. Not getting custody is often equated to losing and stirs up much resentment.

The results of question 13 indicate that 57% of the mediators believe that mediations involving one central issue are most difficult to resolve and 42.8% indicated mediations involving multiple issues are most difficult to resolve. These findings are consistent with Whiting's (1992) research suggesting single issue mediations produced higher failure rates than multiple issue mediations. Whiting found that with multiple issue cases, 75% of the disputants reported a win/win outcome, while only 29.55% of disputants in single issue cases reported a win/win outcome. The generally accepted theory of why single issue mediations are more difficult than multiple issue mediations is that it is more difficult to introduce trade-offs or generate multiple options with single issue mediations. There simply are fewer choices in single issue mediations and they are more likely to produce win/lose type results.

7. What do family law mediators believe are the most important influences on the outcome of family law mediation?

This question was divided into 35 factors, either known or suspected to be important in mediation. In order to make some sense of this data and to make it more comprehensible, I have chosen to rank the factors in a manner similar to question 14.

If we examine the top ten factors that the mediators ranked as very important or somewhat important, the client's level of commitment, level of mental health and level of hostility are highly important factors. Also figuring highly are the mediator's level of skill, and level of experience. Not surprisingly, physical abuse is an important factor, as is the influence of third parties, such as friends and relatives together with the level of family functioning. Two of the factors relate to mediator skill and experience, but eight out of the ten have more to do with the interpersonal relationship of the clients. This is where increased training in counselling and couples work would be extremely valuable and may help explain why a third of lawyers feel that mediation should not be restricted to lawyer mediators. Obviously since the most significant factors involve the interpersonal psychology of the clients, therapeutic training or background is an important asset. Interestingly, the willingness of the clients to compromise (move from positions to interests) is the least significant of the top ten. These results also point to future research in determining with more quantifiable

accuracy which clients will do well in mediation. For example, if a scale could be developed which measured the level of hostility between the clients with some accuracy this would assist lawyers in weeding out those clients not suited to mediation. These results also indicate that the clients' level of commitment to the process is critical and must be established for it to succeed. The level of client mental health, although a very general factor, is significant, and future research could determine what factors about the client's mental health result in poor mediation prospects. It is fairly easy to speculate that clients with a low level of functioning may not be good prospects for mediation. Mediation is not designed to be therapeutic and to resolve interpersonal psychological problems, however, results of this survey indicate that it is a delicate balance between managing clients' interpersonal issues and doing the legal job of mediation. It should be noted that none of the top ten factors include the clients' lack of legal information, and one would expect this factor would rank more highly with non-lawyer mediators.

Most of the factors mediators determined to be least influential (see Figure 11) will not be surprising to practitioners, and they will be useful for mediators in helping to inform their clients. The principle purpose of this question was to give mediators some sense of the general consensus about factors that influence outcome. This was done to assist mediators in assessing their particular client fact situation understanding which factors are most significant in the mediation. This information could be used to assess

whether a couple is likely to succeed in mediation. To take an extreme example, if a couple arrives with a situation of a poor commitment to the mediation process, low levels of mental health and family functioning in the presence of physical abuse, and are heavily influenced by third parties, combined with an inexperienced mediator, the prospects for a successful mediation are probably remote. On the other hand, if a client comes to the mediator with a concern with the fact that they are common-law and not married, have low level of education, can't afford more than a few sessions or are worried about the gender of the mediator, it can at least be said that the general consensus of mediators is that these tend not to be very significant factors and are unlikely to affect outcome.

9. **What are family law mediators' attitudes towards the influence of gender in mediation?**

Part One contained those statements which would tend to indicate that mediators believe the gender of the clients is not a factor, questions 1, 3, 6, 13 and 17.

Part Two contained those statements that would tend to indicate that mediators believe that men have some advantage in mediation: questions 2, 8, 11, 12 and 18.

Part Three contained those statements that would tend to indicate mediators feel women have some advantage in mediation: questions 4, 5, 7, 10 and 15.

Part Four contained those statements indicating that the gender of the mediator is a factor.

Part One - Gender Tends Not to be a Factor in Mediation

In order to interpret mediator's attitudes to these statements, I have added the percentage of respondents agreeing or strongly agreeing to indicate agreement with the question. As Figure 12 shows 75.5% of mediators believe it is possible to balance power between men and women. 82.8% believe power varies from person to person and is not a matter of gender. 24.35% believe men and women usually have about equal bargaining skills in mediation. 60% believe mediated separation agreements are comparable to separation agreements using lawyer negotiation or litigation in terms of fairness to both genders, and 10% believe men and women of approximately equal personal power tend to be in relationships with one another.

In statements 1, 2 and 4 it could be said that there is a majority opinion that gender differences between men and women are not a factor, or if they are, the power differences can be balanced and fair agreements will result. There is strong agreement with the notion that power varies from person to person and is not gender-related. These statements are consistent with the research that mediation agreements result in similar agreements to lawyer negotiated or Court ordered agreements (Pearson, 1991).

There are two areas, however, where the mediators suggest gender is a factor. Mediators believe that men and women have unequal bargaining skills and tend to be in relationships with unequal personal power. This is consistent with much of the research (Regehr 1994). Presumably, since the mediators believe it is possible to balance power between men and women, there may be offsetting or equalising feminine forms of power or other factors which ultimately result in fair agreements.

Part Two - Mediation Tends to Benefit Men

In this question I have added the level disagreement and strong disagreement to statements that indicate that mediation in some way benefits men. Results can be summarised as follows. 73.13% believe men do not have an advantage in mediation because they are more familiar with negotiating. 65.8% believe men do not have an advantage because they tend to earn more and have more assets. 82.5% believe men do not have an advantage in mediation because they are culturally trained to be more competitive than women. 57.5% do not believe women are at a disadvantage in mediation, because in our culture they tend to be more co-operative than men and 72.5% disagree that men have an advantage in mediation because women attribute men with having more authority. The results of Part 2 are somewhat more consistent than the Part I results with the majority disagreeing with statements that indicate men have some benefit. It can be said then that the majority opinion here is that mediation does not inherently benefit men.

Part Three - Mediation Tends to Benefit Women

In this question, 65.83% of mediators disagree with the statement that mediated agreements tend to favour women with respect to property settlements. 60.93% of the mediators disagreed that men are at a disadvantage in mediation because they tend to be less comfortable in dealing with strong emotional issues. 58.48% of the mediators indicated that they disagreed with the statement that women have an advantage in mediation because they tend to be better able to make decisions involving both thoughts and feelings together. 12.19% of mediators disagreed with the statement that mediation affords women a greater opportunity to express their views than other forms of dispute resolution. 21.9% indicated that they disagreed with the statement that women in general are more satisfied with the mediation process than are men. Pearson's (1991) research shows that property settlements tend to favour women no matter what form of dispute resolution is used but a majority of mediators in this study disagree with this. They also disagree with the idea that women have some advantage due to a greater ability to make thought-feeling decisions. The mediators believe that mediation does benefit women in the sense that it affords them a greater opportunity to express their views than other forms of dispute resolution and indicates that women are more satisfied with the process than are men. High rates of client satisfaction with mediation are common in the research (Leibel 1989 p. 34) (Bahr, 1981) (Pearson, 1982). In spite of these benefits it is probably not correct to say that

they are any particular advantage to women in the sense that they would result in unfair agreements.

Part Four - Gender of the Mediator

The majority opinions with respect to the gender of the mediator were uncertain. Seventeen per cent of the male clients were more likely to agree to mediation if there was a male mediator and 25% of the female clients were more likely to agree with mediation if there was a female mediator. Thirty-nine per cent of the mediators agreed that it made no difference to the outcome whether the mediator was male or female. Due to the large percentage of uncertain responses, answers to these questions are probably equivocal. I suspect this was due to the fact that the question amounted to making a guess about what a client of another gender would want which probably resulted in the large uncertainty. Common sense would indicate that people would prefer someone of the same gender to better understand their situation, but the only way to balance this would be in co-mediation with a male and female mediator, and this is occasionally done.

Summary

The results of this question could be summarised by saying that mediators believe that it is possible to balance power between men and women and that fair agreements can be created, notwithstanding gender differences.

Gender Neutrality of Mediation

When asked the general question: “Is mediation gender neutral?”, most male and female mediators believed that it was, however, the majority opinion was slight with the male mediators. An interesting result in this study is that the female mediators are more confident that gender is not a factor than male mediators.

Analysis of Subjective Comments

Although most male and female mediators believe mediation was gender neutral, a significant minority had a different point of view. Those answering yes made comments like “*I believe neither sex has the advantage in mediation - each sex has a number of advantages, often different ones*”. “*It can be gender neutral if mediation is aware and sensitive*”. Those answering no made comments like “*No human behaviour is gender neutral. Recognise gender differences and deal with them*”. “*No, and it never will be because society’s attitudes and general values will never be gender neutral*”. Some mediators are of the belief that although mediation may not be gender neutral, neither is any other form of dispute resolution, “*as much as any other form of dispute resolution*”.

It seems that mediators, then, have the task of acknowledging gender differences and balancing power to result in a fair agreement as best they can. In this sense mediation may have an advantage over negotiating lawyers or judges who also

must deal with it but have less direct contact with the clients and use a system which tends to take power away from clients rather than return it to them.

17. What forms of power do mediators believe are the most and least difficult to balance between spouses?

“Power balancing” is a skill taught to mediators and is designed to level the playing field given numerous unequal situations. This is done primarily through the mediator’s control of the process (Neuman 1992) and (Mayer 1987) and both the mediator’s and clients’ sense of subjective fairness, together with the objective standard of the law. The fact that power balancing is even possible owes much to the complexity of human nature. Few people are without power of some kind and some forms of power, such as neediness, are not often recognized as a form of power at all.

Most Difficult Forms of Power to Balance

Figure 17 shows the level of difficulty in balancing the most difficult forms of power. The results of this study show the most difficult areas to power balance include self-esteem, assertiveness, ability to manipulate emotions, using the children as a bargaining tool, and the ability to make difficult emotional decisions. The subjective comments provide reasons for the mediators’ choices.

“Children as tools...parties may accept unfair proposals to ensure relationship with their children”.

“Lack of self-esteem has built up over the years and is difficult to overcome”.

“Self-esteem - deeply engrained, not amenable to mediation”.

“Self-esteem - these go to deeper personality issues, areas where therapeutic counselling skills are really important and mediation may not be the best choice until self work is done”.

“Selfishness, ability to manipulate emotions - these factors are personality problems and make resolution of disputes much more difficult”.

The common theme of the most difficult areas to power balance is that they are deep-rooted aspects of the client's personality which are not easily amenable to change in mediation. Lawyer mediators are usually not therapists and it is challenging even for the best therapists to make progress with these issues. Lawyer mediators are not equipped to deal with these matters and for them it is not part of the mediation process.

Perhaps, unfortunately, deal with them they must, whether or not they are prepared or trained for it, and some ability to deal with these most difficult issues will obviously impact outcomes. Although most lawyer mediators would not consider themselves couple's therapists that role is nevertheless thrust upon them in difficult mediations.

Mediators are often placed in a difficult position since they are often forced to deal with these matters which are admittedly beyond their area of expertise.

Least Difficult Forms of Power to Balance

The factors which mediators ranked easiest to resolve are information, knowledge, income and assets, education and status or age. Again, the subjective comments were helpful in determining why these were chosen and the main explanation as to why these issues are least difficult is that they are within the mediator's power to deal with, unlike the issues at the other end of the spectrum which may require therapeutic intervention or are otherwise beyond the scope of the mediator or their abilities to deal with them. Information can be obtained and disseminated and people can be informed and educated in the mediation. The fact that income and assets ranked as a fairly easy issue to power balance may come as a surprise to some theorists who repeatedly suggest that this issue is difficult or impossible to balance. Probably the principle reason why this is such an easy area to deal with is that the Family Relations Act, R.S.B.C. 1979, C.21 and the Divorce Act, R.S.C. 1985, C.3 together with the case law, provide rules for redistribution and evening out of income and assets. It must also be remembered that the person who has the most assets also has the most to lose. The subjective comments provide reasons for the mediators' choices.

"Income and assets - this can be remedied easily with asset division".

"Income and assets - the party with the higher income and assets has the greatest risk which helps balance the situation".

“Part of the mediator’s role is to get information and knowledge shared; lawyers can help balance negotiating skills”.

“Information and knowledge can be provided by the mediator or by independent legal advice”.

It would be interesting to speculate what therapist mediators would rank as the issues most and least difficult to resolve. It is arguable that the answers to the question would be reversed for therapist mediators, having greater skill in difficult interpersonal relations but lacking knowledge in law or the tax consequences of various options. It seems that lawyers could also use whatever additional training would be helpful in dealing with factors such as poor assertiveness or low self-esteem and their impact on the mediation.

The results of this question can be summarized by saying that mediators have the least difficulty balancing power in areas where they can provide information and knowledge, which is within their area of expertise, such as explanations of the law, and had the most difficulty dealing with deep-seated psychological problems such as poor assertiveness or low self-esteem, which are factors for which lawyer mediators are ill-equipped to deal. The need for cross-training therapist mediators and lawyer mediators seems clear.

Limitations of the Study

This study cannot be generalized to all mediators who practice family law mediation, since only lawyer mediators were surveyed. Although I suspect lawyer mediators are the largest group practicing in this area, data on the non-lawyer mediators is unavailable. The varying background and qualifications of non-lawyer mediators would almost certainly result in quite different results than this survey and could be the subject of a similar comparison survey in the future.

The response rate of 26% was lower than expected. Feedback from the telephone reminders indicated that timing (during the summer vacation) may have been a factor in the return rates. In addition, for those mediators who filled in both Parts A and B, the survey took a long time to complete. This was due to the length of the survey and the fact that it required considerable thought and I assume some mediators lacked the patience for its completion due to other time pressures. A shorter, simpler survey may have improved the response rate.

One hundred percent of the family law mediators were sampled, but the respondents may or may not have been random in the sense that the data was collected only from those mediators who chose to complete and return the survey. The question then becomes, are the non-respondents different from the respondents in a way that would affect the outcome of the study? The respondent data, when compared to

equivalent Law Society data on geography, gender and practice size indicates that the respondents seemed to be more or less randomly distributed in terms of geography, gender and practice size. I suspect the chief difference between non-respondents and respondents was that the non-respondents are mediators who do little mediation and have little interest in it. If this is true, this would mean that mediation is practiced by even a smaller group than this survey indicates. If most of the respondents were low experience mediators, Part B would not be affected at all.

The survey instrument itself, although it was pre-tested and went through numerous drafts was more or less an original and was therefore imperfect. Given the benefit of 20/20 hindsight, some of the questions could have been better worded or less confusing. Questions 14 and 17, where mediators were asked to rank issues, seemed to confuse some mediators and some did not rank the questions, but simply marked them with an "x" or marked more than three choices, resulting in spoiled data. Also, the data towards the centre of the ranking in these questions may be questionable. This was due to the fact that if five mediators ranked factor X as least difficult and six ranked factor X as most difficult, the difference was too small to base any reliable conclusions concerning its ranking.

Some questions, such as 11 and 16 (19) were difficult for mediators to generalize and often they wrote comments like "cannot generalize - depends on particular cases or couples". There was an annoying tendency to change the questions

and then answer the amended question. This practice was popular with the gender questions which also included graffiti, notes, comments and in some cases even letters or explanations about why they agreed or disagreed with a particular question. Some lawyers even objected to the survey itself and one mediator wrote a lengthy letter objecting to the attempt to do empirical research in mediation, suggesting it was impossible. This objection to empirical, quantitative research would probably seem surprising to some scientific researchers, but one must remember that historically, law has been driven primarily by politics, public and judicial opinion. This resistance to scientific research (not shared by the medical profession, for example) may help explain the declining respect and confidence in lawyers and our society's justice system.

A limitation that was expected was that mediators would exaggerate the critical statistic of outcome rates, but compared to client reported or third party reported outcome results from other research, this did not seem to occur. This other data was almost identical with the mediator reported data which increased my confidence in the results. In one sense, this may not be surprising since mediators are a very homogeneous professional group with almost exactly the same background, education and experience.

In retrospect, some of the questions were too long and complex for a survey of this type and might have been better suited for personal or individual interviews. I

chose the voluntary response method so that the survey would be province-wide and to avoid the costs associated with lengthy long distance interviews.

Recommendations for Further Research

If one uses the metaphor of fishing, this survey was designed to cast a large net and future research using this and other data could now begin to refine this method and use hooks and bait.

Interest in mediation research is intense, as our society searches for cheaper, faster and more sensitive ways to resolve conflict. This interest is so great that data from this research was requested and presented to the Law School at the University of Washington in Seattle, Washington, U.S.A. and the Family Mediation Canada Ninth Annual Conference in Victoria, British Columbia prior to completion of the final drafts of the thesis. In addition, I have been interviewed by the local press, (reported in the Times-Colonist November 10, 1995), been booked for a television program and received requests from the Canadian Bar Association for all of the data for dissemination and publication immediately upon completion of the thesis. The most popular request is for the gender data since it is topical and a political battle rages over the gender fairness of mediation. For example, Legal Aid will not fund direct referrals of mediation, notwithstanding the requests of clients, for fear that mediators will not screen out cases of physical or sexual abuse, or will not be able to balance power

between men and women. Theorists abound but little hard data, especially from Canadian sources, is available and thus is eagerly sought after.

Future research in the area of training could be directed toward the skills lawyer mediators lack, such as counselling skills. This type of research could be seek to identify the nature and extent of the minimum skills necessary for dealing with couples in conflict.

The gender issues in mediation seem to be of great interest particularly in the area of balancing of power between men and women. This research was designed to be fairly general; future research could be more focused and concentrate on how mediators can assist men and women to negotiate fair agreements, given the differences between them in our culture. For example, some theorists assume that men are better negotiators than women or more competitive or that women are more cooperative and research could be designed to determine if this is really true or simply a cultural myth.

Although there seems to be a great deal of literature about the forms of power men are supposed to have, there is little research on feminine forms of power. My own experience in mediation is that these powers, whatever they are, seem to balance each other out in many relationships.

An interesting result of this study is that few mediators believe men and women are in equal relationships in terms of power or tend not to have equal bargaining skills. This result astounds me since my experience is that men and women both have and use

different forms of power. Future research in these areas could include video or audio tapes of actual mediations observing the words, voice tone and body language used, to better understand how power is used between men and women in actual conflict situations.

One difficulty that I have encountered in researching gender issues in mediation is current gender politics. I believe objective empirical research is presently being hampered by this climate, particularly when research contradicts the “politically correct” viewpoint.

Another fruitful area of future research would be in the nature of power in mediation. In the survey, I define power as “the ability of one person to influence the behaviour of another” and determined that mediators believe certain psychological influences such as self-esteem or assertiveness influence mediation most and they were the most difficult to deal with. This has implications in terms of training that would help compensate for lawyers’ deficiency in dealing with these therapeutic matters. It is apparent to me that lawyer mediators require counselling skills dealing with these issues.

My vision of future research would include being able to determine with great precision what types of mediation should or should not be attempted and being able to predict with great accuracy whether certain types of issues should or should not be mediated. This would obviously require more detailed research, such as comparing

couples with different issues such as spousal maintenance, to other couples having less difficult issues such as access and confirming if in fact spousal maintenance is as difficult an issue to resolve as the mediators suggest. This could lead to recommendations that access is amenable to mediation whereas spousal maintenance should be dealt with by the traditional court system.

There is potential for future research into mediator style since the results of this survey on that subject were inconclusive. The level of directiveness probably does affect the mediation and other research indicates that women tend to have slightly better success rates than men and the reasons why should be investigated. Such research could also include comparisons of directive and non-directive styles and comparing results.

Factors that influence outcome could be researched in greater detail. This study identified the most and least important factors and future research could find out why such things as commitment is so critical and why certain factors such as the number of sessions seemed to be insignificant.

This research did not go into any detail about amount of time mediation takes and future research could be more precise in calculating the average amount of time a mediation takes to complete. This rapidity of resolution is an important and valuable aspect of mediation. This adds to the already considerable cost savings in mediation.

In any event, I hope that some of the data I have collected will benefit future researchers in terms of base line data or as a springboard for future research. In addition, I sincerely hope that my overall objective of improving information and enhancing the knowledge of mediators will have a direct and immediate impact on clients using this process. Knowing that I have done this will be my greatest reward.

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July 12, 1995

Dear Family Law Mediator:

As you are aware mediation is a growing field and is becoming more firmly established as a significant option to the traditional court process. As mediators, it is difficult to accurately predict the outcome in mediation given a certain set of family issues and circumstances. The enclosed survey is designed to gather information which may allow for more accurate predictions of the outcome in mediation. The survey also deals with other issues in mediation such as gender influences, qualifications and training, type of issues in mediation, as well as power balancing.

All of the mediators qualified by the Law Society of British Columbia in the Province are being sent this survey and to provide the most accurate and reliable conclusions we must have as many people responding as possible. The enclosed survey has been designed to be filled in quickly, because as a practising lawyer and mediator I know how valuable your time is. In a pre-test of mediators it took only 15 minutes to complete.

I would appreciate it if you could complete the form and return it to me by July 30, 1995, by fax or mail. Your anonymity will be protected by using code numbers to identify the results and any identifying information from fax machines or letters will be removed. I undertake to maintain the strictest confidence with the responses. Your consent to participate in this study will be assumed by completing the survey and returning it to me.

The survey is being done in association with the University of Victoria and I am confident the results will be of immediate practical value to mediators in the province. I will be submitting the results for publication in *The Advocate* and the *Canadian Bar Review* in the fall of this year to ensure all mediators can benefit from the information.

I thank you in advance for contributing to research in mediation by participating in this survey and, since I am not funded in any way for this research, bearing the cost of returning the survey to me. Please read the brief instructions before completing the survey.

Yours truly,

SALMOND ASHURST

Per: 

ROBERT J. BIRCHER

RJB/slh

**Instructions for Completion of the Survey
of Family Law Mediators in British Columbia**

1. You must be a Family Law Mediator certified by the Law Society of British Columbia to complete this survey.
2. Please complete the entire survey if you have done more than three family law mediations. If you have done less than three, please complete Part A only.
3. In estimating your success rate in item 12.1 (outcome rates), please be honest as this is a critical statistic.
4. All responses will be kept confidential and the response codes will not be known to anyone but myself and I personally undertake your anonymity in this matter. The purpose of the response reminder code is for follow-up purposes only and this information will be kept in a confidential file. The responses will be given the same security as solicitor client files.
5. Your participation is entirely voluntary. There will be no further steps to the study, apart from a reminder to return the questionnaire if you do intend to participate. If, at any time following your return of the survey, you wish to withdraw your participation, please contact me and your survey will be destroyed.
6. I appreciate you bearing the expense of the return postage or fax as a contribution to research in mediation.
7. When completed you may either return the survey in the self-addressed envelope provided or fax the response to 1-604-477-4451 reference: Bircher Mediation Survey

**SURVEY OF FAMILY LAW MEDIATORS ON
FACTORS THAT INFLUENCE OUTCOME
IN MEDIATION**

- Please Note:**
1. Questions relate only to family law mediation;
 2. "Clients" refers to spouses or common-law partners.

PART A

I Questions concerning background, training, qualifications and experience.

Tell us about your mediation practice by placing an X in the most appropriate box.

1. Please indicate your practice size:

- | | | | | | |
|-----|-------------------|-----|-----|------------------|-----|
| 1.1 | Sole practitioner | [] | 1.2 | 1 to 5 lawyers | [] |
| 1.3 | 6 to 10 lawyers | [] | 1.4 | 11 to 15 lawyers | [] |
| 1.5 | Over 16 lawyers | [] | | | |

2. Tell us about your geographic location:

- | | | | | | |
|-----|----------------------------|-----|-----|-----------------------------|-----|
| 2.1 | Rural area | [] | 2.2 | City under 50,000 | [] |
| 2.3 | City from 50,000 - 100,000 | [] | 2.4 | City from 100,000 - 250,000 | [] |
| 2.5 | City of 250,000 or more | [] | | | |

3. Gender: Male [] Female []

4. How many years have you practised as a family law mediator?

- | | | | | | | | | |
|-----|---------------|-----|-----|---------------|-----|-----|-------------|-----|
| 4.1 | 0 - 3 years | [] | 4.2 | 4 - 6 years | [] | 4.3 | 7 - 9 years | [] |
| 4.4 | 10 - 12 years | [] | 4.5 | over 12 years | [] | | | |

5. What percent of your current practice time is spent doing family law mediation?

- | | | | | | |
|-----|-----------------|-----|-----|-----------------|-----|
| 5.1 | 0 - 10 percent | [] | 5.2 | 10 - 20 percent | [] |
| 5.3 | 20 - 40 percent | [] | 5.4 | 40 - 60 percent | [] |
| 5.5 | over 60 percent | [] | | | |

6. Indicate how many family law mediation cases you have done in the last two years:

- | | | | | | | | | |
|-----|--------|-----|-----|-------|-----|-----|---------|-----|
| 6.1 | 0 | [] | 6.2 | 1 - 3 | [] | 6.3 | 4 - 6 | [] |
| 6.4 | 7 - 12 | [] | 6.5 | 13-20 | [] | 6.6 | over 20 | [] |

7. How many hours of family law mediation or mediation related work have you done in the last month?

- | | | | | | |
|-----|---------------|-----|-----|---------------|-----|
| 7.1 | 0 - 5 hours | [] | 7.2 | 6 - 10 hours | [] |
| 7.3 | 11 - 15 hours | [] | 7.4 | 16 - 20 hours | [] |
| 7.5 | over 20 hours | [] | | | |

8. Indicate any additional mediation training you may have, apart from the Law Society mediation certification course (you may check more than one box):

- | | | |
|-----|--|-----|
| 8.1 | no additional courses; | [] |
| 8.2 | some courses relating to mediation; | [] |
| 8.3 | under graduate degree or diploma in the social sciences; | [] |
| 8.4 | masters level degree in the social sciences; | [] |
| 8.5 | doctoral level degree in the social sciences; | [] |

Response Reminder Code: _____

9. Do you believe family law mediation should be restricted to lawyers certified by the Law Society as mediators:
Yes [] No []

10. Please indicate your attitude toward the following by marking an "x" in the appropriate box:

10.1 The existing certification standards set by the British Columbia Law Society are adequate;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.2 Mediators should pass a competency test;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.3 Mediators should have additional training in counselling or psychology related to working with couples;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.4 Mediators should have an articling or training period with a mentor or experienced mediator;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.5 Mediators should have more training in helping skills such as communication or listening skills;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.6 Mediators should have more training in mediation, conflict resolution and negotiation theory in general;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.7 The personality of the mediator is a more significant factor than knowledge, skills, or experience;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

10.8 More training in family law would be an asset to mediators;
strongly disagree [] disagree [] no opinion [] agree [] strongly agree []

11. Indicate whether you would proceed with mediation if the initial interview revealed the following situations. "Clients" refers to spouses or common-law partners. (circle the most appropriate response):

- | | | |
|----------------------|----|--|
| Yes / Uncertain / No | 1. | Clients have a moderate power imbalance. |
| Yes / Uncertain / No | 2. | Clients have a substantial power imbalance. |
| Yes / Uncertain / No | 3. | There is an allegation by one client of sexual abuse. |
| Yes / Uncertain / No | 4. | There is an allegation by one client of physical abuse. |
| Yes / Uncertain / No | 5. | You suspect one or both clients will not get independent legal advice. |
| Yes / Uncertain / No | 6. | Clients are emotionally abusive to one another. |
| Yes / Uncertain / No | 7. | You suspect one of the clients is not fully disclosing assets. |

If you have completed fewer than three family law mediations you are now complete. Thank you for completing this portion of the Survey. Please fax this portion to 1-604-477-4451 or return it in the self addressed envelope enclosed.

PART B

Please Note: To be completed only by family law mediators who have completed a minimum of three family law mediations.

I-A MEDIATOR RESULTS

- 12.1 Indicate (in percentage terms) the number of mediations that:
- (a) Have resulted in a signed separation or other agreement or resulted in a consent order; []
Of the remaining mediations indicate (in percentage terms) those that:
- (b) Resulted in a substantial narrowing of issues; []
 (c) Resulted in some narrowing of issues; []
 (d) Resulted in termination of the mediation; []
 (e) Had another result; []
- Total: 100%
- 12.2 In those cases where agreement was reached indicate the average number of mediation sessions required:
- (a) 0 - 2 sessions [] (b) 3 - 4 sessions []
 (c) 5 - 6 sessions [] (d) 7 - 8 sessions []
 (e) over eight sessions []

I-B MEDIATOR STYLE

- 12.3 Please indicate (by circling the letter at the beginning of the statement) which most accurately describes your style of mediation:
- (a) I identify the problem and impose a procedural solution;
 (b) I identify the problem, suggest one procedural solution and push for its adoption;
 (c) I identify the problem, make several suggestions as to procedural options;
 (d) I identify the problem, and facilitate problem solving with the clients;
 (e) I identify the problem, and use socratic questioning to assist the parties to find a solution;
 (f) I identify the problems for the clients and let them work out their own solution;
 (g) I question the parties to help them identify the problem and then let them work on their own solution;
 (h) I let the clients work things out on their own;

II Issues in Mediation

13. Indicate which type of mediation you believe to be most difficult to resolve:
- (a) Mediations involving one central issue; []
 (b) Mediations involving multiple issues; []
- 14.1 Of the issues listed below that could arise in family law mediation, indicate in the appropriate column the three least difficult and the three most difficult issues to resolve. Rank your choices by putting either a 1, 2, or 3, in the appropriate box:
- | | Least difficult
to resolve
(choose 3) | Most difficult
to resolve
(choose 3) | |
|--------------------------|---|--|-----|
| (a) Spousal maintenance | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (a) |
| (b) Child maintenance | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (b) |
| (c) Parenting decisions | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (c) |
| (d) Access | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (d) |
| (e) Custody | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (e) |
| (f) Division of property | <input type="checkbox"/> [] | <input type="checkbox"/> [] | (f) |

		Least difficult to resolve (choose 3)	Most difficult to resolve (choose 3)	
(g)	Payment of debts	[]	[]	(g)
(h)	Occupancy of the matrimonial home	[]	[]	(h)
(i)	Disclosure of assets	[]	[]	(i)
(j)	Valuation of assets	[]	[]	(j)

14.2 Briefly explain why you chose the three least difficult issues to resolve: *(Please print or write legibly).*

1. _____

2. _____

3. _____

14.3 Briefly explain why you chose the three most difficult issues to resolve:

1. _____

2. _____

3. _____

III Factors that May Influence Outcome

15.1 Below are listed a number of factors involved in mediation. Indicate how important you think the factor is in mediation in general (not any particular mediation) by marking an "x" in the scale to the right of each statement. "Clients" refers to spouses or common-law partners.

	Very Important	Somewhat Important	Undecided	Somewhat Unimportant	Very Unimportant	
1	[]	[]	[]	[]	[]	1.
2	[]	[]	[]	[]	[]	2.
3	[]	[]	[]	[]	[]	3.
4	[]	[]	[]	[]	[]	4.
5	[]	[]	[]	[]	[]	5.
6	[]	[]	[]	[]	[]	6.
7	[]	[]	[]	[]	[]	7.
8	[]	[]	[]	[]	[]	8.
9	[]	[]	[]	[]	[]	9.
10	[]	[]	[]	[]	[]	10.
11	[]	[]	[]	[]	[]	11.

	Very Important	Somewhat Important	Undecided	Somewhat Unimportant	Very Unimportant	
12 Gender of the mediator;	[]	[]	[]	[]	[]	12.
13 Mediators' level of experience in mediation;	[]	[]	[]	[]	[]	13.
14 Influence of independent legal advice on client;	[]	[]	[]	[]	[]	14.
15 Influence of third parties on client (parents, relatives and friends);	[]	[]	[]	[]	[]	15.
16 Level of trust between the clients;	[]	[]	[]	[]	[]	16.
17 Number of issues to be resolved;	[]	[]	[]	[]	[]	17.
18 Willingness of clients to move from positions to interests;	[]	[]	[]	[]	[]	18.
19 Number of sessions of mediation;	[]	[]	[]	[]	[]	19.
20 The length of the sessions of mediation;	[]	[]	[]	[]	[]	20.
21 The place where mediation occurs;	[]	[]	[]	[]	[]	21.
22 Whether the clients are married or common-law	[]	[]	[]	[]	[]	22.
23 Whether one or both clients are employed;	[]	[]	[]	[]	[]	23.
24 Court application or other time deadline;	[]	[]	[]	[]	[]	24.
25 Influence of home assessment or parental evaluation;	[]	[]	[]	[]	[]	25.
26 Stage at which the mediation occurred;	[]	[]	[]	[]	[]	26.
27 Age of the clients in mediation;	[]	[]	[]	[]	[]	27.
28 Age of the clients at marriage;	[]	[]	[]	[]	[]	28.
29 Level of family functioning;	[]	[]	[]	[]	[]	29.
30 Presence of addiction;	[]	[]	[]	[]	[]	30.
31 Cross cultural influences;	[]	[]	[]	[]	[]	31.
32 Level of commitment of the clients to mediation;	[]	[]	[]	[]	[]	32.
33 Verbal abilities of the clients;	[]	[]	[]	[]	[]	33.

	Very Important	Somewhat Important	Undecided	Somewhat Unimportant	Very Unimportant	
34 Willingness to compromise;	[]	[]	[]	[]	[]	34.
35 Presence of physical abuse;	[]	[]	[]	[]	[]	35.
<i>Other factors that influence outcome</i>						
36 _____	[]	[]	[]	[]	[]	36.
37 _____	[]	[]	[]	[]	[]	37.
38 _____	[]	[]	[]	[]	[]	38.
39 _____	[]	[]	[]	[]	[]	39.

IV Gender Issues in Mediation

16.1 On the scale below put an "x" in the box which most closely indicates your attitude toward the following statements. The statements refer to family law mediation in general and not a particular mediation. For the purposes of this survey consider power to be "the ability of one person to influence the behaviour of another".

1. It is possible for mediators to balance power between men and women;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

2. In general men have an advantage in mediation because they are more familiar with negotiating;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

3. Power varies from person to person and is not a matter of gender;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

4. Mediated agreements tend to favour women with respect to property settlements;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

5. Men are at a disadvantage in mediation because they tend to be less comfortable in dealing with strong emotional issues;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

6. Men and women usually have about equal bargaining skills in mediation;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

7. Women have an advantage in mediation because they tend to be better able to make decisions involving both thoughts and feelings together;

strongly disagree disagree uncertain agree strongly agree
 [] [] [] [] []

8. Men have an advantage in mediation because they tend to earn more and have more assets;
 strongly disagree disagree uncertain agree strongly agree
9. Male clients are more likely to agree to mediation if there is a male mediator;
 strongly disagree disagree uncertain agree strongly agree
10. Mediation affords women a greater opportunity to express their views than other forms of dispute resolution;
 strongly disagree disagree uncertain agree strongly agree
11. Men have an advantage in mediation because they are culturally trained to be more competitive than women;
 strongly disagree disagree uncertain agree strongly agree
12. Women are at a disadvantage in mediation because in our culture they tend to be more cooperative than men;
 strongly disagree disagree uncertain agree strongly agree
13. Mediated separation agreements are comparable to separation agreements using lawyer negotiation or litigation in terms of fairness to both genders;
 strongly disagree disagree uncertain agree strongly agree
14. Female clients are more comfortable in mediation if there is a female mediator;
 strongly disagree disagree uncertain agree strongly agree
15. Women in general are more satisfied with the mediation process than are men;
 strongly disagree disagree uncertain agree strongly agree
16. It makes no difference to the outcome in mediation whether the mediator is male or female;
 strongly disagree disagree uncertain agree strongly agree
17. Men and women of approximately equal personal power tend to be in relationships with one another;
 strongly disagree disagree uncertain agree strongly agree
18. Men have an advantage in mediation because women attribute men with having more authority;
 strongly disagree disagree uncertain agree strongly agree
19. Do believe mediation is gender neutral?

V. Issues Relating to Balancing of Power

17. Power imbalances occur in mediation when one party has more real or perceived power than another. Listed below are forms of power that could arise in mediation and may require balancing. Indicate in the appropriate column the three least difficult and three most difficult forms of power to balance, in your experience of family law mediation. Rank your choices by placing a 1, 2, or 3 in the appropriate box.

	least difficult to balance power (choose 3)	most difficult to balance power (choose 3)	
(a) Income/Assets	[]	[]	(a)
(b) Education	[]	[]	(b)
(c) Knowledge	[]	[]	(c)
(d) Personality	[]	[]	(d)
(e) Self esteem	[]	[]	(e)
(f) Selfishness	[]	[]	(f)
(g) Forcefulness	[]	[]	(g)
(h) Status or age	[]	[]	(h)
(i) Ability to make difficult emotional decisions	[]	[]	(i)
(j) Negotiating skill	[]	[]	(j)
(k) Ability to manipulate emotions	[]	[]	(k)
(l) Ability to display emotions	[]	[]	(l)
(m) Information	[]	[]	(m)
(n) Assertiveness	[]	[]	(n)
(o) Neediness	[]	[]	(o)
(p) Using the children as a bargaining tool	[]	[]	(p)
<i>Other forms of power</i>			
(q) _____	[]	[]	(q)
(r) _____	[]	[]	(r)
(s) _____	[]	[]	(s)

18. Briefly explain your choices for the most difficult:

Rank 1. _____
 2. _____
 3. _____

19. Briefly describe your choices for least difficult:

Rank 1. _____
 2. _____
 3. _____

Thank you completing this survey and contributing to empirical research in mediation. Please return the survey in the self addressed envelope provided or fax it to 604-477-4451 attention: Bircher Mediation Survey. I appreciate you bearing the cost of returning the survey.

VITA

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Author



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