

TO MEDIATE OR NOT TO MEDIATE. . . THAT IS THE QUESTION: THE IMPACT OF
DOMESTIC VIOLENCE ON MEDIATION OF FAMILY LAW DISPUTES

By Sherry Myers

I. INTRODUCTION

Mediation of family law disputes is a relatively new concept which was introduced in the early 1970's in response to the changing landscape of divorce law.¹ With the emergence of the no-fault grounds for divorce and alimony, which is now determined by need and ability to pay rather than on fault and entitlement, attorneys began offering "non-adversarial legal services" to divorcing couples.² Mediation has now become one of the most widely accepted alternatives to traditional divorce and custody proceedings.³

Mediation can be defined as:

[A] dispute resolution process by which the participants, together with the assistance of a neutral person . . . systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation . . . emphasizes the participants own responsibility for making decisions that affect their lives. It is therefore a self-empowering process.⁴

Courts encourage greater use of mediation of family law disputes in hopes of relieving the overflowing dockets of family courts and reducing the delays and costs of modern litigation.⁵ The voluntary, informal, self-determined mediation process is seen as beneficial to parenting because it is believed that parties who participate in the process of creating their own agreement

¹ Jay Folberg, Ann L. Milne, *Divorce Mediation: Theory and Practice*, 5 (The Guilford Press 1988).

² *Id.*

³ Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. Ill. U. L.J. 559, 559 (Spring, 2002).

⁴ Jay Folberg, Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, 7-8 (Jossey-Bass Publishers 1984).

⁵ Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 St. John's L. Rev. 375, 474 (1999).

are more likely to adhere to the terms.⁶ Mediation may also reduce the emotional and financial toll of litigation.⁷

While the benefits of mediation over litigation are obvious in the family law arena, mediation of cases where domestic violence has occurred within the family presents significant considerations which may threaten the safety and diminish the interests of the victim. For this reason, critics maintain that mediation of cases involving domestic violence is *never* appropriate.

This paper argues that while mediation of *some* cases involving domestic violence *may* be inappropriate, *all* such cases should not be precluded. Blanket exclusion of all family law disputes where domestic violence has been an issue is based on outdated concepts and therefore does not reflect “the nature of court mediation today,” fails to consider the “full range of victim experiences, needs and abilities,” and focuses excessively on the “danger of mediation for victims without consideration of the costs and risks of the most common alternative – litigation.”⁸ In fact, in some cases where domestic violence is present, mediation is still in many ways a better alternative than litigation and may even be preferred by the victim.

This paper begins by looking at the legislative response of individual states to mandatory mediation of family cases where domestic violence is an issue. It next examines the dynamics between family members in families where domestic violence is present and the effects that these dynamics have on the mediation process. This section focuses particularly on how the unique characteristics of mediation, such as informality, cooperation and self-determination are altered in such a way that prevents authentic mediation results from being achieved. Here, the arguments will be outlined and explored of the many critics who adamantly maintain that

⁶ 33 Willamette L. Rev. 905, 910 (1997).

⁷ King, *supra*, n. 5, at 447.

⁸ Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 Yale J.L. & Feminism 97, 97 (2010).

mediation of cases involving domestic violence is *never* appropriate due to safety concerns and possible disempowerment of the victims.

After examining the dynamics present in families of domestic violence and how those interactions support the contention that cases involving domestic violence should never be mediated, this paper will present the arguments that support the thesis that all cases involving domestic violence should not be precluded from mediation. In fact, after giving the victim an opportunity to make an informed decision about the best alternative for the victim and the victim's family and implementing the proper procedural and substantive safeguards, a great number of cases involving domestic violence, even some where the abuse has been historical, systematic and severe, can be successfully mediated.

II. LEGISLATIVE RESPONSE

Mediation of family law cases has become such a popular alternative to litigation that, as of 2004, forty-two states have enacted statewide statutes or court rules authorizing mandatory or voluntary court-sponsored mediation programs of selected family law disputes with custody and visitation being among the most common types of cases referred for mediation.⁹ Despite mediation's growing popularity and its obvious benefits, however, many states have determined that mediation is not appropriate in all cases. Specifically, state legislatures "have recognized domestic violence as a serious factor to consider in the mediation arena by providing some sort of waiver or exemption for cases involving domestic violence."¹⁰ For instance, in Maryland, in cases involving child custody or visitation, the court would normally order the parties to participate in mediation prior to litigating the case *if* the court determined that mediation was

⁹ Jane C. Murphy, Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 Fam. L.Q. 53, 60-61 (2005).

¹⁰ Holly Joyce, *Comment, Mediation and Domestic Violence: Legislative Responses*, 14 J. Am. Acad. Matrim. Law, 447, 459 (1997).

appropriate.¹¹ In determining whether mediation is appropriate, the predominant factor the court considers is whether there has been physical or sexual abuse of the party or a child.¹² In the event that a genuine issue of physical or sexual abuse of a party or child does exist and the court in its discretion determines that the abuse would render mediation inappropriate, then pursuant to the statute, the court is prohibited from ordering mediation.¹³

Maryland's subjective standard of allowing the court discretion to determine whether domestic violence should preclude a case from court-ordered mediation is not shared by all states. In fact several states' statutes absolutely forbid the court to order mediation of cases where there is evidence of *any* domestic violence or child abuse. Illinois, for example, authorizes the court to order mediation of visitation issues *except in cases where there is evidence of domestic violence.*¹⁴ Likewise, in North Dakota, "The court may not order mediation if the . . . issue involves or may involve physical or sexual abuse of any party or the child or any party to the proceeding."¹⁵

A third approach taken by several states across the U.S. is to enact what could be referred to as "victim's rights statutes."¹⁶ States such as Hawaii, Kentucky, Alaska, New Hampshire and New Mexico have enacted statutes which "prohibit the court from referring the parties to mediation unless the violence victim consents to or specifically requests participation in the

¹¹ See e.g. Md. Rule 9-205(a) and (b) provides, "*Scope of Rule.*- This Rule applies to any case under this Chapter in which the custody of or visitation with a minor child is an issue, including an initial action to determine custody or visitation, an action to modify an existing order or judgment as to custody or visitation, and a petition for contempt by reason of non-compliance with an order or judgment governing custody or visitation."

(b) *Duty of court.*- (1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:
(A) mediation of the dispute as to custody or visitation is appropriate . . ."

¹² See e.g. Md. Rule 9-205(b)(2) provides, "if a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation."

¹³ *Id.*

¹⁴ 750 ILCS 5/607.1(c)(4) (1993).

¹⁵ N.D. Cent. Code § 14-09.1-02 (1991).

¹⁶ Joyce, *supra*, n. 10, at 466.

process . . . and require additional safety precautions to ensure the victim’s well-being throughout the mediation process.”¹⁷ New Mexico’s statute is one of the most comprehensive. While all contested custody matters are automatically submitted to mediation, if a party alleges or the court suspects abuse:

“[A]t that point the court must halt or suspend mediation unless the mediator has substantial domestic violence training, the alleged victim is capable of negotiating with the other party in mediation, either alone or with assistance without suffering from an imbalance of power and the process contains measures to guard the alleged victim from an imbalance of power.”¹⁸

States with legislation similar to that of New Mexico attempt to resolve issues left unaddressed by those statutes that give courts full discretion to determine whether to mediate case involving domestic violence and those statutes that absolutely forbid the court from doing so. By giving the domestic violence victim the decision-making authority on whether or not to mediate and providing for safety precautions in the event that mediation is chosen states are better able to strike a balance between “protecting victims from further abuse and empowering victims to take control over decisions which will affect the rest of their lives.”¹⁹

III. THE CHARACTERISTICS OF BATTERERS AND THE EFFECTS ON FAMILY DYNAMICS

The dynamics that exist between family members where abuse is present is, in large part, why so many states have enacted legislation specifically addressing mediation of these particular types of cases. Factors such as control, entitlement, manipulation and intimidation, identifying characteristics which distinguish batterers from non-batterers,²⁰ play out between family

¹⁷ *Id.*

¹⁸ N.M. Stat. Ann. § 40-4-8 (Miche Supp. 1994).

¹⁹ Joyce, *supra*, n. 10, at 466.

²⁰ Lundy Bancroft, *The Parenting of Men Who Batter*, 39 Court Rev. 44, 44 (2002).

members in ways which can undermine the mediation process and potentially place the victim at risk for further abuse.

Control is by far the most overarching characteristic of batterers and can take many forms.²¹ The batterer usually exerts his control through a mixture of criticism, verbal abuse, economic control, isolation, cruelty and an array of other tactics.²² The predominant areas of the relationship that a batterer may attempt to dominate are: arguments and decision making, household responsibilities, emotional caretaking and attention, sexual relations, finances, child rearing and outside social contacts.²³ An abuser often seeks to increase his power and control in the relationship by undermining his partner's efforts at independence.²⁴ Thus, a woman's efforts to resist the batterer's control are usually met with escalation by the abuser.²⁵

A batterer may control not only their partner, but also any children who may be living in the household. Retaliatory batterers not only "replicate [with the children] much of the interactional style that they use with the mother,"²⁶ but they also use the children as a means by which they can exert further control over their partners. The batterer may use the children to control their partner by undermining their partner's authority or ridiculing or humiliating the mother in front of the children, swearing at her, calling her names, insulting her, laughing at her, or being unusually nice to the children when they are in conflict with her.²⁷

In families where children have witnessed the physical or verbal abuse of a parent, the effects on interfamilial relationships are staggering. Children who witness violence towards a

²¹ Lundy Bancroft, Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 5 (Sage Publications 2002).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.* at 7.

²⁷ *Id.* at 61.

parent usually develop a negative and disrespectful outlook on the abused parent viewing them as weak and powerless, inferior to the abuser, someone not deserving of respect and as someone who, because of her own undesirable behavior toward the batterer, is responsible for and, in fact, may have even deserved such abuse.²⁸

Children who have witnessed abuse may even begin to side with the batterer against the abused parent. In the days following a violent episode, the victim is likely to be depressed and withdrawn as she is wrestling with post-traumatic symptoms such as nightmares, flashbacks, shock, rage and anger. As this occurs, the child may have difficulty interacting with the abused parent which can reinforce the child's earlier impression that the parent was somehow to blame for the abuse. This can lead to the child accepting the batterer's view that the parent is "crazy" or "unfit."²⁹ The batterer may further solidify the child's view of the abused parent and attempt to gain even more loyalty from the child by spending extra time playing with the child, spending money on them or taking them out to do things they would not normally do.

Not only does the batterer undermine his partner's authority during the relationship, but many batterers respond to separation by continuing to undermine the mother's authority by interfering with her ability to parent in an attempt to justify the batterer's past actions and to deny his abusiveness.³⁰ This is especially true for batterers who wish to gain custody of their children and in order to do so, try to prove they are the more stable parent by pointing to the difficulty the victim has had with parenting her children even though this may be wholly the result of the batterer's undermining behavior. Post-separation, the batterer may employ tactics that work to turn the children against the victim and simultaneously portray the abuser as the

²⁸ *Id.* at 57.

²⁹ *Id.* at 59.

³⁰ *Id.* at 62.

“hero” or the “cool, fun parent.” For example, batterer’s often create a home environment that is entirely lacking in discipline perhaps allowing the children to eat anything they want, or may go out of his way to involve the children in activities that he knows will worry the mother or not meet with her approval such as watching movies containing violence or strong sexual content or riding motorcycles.³¹

The use of control tactics by the abuser both pre and post-separation has devastating effects on the mother-child relationship. First, battering leaves many emotional and physical scars on a mother. Depression, anxiety, nightmares, sleeplessness, flashbacks, crying easily, rage, and loss of self confidence are just a few of the fates a victim may endure any one of which can make it harder for her to care for her children.³² One study found that battered women have 16 times the rate of alcohol abuse of non-battered women. Thus, battering which leads to the development of a substance abuse problem by the mother could result in the mother losing custody of her children to the abuser.³³ In addition, children may begin to exhibit distancing, aggressive or even physically violent behavior towards their mothers due to conflicting feelings such as a fear of expressing their true anger to the batterer or feeling anger towards their mother for failing to leave a batterer or to stand up for her children.

In addition to undermining their partner’s authority, a batterer may also use the children as weapons both during the relationship and after the couple has separated. A number of different tactics may be employed by the batterer such as threatening to harm the children, neglecting the children, using the children as vehicles to communicate with a former partner, deliberately endangering the children, threatening to take the children away from the mother and

³¹ *Id.* at 62-63.

³² *Id.* at 67.

³³ *Id.*

even threatening to kill the children.³⁴ Through each of these controlling acts, the batterer engages in psychological warfare in an attempt to intimidate the victim and to maintain control both during the relationship as well as after it has ended. Indeed a majority of battered women report that the psychological abuse that they suffer has a *more* severe impact on them than the physical violence.³⁵ This is particularly disconcerting considering that psychological abuse is a strong predictor of continued difficulties for a battered woman even if the violence has ended.³⁶ As such, the batterer's reign over his victim's life can reach far beyond the last physically violent episode indefinitely compromising a woman's ability to stand up for herself, to articulate her needs and wants and to make decisions which are in the best interest of her and her children.

A batterer's behavior can also wreak havoc on family dynamics in other ways. Because the batterer has created an atmosphere of chronic fear, children may experience a blurring of their identities with that of the batterer as they strive to convince both him and themselves that they share his interests, style and preferences in order to avoid being endangered by him.³⁷ Alternatively, in families where the abuse is intermittent, traumatic bonding may occur which is when the children or the victim become strongly bonded in an unhealthy way to a perpetrator of abuse.³⁸

A batterer will go to great lengths and will employ a myriad of tactics in an attempt to control his victims. Though the degree to which this is done varies from abuser to abuser, the effects on the interfamilial relationships are both lasting and severe. When a couple in a relationship in which domestic violence exists seeks to resolve through mediation issues such as

³⁴ *Id.* at 73-75.

³⁵ *Id.* at 5.

³⁶ *Id.*

³⁷ *Id.* at 80.

³⁸ Donald Dutton, Susan Painter, *The Battered Woman Syndrome: Effects of Severity and Intermittency of Abuse*, 63 *American J. of Orthopsychiatry* 614, 614 (1993).

child custody, visitation or property division, the family dynamics created by the batterer's behavior present unique obstacles that threaten to compromise the mediation process.

IV. THE EFFECT OF FAMILY DYNAMICS ON THE MEDIATION PROCESS AND THE ARGUMENTS AGAINST MEDIATING CASES INVOLVING DOMESTIC VIOLENCE

Because of how the dynamics between family members in families with domestic violence play out in mediation, especially between the batterer and his victim, many victims' rights advocates, scholars and legal professionals believe that under no circumstances should mediation be used in cases where domestic violence has occurred regardless of the severity of the violence or the number of incidents that occurred. Those opposing mediation of domestic violence cases argue that mediation legitimizes violence rather than punishes abusers, places victims at risk for further violence and abuse and results in unfair agreements for the abused who have been stripped of their ability to advocate for their own interests.³⁹ In addition, many opponents are concerned about the quality of court and community-based mediation programs and the staff's ability to accurately and effectively identify cases in which domestic violence is present.⁴⁰

The contention that mediation fails to protect and empower victims of domestic violence is grounded in the control the abuser exerts over his victims. The dynamics between family members where abuse has occurred plays out in mediation in ways which not only puts the victim at risk but also threatens to alter the true mediation process. First, critics argue that the

³⁹ Joyce, *supra*, n. 5, at 451.

⁴⁰ Janice M. Barrett, Christina M. Bates, *The Role of Mediation in Divorce and Child Custody Disputes in Which Domestic Violence is Present: A Research Pathfinder*, 3 (Boston University 2010).

methods and objectives of mediation are incompatible with those necessary to end domestic violence within a relationship.⁴¹ While the goal of mediation is to resolve conflict and reach agreements between the parties, domestic violence is rooted in a struggle for power and control. Mediation is about cooperation and working together for mutual benefit. A batterer understands mutual benefit as synonymous with his exclusive self-interest. Therefore, “cooperation by a batterer with his wife or partner is an oxymoron.”⁴² When a victim is forced into mediation fear of her abuser may prevent her from asserting her needs which will further disempower the victim.⁴³ She has learned through her experiences with the batterer that her needs will not be met because they are either inferior to those of her batterer or simply do not matter at all.

A second reason that mediation of cases involving domestic violence is opposed is that it places the victims at risk for future abuse. Studies have shown that the most dangerous time for a battered woman is when she separates from her partner.⁴⁴ Forcing abused women to mediate will in most cases subject them to face-to-face contact with their abusers, thereby potentially exposing them to further violence.⁴⁵ Serious and imminent safety concerns exist for the victim as well as for her children when the batterer is informed of the time and the place that his former partner will be present at the mediation. This risk is exacerbated if the woman has had to flee from the marital home or has been in hiding.

If domestic violence is not properly screened for and detected, the terms of any resulting agreement of the mediation may also compromise the victim’s safety by, for example, giving the

⁴¹ Joyce, *supra*, n. 5, at 451.

⁴² Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *Mediation Q.* 317, 317 (1990).

⁴³ Joyce, *supra*, n. 5, at 452.

⁴⁴ Karla Fischer, Neil Vidmar & Rene Elis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 *SMU L. Rev.* 2117, 2138 (1993).

⁴⁵ Joyce, *supra*, n. 5, at 452.

batterer access to her through joint custody and visitation agreements.⁴⁶ Studies suggest that batterers are more likely than non-battering fathers to seek custody, especially of sons, and are as likely as non-battering fathers to prevail.⁴⁷ Batterers are likely to seek custody of their children for any number of reasons. A batterer may do so out of a desire to re-impose the control and domination that has diminished as a result of the relationship ending.⁴⁸ An abuser may also seek custody out of a desire for vindication; to refute claims of abuse or to prove that they are more emotionally strong and healthy than their former partners.⁴⁹ Gaining custody thus validates these views that a batterer may hold of himself. Additionally, a batterer may seek custody in order to have a bargaining chip or something to “trade off” against alimony, child support or assets.⁵⁰ Finally, a batterer may seek custody out of a desire to retaliate against their former partners for leaving them, defying them or beginning a new relationship.

A third reason mediating cases involving domestic violence is not met with favor is because mediation, although ideally an empowering process for participants, can actually disempower the victim. There are several reasons for this. First, critics feel that the confidential nature of mediation fails to criminalize domestic violence, invalidates the seriousness of the abuse, “dilutes the message that violence in any context is unacceptable . . . and blurs the message of offender accountability.”⁵¹ In addition, because mediation is forward-looking, it may also disempower victims when talk of past abuse is discouraged. When a battered woman is prohibited from talking about the abuse she suffered in the past, her anger and pain are invalidated and the abuser is excused from accountability.⁵² This invalidation is further

⁴⁶ Andree G. Gagnon, *Ending Mandatory Mediation for Battered Women* 15 Harv. Women’s L.J. 272, 279 (1992).

⁴⁷ Bancroft, Silverman, *supra*, n. 21, at 113.

⁴⁸ *Id.* at 114.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 453.

⁵² *Id.* at 454.

exacerbated when the mediator maintains neutrality because failure by the mediator to condemn the abuse will reinforce the batterer's belief that the behavior is acceptable.⁵³

A fourth reason that critics argue against mediating cases involving domestic violence is that a woman who has been abused will be unable to assert her own best interests which will lead to unfair agreements.⁵⁴ The woman's fear of the abuser is solidified time and again through the physical and verbal assaults, public and private humiliation, undermining of her authority as a parent, abusing the children and the batterer's using the children as weapons. The batterer continues to exert control over his former partner by using mediation as a vehicle by which the batterer can threaten future violence and ensure compliance. As a result, a woman is ineffective as her own advocate. One victim described the impact that fear of her husband had on her ability to mediate:

Mediation does not take into account the fear that I as a battered woman have about voicing my needs in the presence of someone who has pushed me and belittled me for expressing any needs at all . . . I endured two months of weekly meetings with the man who had knocked me to the ground, raped me and repeatedly violated me . . . I felt forced to comply, to attend those sessions and thus avoid greater pain. It reminded me of the nights spent silently weeping as he raped me. If I complied, the pain ended more quickly . . . In mediation, if I let my ex-husband verbally intimidate me and emotionally abuse me, I wouldn't have to go to court. The trade off was not a fair one.⁵⁵

V. COUNTERBALANCING THE EFFECTS OF FAMILY DYNAMICS: WHY AND HOW SOME CASES INVOLVING DOMESTIC VIOLENCE CAN BE MEDIATED

The dynamics between family members where domestic violence is present undoubtedly present significant problems when mediating these types of cases. Admittedly, some cases are "unsuitable for mediation because of safety, control or intimidation issues."⁵⁶ However, critics

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 455.

⁵⁶ Murphy, Rubinson, *supra*, n. 9, at 60.

who emphatically argue that *all* cases involving incidences of domestic violence should be absolutely precluded from mediation:

Tend to assume that the couple is involved in a pervasive “culture of battering,” whereby the woman has been so brutalized and demoralized by her abusive partner that she is rendered a passive shadow of her former self, unable to bargain in any meaningful way. However, this ignores the reality of a “continuum” of family violence, ranging from pervasive abuse to occasional violence.⁵⁷

In the late 1970s, psychologist Lenore Walker developed a theory known as the “Cycle of Violence.”⁵⁸ According to her theory, three phases dominated abusive relationships. During the first phase, the “tension building phase,” stressors such as finances, work, children and relationship problems mount. Tensions within the batterer escalate leading to the occurrence of an acute violent incident, signaling the second phase of the cycle. The acute incident is quickly followed by the third phase, the “honeymoon phase,” wherein the abuser expresses great remorse and tries to get forgiveness many times promising it will never happen again.⁵⁹

Walker describes women caught in this cycle of violence as having low self-esteem, being socially isolated, believing she is at fault for the violence, as suffering from Post Traumatic Stress Disorder which includes flashbacks, anxiety and depression and as likely to stay with the abuser out of fear or economic dependence.⁶⁰ Walker describes the abusers as men who exhibit pathological jealousy, blame the victim for the violence and are capable of being charming manipulators all of which make the batterer highly unpredictable.⁶¹ While Walker’s theory has been widely accepted, it has also been criticized as being too limiting, failing to acknowledge that battered women are a diverse group: some are economically independent but others are not.

⁵⁷ Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women and L. 145, 159 (2003).

⁵⁸ *Id.* at 152.

⁵⁹ *Id.* at 152-153.

⁶⁰ *Id.*

⁶¹ *Id.*

In addition, many of the women are angry at their abusers and are not afraid to fight back both verbally and physically.⁶²

Well-known researchers Janet Johnston and Linda Campbell are two of the many critics who have expanded on Walker's theory. They have identified five distinct profiles of domestic violence.⁶³ The first type, known as "ongoing and episodic male battering," is consistent with Walker's theory describing men as "easily frustrated, exhibiting poor impulse control, jealous and domineering."⁶⁴ The second type, "female initiated violence," begins with an outburst by the woman who may exhibit such behaviors as kicking, biting, or scratching, however, the male remains composed at all times and violence does not escalate.⁶⁵ The third type, "Male controlling interactive violence," begins with a disagreement which escalates into a struggle. The male usually prevails by overpowering the woman, but does not use excessive force. Relationships of the third type are not characterized as fearful and the violence usually ends at separation.⁶⁶ In the fourth type, known as "separation engendered/post-divorce trauma," violence is not present during the relationship, erupts only upon separation and is usually initiated by the person who feels abandoned.⁶⁷ Finally, the fifth group and by far the most dangerous is the "psychotic and paranoid reactions" group in which the abuser suffers from active psychosis and is delusional and very dangerous.⁶⁸

Janet Johnston and Vivienne Roseby are also clinicians who have done work similar to Johnston and Campbell recognizing that "violence derives from multiple sources and follows

⁶² Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 Wm. & Mary J. Women & L. 1, 72 (2001).

⁶³ Ver Steegh, *supra*, n. 57, at 154.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 155.

⁶⁸ *Id.*

different patterns in different families, rather than being a syndrome with a single underlying cause.”⁶⁹ As such, they recommend that “mediation be avoided with abusers in the first and fifth categories but would consider adapted mediation with couples in the second, third and fourth groups.”⁷⁰ The various profiles identified by Johnston and Campbell illustrate the range of violence that exists between couples and shows why a blanket exclusion is not appropriate for all cases involving domestic violence. Intimidation of the victim which critics claim prevents the victim from being able to advance her own in mediation is simply not present in many situations involving domestic violence.

Critics who focus solely on the control issue also fail to consider the many ways in which mediation can actually work to diffuse abuse as opposed to litigation which can actually escalate it. Litigation is an adversarial, rights-based process while mediation is purely interest-based. As such, in a litigated divorce, an adversarial mentality is fostered as each party is encouraged to blame the other for the problems in the relationship rather than taking individual responsibility for their actions.⁷¹ The adversarial mentality can also affect the parenting ability of the litigating parents as “issues [are] framed in terms of the parents’ rights rather than the child’s needs and the contestants see each other as opponents in a win/lose struggle rather than as parents making plans for the future.”⁷² The blame game coupled with the win/lose adversarial mentality can actually increase the risk of future violence to the victim.

Another problem with litigating domestic violence divorces is that it assumes the intimidation factor does not exist. However, the ability of an abuser to intimidate his victim is

⁶⁹ Janet Johnston , Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, 30 (The Free Press 1997).

⁷⁰ Ver Steegh, *supra*, n. 57, at 155.

⁷¹ Joyce, *supra*, n. 5, at 456.

⁷² Ver Steegh, *supra*, n. 57, at 167.

just as prevalent in a courtroom as it is in a mediation room. If the victim wishes to introduce evidence of the domestic violence in order to establish a fault-based grounds for divorce, she must testify that the abuse occurred. In cases where the abuser is *pro se*, the abuser will then have the right to personally cross-examine his victim about the abuse at which time “the abuser may challenge her, question her, and imply that she is to blame in open court.”⁷³ In addition to cross-examination, litigation can present other problems for a woman who has been a victim of domestic violence. An abused woman’s lack of economic resources, fear of retaliation by her abuser and the threat of an intimidating, traumatic litigation process prevents the victim from alleging the domestic violence in the first place⁷⁴ leaving the batterer to “use the court system as a forum to harass and intimidate the abuse survivor by engaging in traumatic and expensive ongoing litigation.”⁷⁵

Critics arguing against mediation of cases involving domestic violence are also concerned that mediation, with its focus on the future rather than the past, will fail to hold abusers accountable and that the neutrality of the mediator will somehow lead the abuser to believe his abuse is an acceptable form of behavior.⁷⁶ This reasoning fails to consider several important points. First, as an exception to confidentiality requirements of mediation, a mediator is permitted to disclose information regarding domestic violence. The Model Standards of Practice for Family and Divorce Mediation which “serve as a guide for the conduct of family mediators”⁷⁷ provides in Standard VII, Section C, that “the mediator *shall* disclose a participant’s

⁷³ Adkins, *supra*, n. 8, at 120.

⁷⁴ *Id.* at 125. Noting that “it will be important not to create strong incentives for the victim to avoid raising DV issues in the first place. Requiring her to litigate upon a DV or allegation is a demand that may run counter to (1) her financial interests, (2) her interest in regulating the process trauma she and her children may experience, and (3) her sense of physical safety.”

⁷⁵ Ver Steegh, *supra*, n. 57, at 161-162.

⁷⁶ Joyce, *supra*, note 5, at 454.

⁷⁷ Jane Murphy, Robert Rubinson, *Family Mediation: Theory and Practice*, C-1 (LexisNexis 2009).

threat of . . . violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.”⁷⁸ Likewise, the Uniform Mediation Act provides for disclosure of any communications in mediation that are “intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity.”⁷⁹ Indeed many states have also adopted similar statutory provisions providing for an exception to mediator confidentiality under these circumstances. Under Maryland Rule 17-109(d), “A mediator . . . may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help . . . prevent serious bodily harm or death.”

Second, mediation does not preclude a victim from filing criminal charges. If a victim chooses to do so, she may “file criminal charges, pursue a protective order, and mediate the divorce.”⁸⁰ In addition, evidence suggests that criminal sanctions still may not prevent future abuse to the victim and, in some cases may actually increase the likelihood that the abuser will in fact inflict further violence.⁸¹ A third point critics fail to consider is that although the abuse happened in the past that does not make it irrelevant to the forward-looking mediation process. In a mediation session where the mediator has given the parties an accurate description of what is likely to happen in court as a result of the allegations of the violence, the abuse can be factored into any resulting agreement, for example, to ensure the safety of the victim with regard to custody or visitation agreements, once the batterer understands that “he is better off reaching an agreement in mediation, even if it has been influenced by the history of violence.”⁸² Finally,

⁷⁸ *Id.* at C-2.

⁷⁹ *Id.* at 196.

⁸⁰ Ver Steegh, *supra*, n. 57, at 181.

⁸¹ *Id.*

⁸² Adkins, *supra*, n. 8, at 129.

there is the possibility that the confidential mediation process and the neutrality of the mediator may make it more likely that the abuser will admit fault and agree to seek help. “Some batterers may respond more constructively if they perceive that they are being listened to, treated fairly, and given clear expectations about future behavior.”⁸³

B. SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR MEDIATING CASES INVOLVING DOMESTIC VIOLENCE

1. SPECIALIZED TRAINING FOR MEDIATORS

Critics that argue emphatically against mediation of cases involving domestic violence not only fail to recognize the vast continuum of abuse, but they also fail to acknowledge recently developed tools and protections that may make mediation appropriate and, in many cases, a better alternative than litigation. Mediators are the front line of defense in insuring that a case involving domestic violence is appropriately referred to mediation. The “special needs of victims of domestic violence and the complexities inherent in violent relationships cry out for sophistication on the part of the mediators.”⁸⁴ While the verdict is still out on whether mediator training in this area must rise to the level of a licensed mental health professional, one thing is certain; “specialized training and certification should be required for those undertaking cases involving domestic violence.”⁸⁵ The Association of Family and Conciliation Courts adopted the Model Standards of Practice for Divorce and Family Mediators which provides some guidance. The Model Standards specify that “mediators must be knowledgeable about family law, the psychological impact of family conflict on parents and children, education and training in domestic violence, child abuse and neglect, and special education and training in the process of

⁸³ Ver Steegh, *supra*, n. 57, at 181.

⁸⁴ Murphy, Rubinson, *supra*, n. 9, at 57.

⁸⁵ Nancy Ver Steegh, *supra*, n. 57, at 204.

mediation.”⁸⁶ In addition, “a family mediator should recognize family situations which involve child abuse or domestic violence.”⁸⁷

Extensive and ongoing training of mediators to screen for and recognize domestic violence is especially essential considering that “domestic violence is not always obvious or easily recognized.”⁸⁸ Victims regularly “erase the violence against them by glossing over the reality of violence in their descriptions, or leaving out significant aspects of the violent episodes. . . Women often tend to deny their suffering while the abusers deny their culpability.”⁸⁹ Even more disturbing, because signs of abuse are often subtle, those outside the intimate relationship cannot understand the meaning of the communication that extends far beyond the words or non-verbal cues.⁹⁰ Clues that a victim is being intimidated or threatened vary from couple to couple and will oftentimes be as slight as a certain look or body movement made by the abuser that may be unrecognizable to the general public but may send an unmistakable message to the victim that she is in serious trouble if she does something she knows her abuser will not approve of.⁹¹ Thus, the ability to recognize the signs that indicate that domestic violence is present is of paramount importance in assessing the appropriateness of mediation.

Once domestic violence is identified and a determination has been made that a case may still proceed to mediation, a mediator must be aware of and attend to any power imbalances that may occur during the mediation sessions. One way that mediators deal with power imbalances

⁸⁶ Wheeler, *supra*, n. 3, at 568.

⁸⁷ *Id.*

⁸⁸ Anita Vestal, *Domestic Violence and Mediation: Concerns and Recommendations*, <http://www.mediate.com/articles/vestala3.cfm>. (May, 2007).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Wheeler, *supra*, n. 3, at 569. (“It would be next to impossible, no matter how extensively trained the mediator is, to be able to understand that a slight hand movement or word has created a serious level of fear in the victim, and will ultimately impact the outcome of the mediation.”)

is through their own exercise of power.⁹² A mediator may exercise their own power and control the process through a combination of any of the following:

1. Creating ground rules.
2. Choosing the topic.
3. Deciding who may speak.
4. Controlling the length of time each person may speak.
5. Allowing and timing the person's response.
6. Determining which spouse may present a proposal to the other.
7. Presenting an interpretation of what the other spouse said.
8. Ending the discussion.⁹³

If and when the couple begins to use their own power appropriately, the mediator can then transfer power from himself or herself to the couple.⁹⁴ By becoming skilled in recognizing when domestic violence exists and by learning how to attend to power imbalances, mediators can continually monitor each individual case where domestic violence is an issue to ensure that the case is in fact appropriate for mediation.

2. IMPLEMENTATION OF EFFECTIVE SCREENING TOOLS AND PROCEDURES

An additional layer of protection which is absolutely essential when mediating domestic violence cases is the implementation of effective screening procedures which detect domestic violence, assess the risks involved to each individual victim and determine the appropriateness of mediation. Unfortunately, this is another tool which remains highly underutilized by many states.⁹⁵ Screening is important because, in many cases, the victim is not forthcoming with information about the abuse out of fear of retaliation by the abuser. There is a "strong tendency to keep [the abuse] a secret, to deny and minimize what has happened or simply to accept the

⁹² Ver Steegh, *supra*, n. 57, at 186.

⁹³ *Id.* at 186-187.

⁹⁴ *Id.*

⁹⁵ Murphy, Rubinson, *supra*, n. 9, at 64. Noting that "only a handful of state laws make any reference to screening," and "those that do say little or nothing about who should do it or how it is to be done."

behavior as a "normal" way of functioning in the relationship.⁹⁶ Screening therefore helps to uncover abuse that may be lurking just beneath the surface and gives professionals an opportunity to assess whether the couple should proceed with mediation.

a. COURTS AND COURT PERSONNEL

Ideally, three tiers of screening for domestic violence should exist: the courts, the attorneys and the mediators. Screening by the court for domestic violence and child abuse or neglect will help the court identify cases that [may] be inappropriate for mediation . . . and will also help the court identify cases that . . . [may] require a hearing, for example for a protective order, before the case may be referred to mediation.⁹⁷ Screening should be effectuated at the pre-filing stage, after the parties have filed their first pleadings and again at the time of the parties' first appearance in court. This process should be standard for both represented and *pro se* litigants. Effective screening can be achieved through a combination of written questionnaires, review of the parties' paper file, search of the court's information system to determine if there are any related matters which have not been disclosed by the parties and private, confidential, individual interviews conducted by specially trained court personnel.⁹⁸ Following a proper screening, the court may recommend and refer the parties to community resources or may refer the parties to mediation if deemed appropriate at this stage.

b. ATTORNEYS

A second tier of screening lies with the attorneys who may represent parties in a case involving domestic violence. In order to most effectively represent these clients, it is imperative

⁹⁶ Vestal, *supra*, n. 88.

⁹⁷ Office of Dispute Resolution, Michigan Supreme Court, *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation: Model Screening Protocol*, <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf> . 2 (January 2006).

⁹⁸ Murphy and Rubinson, *supra*, n. 9, at 67-69.

that the lawyer understand the dynamics of domestic violence and how mediation is affected by those dynamics. Because of the lawyers' relationship with their clients and the amount of private, personal information that their clients often share, attorneys are in an optimal position to determine whether or not mediation is appropriate.⁹⁹ Lawyers can also help their clients determine if mediation is appropriate by understanding how mediation is likely to be conducted in a given jurisdiction and by assessing an individual mediator's qualifications and competence "to help ensure the choice of a sensitive and sophisticated mediator."¹⁰⁰ Finally, lawyers can "act as power enhancers and equalizers" during the mediation by "speak[ing] on behalf of clients, evaluat[ing] proposed solutions in light of applicable legal norms and the specific experiences of the client, and, if necessary, . . . opting out of the mediation itself if it is not serving the client's interests."¹⁰¹ Each of these functions will serve as an additional layer of screening when determining the appropriateness of a domestic dispute for mediation.

c. MEDIATORS

Even though screening may be carried out at the court level and, if the parties are represented, at the attorney level, it is possible that domestic violence may still not be revealed and that many of these cases will proceed to mediation. Arguably then the mediator is the most important player in the screening process since the mediator is essentially the final "gatekeeper." Mediators, professional organizations and experts have developed a number of screening tools made up of questions specifically designed to elicit information which will reveal the existence of domestic violence or instances of child abuse and neglect.¹⁰² Experts have also developed a list of behaviors that will indicate to mediators that a potential power

⁹⁹ *Id.* at 66.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 69.

imbalance exists.¹⁰³ Effective mediator screening can be in the form of either a written questionnaire or an oral interview and would ideally be a combination of the two. A comprehensive written questionnaire with questions can be distributed to each of the participants who can complete the questionnaire and return it to the mediator for review prior to the first mediation session. The questions should cover the vast range of abuse that can occur in domestic violence, i.e. from name calling and belittling to severe physical abuse.

In addition to the written tool, confidential, pre-mediation interviews can also be held with each of the participants. At the oral interview the mediator, after having the opportunity to review the results of the participants' written questionnaires, can pose oral questions similar to those advanced in written form which would clarify information already provided or probe for additional facts. A mediator must continually assess whether a case is appropriate for mediation. A key factor in this assessment is "whether the participants can safely stand up for what they believe is good for themselves and their children."¹⁰⁴ Therefore, it is imperative that the mediator's screening process be ongoing starting at a date prior to the mediation and continuing throughout.

C. SAFETY PRECAUTIONS

While mediation of cases involving domestic violence does undoubtedly pose important safety risks for the victim and the victim's children, there are several safety precautions that can mitigate, if not altogether eliminate, any risk of physical safety that exists. Shuttle mediation ensures that the couple need never be present in the same room at the same time. It includes a combination of any of the following: caucusing, confidential scheduling of appointments, transportation of the victim to and from an undisclosed location, separate waiting rooms,

¹⁰³ *Id.*

¹⁰⁴ Johnston, Roseby, *supra*, n. 69, at 3.

staggering arrival and departure times, telephone conferencing, providing escorts and encouraging attorney presence. Shuttling “precludes the possibility of both verbal manipulation and nonverbal cues intended to intimidate the victim.”¹⁰⁵

Should it be determined that face-to-face mediation is appropriate, setting ground rules is another precaution which can be taken to ensure the victim’s safety. Basic ground rules can be set regarding conduct both in and out of mediation and can include such things as “respectful and appropriate use of language and gestures, not interrupting, not touching the other person . . . as well as “boundaries regarding telephone, e-mail, and face-to-face contact.”¹⁰⁶ To solidify the parties’ understanding of the ground rules, they should be put in writing and reviewed at the beginning of each mediation session.¹⁰⁷

The use of male and female co-mediators is encouraged to balance the gender dynamic in the room.¹⁰⁸ Holding separate caucuses as necessary to guard against lopsided agreements and to ensure the agreements are being made voluntarily is also advised. When mediating cases where domestic violence has occurred, the mediator should downplay the importance of reaching an agreement and be prepared to terminate the mediation if necessary taking appropriate steps to ensure the safety of the victim. Finally, where it is likely that an agreement can be reached, mediators should encourage detailed parenting agreements with very specific terms, especially with respect to visitation and custody arrangements, to ensure the continued safety of both the victim and her children.¹⁰⁹

IV. CONCLUSION

¹⁰⁵ Adkins, *supra*, note 8, at 109.

¹⁰⁶ Ver Steegh, *supra*, n. 57, at 199.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Divorce mediation in the context of domestic violence is one of the most controversial issues in family law today.¹¹⁰ Unfortunately there is no “one size fits all” answer. Indeed some cases involving domestic violence, due to the power imbalance and the resultant fear and intimidation of the victim as well as the inherent safety risks, should never be mediated. However, domestic violence is unique to each family with the degree of abuse suffered by the victim and the effects of that abuse varying widely.

When considered in light of the “continuum” of domestic violence, mediation is appropriate and often preferred in many cases given the proper procedural and substantive safeguards. In addition to specialized mediator training and the implementation of a three-tier screening system, a “specialized procedure including ground rules, safety planning, separate caucuses, and the presence of attorneys and support people should be tailored to the needs of each couple.”¹¹¹ If implemented properly, these safeguards will not only help to identify the presence of domestic violence, but will also work to protect the victim from further abuse and empower, rather than disempower, the victim. The result will be that many victims of domestic violence will have another option to consider in resolving their divorce which will ultimately prove to be less expensive, less adversarial, less traumatic and safer than traditional divorce litigation.

¹¹⁰ *Id.* at 147.

¹¹¹ *Id.* at 204.