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# Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens

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JANE C. MURPHY\* & ROBERT RUBINSON\*\*

## I. Introduction

Over the last two decades, mediation of family law cases has become well-established in American courts.<sup>1</sup> Beginning as a voluntary alternative to litigation for a handful of divorcing couples, mediation of family law cases in court-sponsored programs is now authorized by statute or court rule in almost every state.<sup>2</sup> As mediation has grown, experts have recognized that power imbalances between couples may interfere with mediation.<sup>3</sup> This imbalance is particularly evident where one partner has been abusive to the other. Indeed, widespread consensus has developed that decisions about whether mediation is appropriate are particularly crucial and delicate when domestic violence is present.<sup>4</sup> Some believe mediation is never an

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1. See, e.g., Louise Phipps Senft and Cynthia A. Savage, *ADR in the Courts: Progress and Possibilities*, 108 PENN. ST. L. REV. 327, 329-33 (2003) (describing the use of ADR in the courts as having “exploded” in the last twenty-seven years, particularly in court-annexed mediation programs); Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95 (2001) (citing a National Center for State Courts study demonstrating the “growth and popularity” of mediation in the state courts, particularly in family law).

2. See Appendix A and *infra* notes 46-50 and accompanying text.

3. See *infra* text accompanying notes 19-23.

4. See *infra* text accompanying notes 28-33. Intimate partner violence and child abuse are

appropriate dispute resolution alternative when domestic violence has been identified.<sup>5</sup> Others argue that mediation is a viable option for battered women as long as procedural and substantive safeguards are in place.<sup>6</sup> Still others argue that the choice to mediate should be left to the victim, particularly when the victim can be provided with meaningful guidance about whether her specific circumstances are such that mediation can enhance her ability to gain some measure of control over her future.<sup>7</sup> While there is wide variation among experts about how to respond to domestic violence, most agree that the presence of such violence presents special challenges in the mediation context.

This consensus that domestic violence cases should be given special treatment in the mediation of family law disputes is reflected in the pronouncements of academics, legislators, and judges.<sup>8</sup> Leaders in the mediation and legal communities have adopted standards of practice reflecting this consensus. In addition, while a few family mediation rules and statutes make no reference to domestic violence,<sup>9</sup> most include some provision for excluding or otherwise giving special treatment to cases involving couples who have had relationships where abuse has been or is present.<sup>10</sup>

Despite this consensus, there is evidence that courts are still ordering couples who have experienced domestic violence to mediate their family law disputes with little or no particularized examination of the couples' circumstances.<sup>11</sup> There are a number of reasons for this failure to implement policies designed to protect domestic violence victims in the mediation process. These include a lack of precision in mediation statutes that has

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often addressed collectively in mediation literature and statutes, sometimes referred to as "family violence." The issues of child abuse and intimate partner violence raise some of the same serious concerns in the mediation setting and often overlap in the same family. This Article addresses primarily court response in cases of intimate partner violence, which the authors refer to as "domestic violence." For a thorough discussion of the distinctive issues raised by child abuse and mediation, see ANDREW I. SCHEPARD, CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 93-100 (2004).

5. See, e.g., Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235 (2002); Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559 (2002).

6. See, e.g., Alexandra Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253. (2001). Current studies suggest that over ninety percent of victims of domestic violence are women. NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 34 (1998).

7. See, e.g., Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 196-97 (2003).

8. See *infra* notes 34-50 and accompanying text.

9. See, e.g., ARK. ACTS 804, CONN. GEN. STAT. ANN. § 46b-59a.

10. See Appendix A.

11. See *infra* notes 51-63 and accompanying text.

generated confusion among court personnel, litigants and lawyers about what we mean when we refer to both “mediation” and “domestic violence.” This confusion contributes to the ineffectiveness of attorneys and courts in screening for domestic violence and counseling litigants about the risks of mediation for those who are in an abusive relationship. As a result, domestic violence victims do not benefit from the often elaborate statutory schemes designed to protect them.

This Article begins by exploring and explaining the risks of mediating cases where a power imbalance exists between the disputing couple, particularly where domestic violence is present. Rather than engaging in the often polarizing debate about “whether domestic violence cases should be mediated,” the Article seeks to reframe the debate by improving understanding about the meaning of both “mediation” and “domestic violence” in this context. It describes the consensus that has been reached among courts, legislatures and academics that domestic violence cases require special treatment in the mediation context in order to protect victims of such violence. It also analyzes the court rules and statutes as well as recent research suggesting significant failures in effectively implementing such statutes. Finally, the Article offers some proposals to improve the ability of both attorneys and courts to screen for domestic violence. The adoption of these proposals should narrow the gap between theory and practice in this area and fulfill the promise of better protecting and empowering domestic violence victims.

## II. Power Imbalances and Mediation

### A. *The “Power Critique” of Mediation and Domestic Violence*

A primary goal of the mediation process is to empower parties.<sup>12</sup> By valuing substantive and procedural flexibility and, at least in theory, a direct and central role for “stakeholders,” many forms of mediation strive to put the power to resolve disputes in the hands of disputants themselves.

The very flexibility and lack of external legal and procedural constraints in most mediation processes can, however, *disempower* parties by recapitulating or even exacerbating existing power imbalances. Scholars have focused on a number of groups that are particularly vulnerable in this regard, including minorities,<sup>13</sup> women,<sup>14</sup> and the economically disadvan-

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12. See KIMBERLEE KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 39 (3d ed. 2004) (gathering definitions of mediation that characterize its “essence” as “empowerment”).

13. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-91.

14. The most famous of these critiques is Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 1991 YALE L.J. 1545 (1991). See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). A noted response to such critiques is Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

taged.<sup>15</sup> A common thread running through these critiques is that many of the characteristics of litigation that mediation seeks to avoid—formality, decision making by a neutral fact finder, the constraining influence of a set of neutral principles embodied in “law,” even the institutional naming of actions as wrong and illegal—can act to equalize the playing-field in the presence of power differentials between or among parties.<sup>16</sup> The absence of such safeguards could thus render mediation a more dangerous process in the presence of power imbalances between parties.

Yet another aspect of the “power critique” addresses the presence of ill-equipped or poorly trained mediators. Mediator “quality control” is a thorny issue that has attracted substantial attention.<sup>17</sup> Bad mediators can do great harm, especially to vulnerable parties, when the “empowering” promise of mediation can become, instead, an exercise in coercion and arm-twisting.<sup>18</sup> This risk is particularly acute without appellate review, a public record, or established grievance procedures that, at least in theory, provide a check on a comparable risk of “bad” judging.

The power of the “power critique” of mediation intensifies further when one of the parties is a victim of domestic violence. This has long been recognized by scholars and legislators<sup>19</sup> and, as explored in detail below, has generated a range of statutory and administrative responses.<sup>20</sup> Victims of domestic violence might be incapable of directly participating in mediation or even recognizing the full extent of their harm due to the psychological scars of the battering<sup>21</sup> or by a fear that participating in mediation might provoke the batterer to engage in retaliatory violence during or after the session.<sup>22</sup> Moreover, while the “empowerment” and “collaboration” rhetoric so central to many conceptions of mediation sounds attractive in the abstract, some argue that encouraging, or worse, forcing

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15. Richard Abel has set forth a particularly pointed critique that argues that mediation and other forms of “informal justice” inhibit collective action for economic and social justice by individuating claims. See, e.g., Richard L. Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* (Richard Abel ed., 1981); Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 *INT’L J. SOC.* 245 (1981). See also Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984).

16. See Delgado, *supra* note 13, at 1388.

17. See KOVACH, *supra* note 12, at 429-78 (collecting authorities).

18. For discussions of the damage that poor mediators can wreak in family law mediation, see, e.g., Grillo, *supra* note 14, at 1603. For a rare instance where an alleged bad mediator was subjected to judicial scrutiny, albeit unsuccessfully, see *Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (plaintiffs alleged that mediator coerced settlement).

19. See Ver Steegh, *supra* note 7, at 180-90 (collecting authorities).

20. See *infra* text accompanying notes 34-73.

21. Zylstra, *supra* note 6, at 255 (victims of domestic violence “may psychologically minimize the violence, or believe they are to blame for the violence”).

22. See Krieger, *supra* note 5, at 245-56.

through “mandatory mediation,” a battered spouse to “collaborate” with her batterer is abuse itself.<sup>23</sup> One possible consequence may be to intensify the trauma the victim has already experienced.

Moreover, the special needs of victims of domestic violence and the complexities inherent in violent relationships cry out for sophistication on the part of mediators. As a result, the “bad mediator” problem becomes even more acute, with the very real risk of a poorly trained or equipped mediator facilitating the revictimization of victimized parties.<sup>24</sup>

### B. The Challenge of Definitions

While the challenges and potential dangers of mediating disputes in the presence of domestic violence are well recognized, there is an underlying issue that is crucial to developing an informed and sophisticated way to screen such cases: what, precisely, is “mediation” and what, precisely, is “domestic violence?” In the absence of an understanding of the complexity and variability underlying these terms, abstract questions of “should disputes involving domestic violence be mediated” or “how such disputes should be screened” are of limited value.

As to mediation, an extraordinary range of activities is undertaken with that label attached.<sup>25</sup> In some instances, “mediation” may be nothing more than a conventional settlement conference that would be familiar to the most adversarial of litigators.<sup>26</sup> In other instances, “mediation” may seek to be a “pure” facilitative process, in which the merest hint of evaluating the merits of a position or idea is anathema.<sup>27</sup> There also remains the issue

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23. See, e.g., Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317 (1990); Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 *CARDOZO WOMEN'S L.J.* 235 (2002).

24. Indeed, some have noted that examples cited by those who oppose mediating matters involving domestic violence are examples of bad mediation. See Rosenberg, *supra* note 14, at 467 (examples purportedly demonstrating the dangers of mediation “effectively capture and magnify only the worst possible abuses of the process”).

25. Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 *CLINICAL L. REV.* 833, 846-49 (2004). Such variability sometimes generates confusion as to whether or not matters involving domestic violence are, in fact, being mediated. See Vogt v. Vogt, 445 N.W.2d 471, 474-75 (1990) (reviewing a motion to vacate a visitation “agreement” where appellant, a battered woman, claimed that the trial court ordered “mediation”; court found that “mediation” did not take place, although the “record lends itself to different interpretations” on the issue); Mechtel v. Mechtel, 528 N.W.2d 916, 919 (1995) (court found that mandatory “meeting with the court services officer ‘to discuss the issues at hand’ constituted” mediation in violation of the Domestic Abuse Act, even though the act does not define “mediation”).

26. Rubinson, *supra* note 25, at 846-47.

27. The distinction between “facilitative” and “evaluative” mediation, first articulated by Leonard Riskin, has become entrenched in the literature on mediation, although Riskin himself has recently called for changes in these labels. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 *NOTRE DAME L. REV.* 1 (2003).

of quality control and the variability of skills and competencies of individual mediators.

There are comparable risks in assuming a unitary definition of “domestic violence.” While scholars from different disciplines have investigated domestic violence and the physical, psychological, and social harms it generates, there is neither a “typical” victim of domestic violence, nor “typical” responses,<sup>28</sup> nor “typical” circumstances in which such violence occurs.<sup>29</sup> Variables may include the nature, extent and frequency of the abuse itself, whether there are children involved and, if so, their ages and if they have special needs, the presence or absence of other individuals who may take a supporting role, whether and how the parties are employed and the economic resources available to them, whether or not related proceedings—such as protective order hearings or criminal prosecutions—have taken place, and whether neither, one, or both parties are represented by counsel.<sup>30</sup> Moreover, evidence suggests that victims of domestic violence can and do employ mechanisms to protect themselves and their children in the face of extraordinarily challenging circumstances, and may indeed find mediation more empowering than conventional litigation.<sup>31</sup> In sum, domestic violence is a complex phenomenon replete with varying physical, psychological, social, economic, and legal dimensions.

This is not to say, however, that such complexity precludes reaching informed decisions about which cases are appropriate for mediation and which are not. Victims of domestic violence who have experienced a “culture of battering”—a systematic pattern of control and domination characterized by forms of physical, emotional, sexual, familial and/or financial abuse—are, in virtually all instances, not appropriate candidates for mediation.<sup>32</sup> This is especially true when these horrific experiences generate complex psychological dynamics that lead such victims to hide, deny, or minimize the abuse.<sup>33</sup>

In light of all of these considerations, effective screening must seek to ensure sensitivity and sophistication in assessing individual circumstances while identifying criteria to determine which cases are appropriate for mediation. Appreciating both the variability of the quality and experience

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28. See Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 *Am. U.J. GENDER. SOC. POL'Y & L.* 499, 504-09 (2003).

29. Ann Shalleck, *Theory and Experience in Constructing the Relationship Between the Lawyer and Client: Representing Women Who Have Been Abused*, 64 *TENN. L. REV.* 1019 (1997); Ver Steegh, *supra* note 19, at 159.

30. For a discussion of the impact of legal representation in mediation involving domestic violence, see *infra* text accompanying notes 74-78.

31. Ver Steegh, *supra* note 19, at 185 (collecting authorities).

32. Rimelspach, *supra* note 1, at 100-01.

33. *Id.* See also Zylstra, *supra* note 6, at 255.

of mediators and of differences and commonalities of the experience of victims of domestic violence provide a crucial jumping off point for structuring an effective screening regime.

### III. The Consensus: Domestic Violence Cases Need Special Treatment in Mediation

#### A. Academics and Practitioner Statements

##### 1. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION

As mediation of family disputes has become more widespread and institutionalized through court programs, practitioners and academics have recognized the need to develop standards for high quality, ethical practice in this area. As a result, the American Bar Association Section of Family Law (ABA) and the Association of Family & Conciliation Courts (AFCC) collaborated with a wide range of individuals and professional organizations to develop what became the *Model Standards of Practice for Family and Divorce Mediation* (Model Standards).<sup>34</sup> After extensive drafts and an opportunity for comment, the Model Standards were adopted by the ABA and AFCC in 2001. The Model Standards seek to guide mediators in both court-sponsored and private practice settings on issues encountered in practice. They also summarize what constitutes good practice for lawyers, courts, and the public. While, by their terms, the Model Standards are an “aspirational resource document for organizations and individuals that wish to adopt them voluntarily,”<sup>35</sup> they have been adopted by a number of leading professional organizations.<sup>36</sup>

The Model Standards address issues of domestic violence in mediation practice. These include provisions defining domestic violence,<sup>37</sup> requiring domestic violence training for mediators,<sup>38</sup> screening,<sup>39</sup> and setting forth steps to ensure safety during mediation.<sup>40</sup> Finally, the Model Standards recognize that:

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34. Other participants included the ABA Section of Dispute Resolution and the National Council of Dispute Resolution Organizations. For the full text of the Model Standards and a thorough history of them, see Andrew Schepard, *Model Standards of Practice in Divorce & Family Mediation in FAMILY AND DIVORCE MEDIATION* 516 (JAY FOLBERG ET AL. EDS, 2004) [hereinafter MODEL STANDARDS].

35. MODEL STANDARDS, *supra* note 34, at 518.

36. In addition to the ABA & AFCC, the following organizations, among others, have adopted the Model Standards: the Michigan Council for Divorce Mediation, The Wisconsin Association of Mediators, the Family and Divorce Mediators of Greater New York, and the Connecticut Council for Divorce Mediation.

37. The Model Standards define domestic violence as both “control and intimidation” as well as any definitions included in “applicable state law.” Standard XA, Model Standards, *supra* note 34, at 540.

38. *Id.* at Standard XB.

39. *Id.* at Standard XC.

40. *Id.* at Standard XD1-6.



Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.<sup>41</sup>

In sum, while not exempting all cases where domestic violence is present, the Model Standards recognize the need for special treatment of these cases and the obligation of mediators trained in these issues to screen for the existence of domestic violence prior to mediation.

## 2. THE AMERICAN LAW INSTITUTE

Another group of distinguished academics, judges and practicing lawyers, the American Law Institute (ALI), has also addressed the issue of mediating family disputes where domestic violence is present. In its Principles of the Law of Family Dissolution,<sup>42</sup> the ALI takes the position that the risks of coercion and intimidation in mediation for victims of domestic violence require that all mediation programs be voluntary.<sup>43</sup> In order to protect victims in parent education and the development of parenting plans, the ALI would require courts to develop a screening process to identify cases in which there is “credible” evidence that domestic violence has occurred and to conduct evidentiary hearings to evaluate such evidence.<sup>44</sup>

The ALI then takes the position that the best way to address the risks of domestic violence and mediation is to make certain such cases are identified in the courts and to use mediation only when both parties agree to it.<sup>45</sup>

### *B. Legislative and Judicial Responses*

Courts and legislatures have responded to the consensus that domestic violence cases should be given special treatment in mediation by enacting a variety of rules and statutes to achieve that goal. 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

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41. *Id* at Standard XC.

42. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, A.L.I. ch. 6 (2002).

43. ALI PRINCIPLES § 2.07 and cmt. at 166-67.

44. ALI PRINCIPLES § 2.06.

45. This consensus that domestic violence cases require special treatment has also been recognized by other organizations of professionals who deal with family disputes, including, the National Council of Juvenile and Family Court Judges and the Academy of Family Mediators Policy. Zylstra, *supra* note 6. The American Bar Association has also adopted the following policy: “RESOLVED, That the American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.” American Bar Association, Mediation and Domestic Violence Policy (Adopted by the ABA House of Delegates July 2000).

disputes. While there is significant variation among these statutes and rules, custody and visitation disputes are the most common types of cases referred for mediation.<sup>46</sup> In addition, the majority of statutes make the decision to order parties to participate in mediation discretionary with the trial judge.<sup>47</sup> Most provide some guidance to the court in exercising this discretion. Of the forty-two statutes or rules, twenty-nine limit the court's discretion to order mediation when domestic violence is present.<sup>48</sup> The remaining statutes give little or no guidance or provide for exceptions under broad, vague concepts like "undue hardship"<sup>49</sup> or "good cause."<sup>50</sup>

Thus, while the statutes and rules tend to provide little specific direction about how to make domestic violence victims safe, the majority contemplate special treatment for such cases in mediation.

### *C. Implementation of Statutory Protections for Domestic Violence Victims in Mediation: Gaps and Limitations*

Given the consensus about the potential risks of coercion and intimidation in the family mediation setting for domestic violence victims, one would expect that court mediation programs would pay particular attention to identifying abuse victims for special treatment. Expert opinion about courts' effectiveness in screening for domestic violence victims, however, is mixed.<sup>51</sup> While research on the efficacy of screening for domestic violence is currently limited, the available studies and other evidence suggest serious problems with the current system for identifying domestic violence cases in court-sponsored mediation programs.

In a 1993 survey of 200 mediation programs, 80% of the programs reported that they screen for domestic violence.<sup>52</sup> While the number of programs that report screening was encouraging, a number of other findings in the survey provided a less favorable picture. Thirty percent of the programs reported that they do no training for mediators or court personnel in assessment of domestic violence, and only 50% of the programs reported doing separate interviews of the parties as part of the screening process.<sup>53</sup>

46. See Appendix A.

47. *Id.* For an excellent analysis of the range of family mediation statutes, see student note, *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431 (2001).

48. *Id.*

49. See, e.g., ARIZ. REV. STAT. ANN. § 25-381 (1999).

50. See, e.g., ARK. ACTS 804.

51. Compare Ann L. Milne, *Mediation and Domestic Abuse* in FOLBERG ET AL., FAMILY AND DIVORCE MEDIATION, *supra*, note 34, at 320 ("screening can be effective in excluding inappropriate cases from mediation") with Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 LOY. J. PUB. INT. L. 37, 55 (2003) ("even when courts do operate a screening process, it is often ineffective").

52. Nancy Thoennes, et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 26 (1995).

53. *Id.*

Finally, problems in both the quality and quantity of questions asked about domestic violence in the screening tools led the researchers to conclude that the screening tools represented “a serious shortcoming and raise[d] questions about the comprehensiveness and adequacy of screening in general.”<sup>54</sup>

A more recent study funded by the National Institute of Justice focused on California, a state with one of the oldest and most widely used family mediation programs in the country.<sup>55</sup> In this study, “Child Custody Mediation’s Failure to Protect: Why Should the Criminal Justice System Care?,”<sup>56</sup> researchers examined child custody mediations in which the parents could not reach mutual agreement. They compared 200 mediations involving charges of domestic violence (DV) with 200 non-DV mediations. The DV group was identified based on answers to a premediation screening form, the existence of a restraining order in the case file, and/or comments in the mediator’s report. One of the questions addressed in the study was “How well do mediators recognize and acknowledge domestic violence?” The researchers found that when domestic violence was expressly alleged on these prescreening forms, including cases in which a restraining order was noted in the file, mediators directly addressed the issue of domestic violence less than half the time.<sup>57</sup> While other indicators of violence increased the likelihood that the mediator would address the violence in the mediation report and recommendation,<sup>58</sup> “property damage” and “police involvement” were the factors most likely to result in having the mediator address the domestic violence.<sup>59</sup>

Another study—conducted on court-sponsored mediation in family law cases in Maryland—also suggests that courts are ineffective in screening for domestic violence. Maryland’s family mediation rule makes the court’s decision to order parties to mediation for custody and visitation disputes

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54. *Id.*

55. For a description and history of the California mediation program, see Isolina Ricci, *Court Based Mandatory Mediation in* FOLBERG ET AL., *FAMILY AND DIVORCE MEDIATION*, *supra* note 34, at 397-99.

56. NIJ Research in Progress Seminar, *Child Custody Mediation’s Failure to Protect: Why Should the Criminal Justice System Care?* Dennis P. Saccuzzo & Nancy E. Johnson, grant number 99-WT-VX-0015, NIJ JOURNAL, Issue No. 251.

57. *Id.* at 21.

58. The majority of mediation programs in California use a “recommending” model of mediation in which the mediator is not bound by confidentiality and makes a recommendation to the court if the parties cannot reach an agreement. Ricci, *supra* note 55, at 407.

59. Saccuzzo & Johnson, *supra* note 56. Perhaps more troubling, this research also found that “women who informed custody mediators that they were victims of domestic violence often received less favorable custody awards.” *Id.* Although this finding raises issues beyond the scope of this article, this finding is relevant to the problem of screening. Moreover, researchers also found that such negative outcomes may contribute to the reports that some researchers heard “from attorneys who represented mothers at these proceedings [who] said that they often advised their clients not to tell the mediator about domestic abuse.” *Id.*

discretionary and exempts from mediation cases where there is a “good faith” allegation of a “genuine issue of physical or sexual abuse of the party or child”<sup>60</sup> No provisions in the court’s rule either define domestic violence or make explicit the court’s obligation to screen for such cases. In the study, a large-scale statistical examination of custody and financial outcomes of divorce in Maryland, researchers gathered preliminary findings about the implementation of Maryland’s family mediation rule.<sup>61</sup> The study analyzed almost 2000 divorce and custody cases, which made up a random 10% sample of all such cases filed throughout Maryland in FY 1999. Out of all the cases involving children (1022), only 6.5% (sixty-six) of them were mediated.<sup>62</sup> Of these mediated cases, over half (thirty-eight) had allegations of domestic violence noted in the pleadings in the court file. Although the sample of mediated cases in this study was small, the finding that cases involving allegations of domestic violence are routinely ordered for custody and visitation mediation is supported by a follow-up study conducted by the state’s court system.<sup>63</sup>

A variety of factors can explain why statutes and court rules often fail in their intended goal of protecting domestic violence victims in court-sponsored family mediation programs. A primary factor is a lack of precision in the majority of these statutes and rules. As discussed earlier, laws in only twenty-nine states explicitly address the risks of domestic violence for mediation. Of these twenty-nine, only nine states define or otherwise assist courts in determining what is meant by “domestic violence” or “abuse” in this context.<sup>64</sup> Moreover, these laws usually do not define domestic violence in the context of mediation, but, rather, through reference to definitions of those terms in the state’s civil protection order or criminal statutes.<sup>65</sup>

60. MD. RULE 9-205(B) (2).

61. CUSTODY AND FINANCIAL DISTRIBUTION: AN EMPIRICAL STUDY OF CUSTODY AND DIVORCE CASES IN MARYLAND 47-48 (April 2004) at [www.wlcmd.org/pdf/custodyfinancialdistribution](http://www.wlcmd.org/pdf/custodyfinancialdistribution).

62. Maryland’s custody and mediation rule went into effect in 1992, seven years before the cases in the study were filed. The researchers hypothesize, however, that the small number of mediated custody cases may be attributed to the fact that family divisions, which focus on services, such as alternative dispute resolution, were not established in the Maryland court system until 1998 and had little or no funding for court sponsored mediation until FY 1999.

63. FAMILY MEDIATION IN ANNE ARUNDEL COUNTY: A STUDY OF THE FAMILY DIVISION, CIRCUIT COURT FOR ANNE ARUNDEL COUNTY’S MEDIATION PROGRAM PERFORMANCE DURING CALENDAR YEAR 2000 6-7 (2001) (unpublished study on file with the authors finding that 16% of cases referred for custody mediation in one large Maryland jurisdiction in 2000 had clear evidence of domestic violence based on a review of pleadings in the file). For an example of an erroneous referral to mediation by a court of a matter involving domestic violence, see Mechtel, *supra* note 25, at 918-19 (finding that a referral to mediation was improper because issuance of an *ex parte* protective order is an “implicit finding of probable cause or physical abuse”).

64. In 2004, those states with mediation statutes or court rules that attempt to define domestic violence included Iowa, Kentucky, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Utah, and Wisconsin.

65. See, e.g., TENN. SUP. CT. R. 31; TENN. CODE ANN. §§ 36-4-130-131.

Only a handful of state laws make any reference to screening.<sup>66</sup> Those that do say little or nothing about who should do it or how it is to be done.<sup>67</sup> Indeed, to the extent they provide any direction at all, these laws anticipate no paper or in-person prereferral screening by court personnel, making mediators primarily responsible for screening after referral.<sup>68</sup>

Other circumstances contribute to the potential for failure to exclude domestic violence cases from routine treatment in court-sponsored mediation programs. Most statutes place the burden on the abused party to come forward with allegations of abuse and, in some instances, prove those allegations in an evidentiary hearing.<sup>69</sup> The ability or willingness of many battered women to meet this burden is questionable. As described earlier, many victims of abuse “may not consider their relationship abusive, may minimize the abuse, or may fear retribution if they come forward.”<sup>70</sup> Moreover, this burden on such litigants is exacerbated even further because most parties in family law cases are unrepresented and, therefore, receive little or no counseling about the nature and potential risks of mediation.<sup>71</sup>

66. *See, e.g.*, HAW. REV. STAT. § 580-41.5 (1998) (“a mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of family violence”); W.VA. CODE § 48-9-202 (requiring the highest court of the state to develop rules for “premediation screening procedures to determine whether domestic violence . . . would adversely affect the safety of a party. . .”).

67. *Id.* Some states may have developed protocols or local rules that detail the court’s obligation to screen for domestic violence when referring cases for mediation, the details of which are not reflected in statutes or court rules. For example, in California “cases with issues of violence are to be handled in accordance with a separate written protocol, required by the Judicial Council of California.” Isolina Ricci, *Court-based Mandatory Mediation: Special Considerations*, FAM. & DIV. MEDIATION 397, 406 (Jay Folberg et al., eds, 2004). Local rules in Missouri (*see, e.g.*, MO. 6TH CIR. CT. R. 68.8) and Pennsylvania (*see, e.g.*, PA. YORK CTY. CT. R. CIV. P. 303) also provide greater guidance to those courts about screening procedures.

68. *See, e.g.*, HAW. REV. STAT. § 580-41.5; OR. REV. STAT. § 107.755.

69. *See, e.g.*, FLA. STAT. ANN. § 44.102; VA. CODE ANN. § 20-124.4.

70. Zylstra, *supra* note 6, at 268. *See also* Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 283 (1999).

71. Steven K. Berenson, *A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 110 (2001) (describing a 1991-92 study of sixteen large urban areas nationwide finding that 72% of all domestic relations cases involved at least one unrepresented party). *See also* The Register (Spring 2005) (reporting data from the Probate and Family Court of Suffolk County, Massachusetts, including Boston and surrounding communities, and finding that “[i]n recent months the number of unrepresented litigants filing papers in the Registry outpaced those who do hire an attorney by a 4-1 margin—80%-20%. . . . Just a few years ago, the ratio was just about 75% to 25%, with one in four opting to come to court without an attorney.”); Maryland Judiciary Administrative Office of the Courts Family Administration, 2003 Annual Report of the Maryland Circuit Court Family Divisions and Family Services Programs, 29-30 (2003) (64% of litigants in family disputes in Maryland were self-represented.) For a general discussion of the difficulties unrepresented parties confront in mediation, *see* Russell Engler, *And Justice For All—Including The Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2006-11 (1999).

Finally, given the increasing numbers of family law cases in court dockets,<sup>72</sup> there is great pressure on court personnel to utilize mediation to resolve these disputes.<sup>73</sup>

#### IV. Proposals for Reform: Best Practices in Screening for Domestic Violence

Screening for domestic violence is not a one-step process. Indeed, many individuals—both lawyers when parties are represented and a wide range of court personnel—can help to narrow the gap between theory and practice in protecting domestic violence victims in the mediation process.

##### A. The Role of Attorneys

An initial problem in approaching the role of lawyers in protecting victims of domestic violence is that the vast majority of such victims cannot obtain counsel.<sup>74</sup> As addressed below, this common situation vastly enhances the responsibilities of the judicial system—both administrators and judges—to protect victims through appropriate screening protocols.

A second problem is when the abuser—sometimes the party with greater economic resources—is represented and the victim is not. Such an instance intensifies an inherent power imbalance, and such an imbalance would, in virtually all circumstances, render the case inappropriate for mediation. In other instances, however, all parties are represented by counsel or the victim is represented and the abuser is not. In such cases, lawyers have a crucial and positive role to play.

First, lawyers are exceptionally well-positioned to act as screeners themselves. By learning and understanding the specific circumstances surrounding domestic violence and by knowing and understanding how mediation is likely to be conducted in a given jurisdiction, lawyers can

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72. See, e.g., MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, DEPARTMENT OF FAMILY ADMINISTRATION ANNUAL REPORT, FISCAL YEAR 2003 (finding that family cases made up 46% of the Maryland state trial courts' dockets, whereas other civil cases made up 27% of the docket, and criminal made up the remaining 27%); Amy Stevens, *The Business of Law: Lawyers and Clients; More Than Just Torts*, WALL ST. J., July 1, 1994, at B6. (finding that domestic relations cases make up an average of 35% of the docket of state courts around the country, more than all other kinds of civil cases combined).

73. Rimelspach, *supra* note 1, at 95 ("Courts have been implementing mediation programs in an effort to cut costs, increase efficiency, and better respond to the public's increasing demands on the traditional court system.")

74. See *supra* text accompanying note 71. See also Leigh Goodmark, *Law Is The Answer? Do We Know That For Sure: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 38-39 (2004); C. Cuthbert, et al., *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts*, 68-69 (Wellesley Centers for Women 2002) (describing testimonials from battered women who could not afford representation).

counsel clients about whether or not mediation is an appropriate process.<sup>75</sup> Moreover, lawyers' relationships with their clients enable them to conclude that mediation would not be appropriate as events unfold and more information is gathered. As a result, lawyers can act as screeners at all points in their representation, up to and including the mediation session itself.

Second, lawyers can advise their clients about other potential remedies and, if appropriate, pursue them. For example, pursuing mediation does not preclude seeking a protective order or pressing criminal charges against an abuser.<sup>76</sup> The advisability of such actions, in turn, might influence whether or not mediation is an appropriate alternative.

Third, when possible, lawyers can assess the qualifications and competence of potential mediators. As "repeat players" in the mediation process, lawyers are in a far better position than parties to help ensure the choice of a sensitive and sophisticated mediator.

Fourth, lawyers can have a crucial role to play in preparing for and attending the mediation sessions themselves.<sup>77</sup> In so doing, lawyers act as power enhancers and equalizers: they can speak on behalf of clients, evaluate proposed solutions in light of applicable legal norms and the specific experiences of the client, and, if necessary, suggest opting out of the mediation itself if it is not serving the interests of clients.

These constructive roles for attorneys presuppose, of course, effective lawyering. In the context of a case involving a client who has experienced domestic violence, this means attorneys who are sophisticated in their understanding of the special needs and experiences of such clients, are rigorous in their fact investigation, and understand the possibilities and shortcomings of mediation in resolving specific issues facing individual clients.<sup>78</sup>

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75. Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 *CLINICAL L. REV.* 833, 861-62 (2004). The increasing importance of mediation has led the American Bar Association to amend a Comment to the Model Rules of Professional Conduct to provide that "it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1.

76. Ver Steegh, *supra* note 17, at 181. The availability of criminal proceedings mitigates concerns of some scholars that in addition to power imbalances, mediation fosters a "private" resolution of a problem that many women's advocates have long sought to bring out of the "private" realm and into public consciousness and condemnation. *Id.* at 190-282.

77. See generally, Craig McEwan, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 *MINN. L. REV.* 1317 (1995); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 *OHIO ST. J. ON DISP. RESOL.* 269 (1999).

78. For a detailed discussion of the challenges of representing victims of domestic violence, see generally Shalleck, *supra* note 29.

### B. The Role of the Courts

Because so many family law litigants are unrepresented, courts must play the primary role in screening cases for mediation. The obligation to screen should be made explicit in the governing statute or court rule. This shifts the burden of raising domestic violence issues from the victim to the court and lays the groundwork for courts to lobby for appropriate resources for effective screening. In addition, courts, by rule or other directive from the chief judge of the highest court, should provide mediation programs with a protocol defining the obligations of each player in the system. Because there are many points of entry into the family justice system, and because domestic violence issues are often difficult to identify, cases should be screened at several different points in the court system.<sup>79</sup>

#### 1. PREFILING

Because so many family law litigants appear *pro se*, court systems around the country have developed court-based *pro se* assistance programs.<sup>80</sup> These programs provide an excellent opportunity for early screening and education for litigants about the benefits of mediation as well as the risks for victims of domestic violence. In the course of assisting litigants with filing pleadings, court staff in these programs should conduct in-person interviews with litigants to determine if they or their children are at risk for family violence. The questions asked during the interview should be developed from the variety of screening tools that have been designed by experts for this purpose and standardized into a court form for consistent use for each litigant.<sup>81</sup> A paralegal or attorney who has been trained in how

79. The protocol described here and the documents in Appendix B were developed by a Maryland working group formed as a result of concerns about the need for more effective screening of domestic violence cases in the state's court-sponsored family mediation programs. The group, which included a coauthor of this article, consisted of representatives from the court, academia, the mediation community, domestic violence shelters, and attorneys who represent litigants in family disputes. In developing the protocol described here and the forms in Appendix B, the group benefitted from the work of a wide variety of scholars and experts who have considered the issue of screening for domestic violence in mediation programs. *See, e.g.*, Julie Kunce Field, *Screening for Domestic Violence: Meeting the Challenge of Identifying the Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases*, 39 COURT REV. 4 (2002); Ver Steegh, *supra* note 17; LINDA K. GIRDNER, DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR MEDIATORS, INSTRUCTOR'S GUIDE (ABA Center for Children and the Law 1999); Richard Tolman, *Tolman Screening Model* in FINAL REPORT OF THE DOMESTIC ABUSE AND MEDIATION PROJECT (1992).

80. These programs have been developed in response to the lack of affordable legal representation in family law disputes, even for those who qualify for free legal assistance. *See, e.g.*, Deborah J. Cantrell, *What Does It Mean to Practice Law "In the Interests of Justice" In the Twenty-First Century?: Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573 (2002); Judicial Council of California Administrative Office of the Courts, *A Report to the California Legislature—Family Law Information Centers: An Evaluation of Three Pilot Programs*, 26-27, 39-40 (2003).

81. *See, e.g.*, Appendix B, Form 1 In-Person Screening Tool. *See also supra* note 79 (citing



to identify and respond to the needs of victims of family violence should conduct the interview. The screening should be done in all domestic cases, regardless of whether the individual seeking assistance states that there has been family violence or that she needs protection from family violence. The interview should be conducted in a private, confidential setting, where feasible. If possible, neither children nor the other party should be present. In addition to the questions in the screening tool, the interviewer should ask the person seeking assistance whether there have been any previous cases filed in any related domestic, domestic violence, child protection, or criminal matter in any court.

The interviewer should also conduct a search of the court's information system to determine if there are any related matters that were not identified by or may be unknown to the person seeking assistance. In order to preserve the confidentiality of the person interviewed, the interviewer should shred any written documents, including any written screening tools, prepared in conducting the screening, and so advise the interviewee.<sup>82</sup> Court personnel can complete screening outcome forms to preserve the results of the screening.<sup>83</sup> Finally, if domestic violence is identified, the interviewer should provide the party with balanced information about mediation and available community resources.<sup>84</sup>

## 2. FILING

After pleadings have been filed in a case, a member of the court's staff should review the entire case file and conduct a "paper screening." Again, court systems should use a form for this purpose to guide court personnel and standardize practice.<sup>85</sup> If the parties are represented, court personnel can contact counsel if additional information is necessary to determine if domestic violence issues are present. If the parties are self-represented, court staff may also consider scheduling individual interviews on separate

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a variety of sources containing screening tools). In cases in which the victim has not disclosed abuse in any prior setting, the victim may be at some risk in disclosing the abuse when both parties are screened using the same tool at a joint court appearance, even if the screening is done individually. For this reason, some mediators suggest adding questions to the screening tool that are unrelated to the abuse to provide "cover" to the victim if the case is excluded from mediation based on the screening at the joint appearance.

82. State reporting requirements might place limits on the ability of such personnel to keep matters related to child abuse confidential. As reflected in Appendix B, Form 1, *supra* note 82, parties being interviewed should be advised of these limits on confidentiality prior to administering the screening interview.

83. See Appendix B, Form 2, Screening Outcome Form. Of course, the disclosure and dissemination of any information about domestic violence provided by a party must be limited and done with the consent of the party to protect the privacy and safety of the victim. See, e.g., Dalton, *supra* note 70, at 283.

84. See Appendix B, Form 3, Instructions for Self-Represented Litigants.

85. Appendix B, Form 4, Pleadings Stage Screening Tool.

days and/or at separate times, with all parties to determine the seriousness of the allegations or the level of risk, if that cannot be clearly determined from a paper review.

### 3. FIRST APPEARANCE IN COURT

All domestic cases also should be screened for domestic violence issues at the time the parties first appear in person in court. Screening should *not* be conducted in open court and, if possible, should not be conducted by the judge presiding over the first appearance in court. Rather, each party should be interviewed separately by a member of the court staff who has been trained to identify and respond to the needs of victims of domestic violence. As with the prefiling in-person screening process, steps should be taken to preserve confidentiality of information obtained during the interviews. The interviewer should shred any written documents, including any written screening tools, completed or prepared in conducting the screening. The interviewer should note in the court file that screening was conducted in person and whether mediation is appropriate.

### 4. MEDIATION

Despite multiple efforts to screen for domestic violence cases prior to mediation, cases involving abusive relationships will still get to mediation. It is, therefore, critical that mediators are properly trained to identify domestic violence and conduct their own screenings. This is required by mediator's ethical standards<sup>86</sup> and is an essential part of an effective screening system. Mediators have developed a number of their own screening tools for this purpose.<sup>87</sup> To ensure quality and consistency, courts may want to prescribe the use of a uniform screening tool to be used by all mediators.<sup>88</sup> A variety of professional organizations have developed lists of questions for mediators and others to use to elicit information to evaluate for the presence of domestic violence in premediation meetings with participants.<sup>89</sup> Even if screening occurs at multiple levels, cases involving abusive relationships will still find their way into mediation. Experts have developed checklists for mediators of behaviors that may be observed in mediation that suggest a power imbalance resulting from domestic violence. These behaviors look at tone of voice, facial expressions, and willingness to express needs, outbursts and lopsided

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86. Standard XC, *supra* note 41.

87. *See, e.g.*, GIRDNER, *supra* note 79.

88. *See, e.g.*, Form 1, Appendix B.

89. *See, e.g.*, Katherine Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUSTON L. REV. 30 (1998) (reprinting screening tool from the American Medical Association); THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK 2-1-2-11 (GOELMAN, ET AL., EDS. 1996).

agreements.<sup>90</sup> Mediators who observe such behaviors can conduct private caucusing and other screening techniques to determine whether to exclude the case from mediation or implement appropriate power balancing or safety measures if the mediation is to continue.

## V. Conclusion

Courts' increasing reliance on mediation in family law cases carries opportunities as well as grave risks in the presence of domestic violence. A crucial preliminary step is for courts to recognize the enormous importance of this issue. Failure to do so might well lead to the revictimization of the victimized. Once the need is recognized, however, it is crucial that judicial systems put into operation effective, structured, and repeated screening devices to determine those cases that are appropriate for mediation and those that are not. In so doing, a core principle is to ensure that this "appropriateness" screen never stops operating: it should begin with the very earliest contacts domestic violence victims have with the judicial system and continue all the way through the mediation session itself and beyond.

Moreover, the judicial system does not have, as it were, exclusive jurisdiction over such procedures. Lawyers for battered women, for example, play a key role in counseling their clients about whether mediation is appropriate and, if the choice is to mediate, representing them in the mediation session itself. Others who support and counsel victims of domestic violence—particularly lay advocates and mental health professionals—also have a role to play in empowering victims and, when appropriate, explore with them the virtues and dangers of mediation.

If done properly, multiple screens from multiple sources and perspectives will enable battered women and the judicial system to confer the benefits of mediation on some, avoid its potential for harm on others, and have the wisdom to know the difference.

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90. See, e.g., Lenard Marlow, *Sampson and Delilah in Divorce Mediation*, 38 FAM. & CONCILIATION CTS. REV. 224 (2000).

## APPENDIX A: Court-sponsored Mediation Programs

Family Mediation Statute	Type of Cases	Domestic Violence Exception	Can victim request mediation?	Does statute specify who shall screen cases for mediation?
<b>Alabama</b> ALA. CODE § 6-6-20 (1975).	Any issue.	Court shall not order mediation to resolve issues involving a protection order. In a proceeding concerning custody or visitation of a child, court shall not order mediation if protection order is in effect or if court finds DV has occurred.	Yes. Mediation shall only occur if (1) victim requests it, (2) mediator is trained in DV in a way that protects victim, (3) victim can have support person	Appears to be two-tiered. Court cannot order if it finds DV occurred, but if it refers case to mediator, then mediator (who receives referral or order from court to conduct mediation) screens for DV.
<b>Alaska</b> ALASKA STAT. § 25.24.060, 25.20.080,  ALASKA CIV. R. 100.	Any issues concerning divorce and dissolution of marriage.	If a protective order is issued or filed under state law, court may not order or refer parties to mediation. Court may not order or refer parties to mediation if a party objects on grounds that DV occurred, unless (see column 4). If the court proposes or suggests mediation, it may not occur unless victim agrees and court shall advise the parties that each has right to not agree to mediation and it will not bias court.	Yes. Mediation can occur if: (1) mediation is requested by victim of alleged domestic violence, or proposed by court and agreed to by the victim; (2) mediation is provided by a mediator who is trained in domestic violence in a manner that protects the safety of the victim and any household member, taking into account results of an assessment of potential danger posed by perpetrator and risk of harm to the victim; and (3) victim is permitted to have in attendance a person of victim's choice, including an attorney.	A mediator who receives a referral or order from a court to conduct mediation under (a) of this section shall evaluate whether domestic violence has occurred between parties. A mediator may not engage in mediation when either party has committed a crime involving domestic violence unless victim requests it and mediator is trained in DV.
<b>Arizona</b> ARIZ. REV. STAT. ANN. § 25-381 (1999).	Mediation plan must be included in parenting plan if joint custody sought by parties. Joint custody won't be ordered if DV found.	No specific exemption for DV except as it relates to joint custody.		
<b>Arkansas</b> ARK. CODE ANN. § 9-12-322.		No specific exemption for DV (but party may move to dispense with mediation for good cause shown).		
<b>California</b> CAL. FAM. CODE §§ 3170-3177, § 3181 (1994).	Contested issues involving custody and visitation.	No exemption for DV. If party alleges DV or there is a protective order in effect, mediator will meet with parties separately, and at separate times, but mediation continues. Domestic violence cases shall be handled by family court services in accordance with a separate written protocol approved by the judicial council.		Not in statute, but screening rules set forth in protocol mandated by statute.

## APPENDIX A: Court-sponsored Mediation Programs *continued*

<p><b>Colorado</b> COLO. REV. STAT. ANN. § 13-22-311 (West 1999).</p>	<p>Any cases.</p>	<p>The court shall not refer the case to mediation services where one of the parties claims that he/she has been victim of physical or psychological abuse by other party and states that he/she is thereby unwilling to enter into mediation services. The court may exempt from referral any case in which a party files a motion objecting to mediation and demonstrating compelling reasons why mediation should not be ordered.</p>	<p>Yes.</p>	<p>No.</p>
<p><b>Connecticut</b> CONN. GEN. STAT. ANN. §§ 46b-53a, 46b-59a, 54-56m (West 1999).</p>	<p>Mediation may address property, finances, custody, and visitation. Also for family violence criminal matters.</p>	<p>No reference to DV exemption.</p>		
<p><b>Delaware</b> DEL. CODE ANN. 13 § 711A (1992).</p>	<p>Support, custody and visitation.</p>	<p>Mediation shall be prohibited in any child custody or visitation proceeding in which one of parties has been found by a court, whether in that proceeding or in some other proceeding, to have committed an act of domestic violence against other party or if either party has been ordered to stay away or have no contact with other party, unless a victim of domestic violence, who is represented by counsel, requests such mediation.</p>	<p>Yes, if represented by counsel.</p>	<p>No.</p>
<p><b>District of Columbia</b> U.S. District Ct. Rules for DC LEV. R. 84.4</p>	<p>Judges may refer cases to mediation by encouraging litigants to submit voluntarily or by requiring them to participate after they've had opportunity to show cause why it wouldn't be appropriate.</p>	<p>No DV exemption, but good cause exemption and cases in which one of the parties is pro se are "generally considered inappropriate for mediation."</p>		
<p><b>Florida</b> FLA. STAT. ANN. §§ 44.102, 61.183 (West 1999).</p>	<p>Custody, visitation or other parental responsibility issues.</p>	<p>Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.</p>		<p>No.</p>
<p><b>Georgia</b> No mediation statute for domestic relations cases. See GA STAT. ANN. Editor's Notes.</p>	<p>Leg. history states that judges in divorce cases are encouraged to require parties to go to mediation.</p>	<p>No mediation statute.</p>		

<p><b>Hawaii</b> HAW. REV. STAT. § 580-41.5 (1998).</p>	<p>Any issues concerning divorce and dissolution.</p>	<p>In contested divorce proceedings where there are allegations of spousal abuse, the court shall not require a party alleging spousal abuse to participate in any component of any mediation program against the wishes of that party. In a proceeding concerning the custody or visitation of a child, if a protective order is in effect, court shall not require a party alleging family violence to participate in any component of any mediation program against the wishes of that party. In a proceeding concerning the custody or visitation of a child, if there is an allegation of family violence and a protective order is not in effect, the court may order mediation or refer either party to mediation only if victim authorizes and safeguards are present.</p>	<p>Yes. Mediation can occur if mediation is: (1) authorized by the victim of the alleged family violence; (2) provided in specialized manner that protects safety of victim by a mediator who is trained in family violence; and (3) victim is permitted to have in mediation a supporting person of victim's choice, including but not limited to attorney or advocate. If victim chooses to exercise such option, any other party to mediation is permitted to have in mediation a supporting person of party's choice, including but not limited to attorney or advocate.</p>	<p>A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of family violence between the parties.</p>
<p><b>Idaho</b> IDAHO R. OF CIV. PROC. 16.</p>	<p>Custody, visitation of minor children.</p>	<p>No reference to DV, cases may be mediated if the court finds it is "in the best interests of the children and is not otherwise inappropriate."</p>		
<p><b>Illinois</b> No unified state statute, but there are local rules from single judicial circuits. II. R. 17 CIR. MED. R. 1, R. 9, R. 10, R. 4.</p>		<p>No reference to DV but some local rules exempt cases where there is DV or intimidation.</p>		
<p><b>Indiana</b> IND. CODE ANN. § 31-15-9.4-1.</p>		<p>No reference to DV, but shall consider "ability of parties to pay for mediation and whether mediation is appropriate in helping parties resolve their disputes."</p>		
<p><b>Iowa</b> IOWA CODE §§ 598.7A, 598.41</p>	<p>Any dissolution of marriage action or other domestic relations action.</p>	<p>The provisions of this section shall not apply to actions that involve domestic abuse. The court shall, on application of a party, grant a waiver from any court-ordered mediation under this section if the party demonstrates that a history of domestic abuse exists.</p>		<p>No.</p>
<p><b>Kansas</b> KAN. STAT. ANN. § 23-602.</p>	<p>Court may order mediation in any contested issues of child custody, residency, visitation, parenting time, or division of property.</p>	<p>No reference to DV exemption.</p>		

## APPENDIX A: Court-sponsored Mediation Programs *continued*

<b>Kentucky</b> KY REV. STAT. ANN. §§ 403.036, 403.720, 403.010-403.350.	Custody, visitation, assignment of nonmarital property, division of marital property and/or maintenance.	In any court proceeding conducted pursuant to a divorce, dissolution, or custody action, if there is a finding of domestic violence and abuse, the court shall not order mediation unless requested by the victim of the alleged domestic violence and abuse, and the court finds that: (1) victim's request is voluntary and not result of coercion; and (2) Mediation is a realistic and viable alternative to or adjunct to issuance of an order sought by victim of alleged domestic violence and abuse.	Yes. See column 3.	No.
<b>Louisiana</b> LA REV. STAT. ANN. § 9:363 & § 9:332 (West 1999).	Custody or visitation disputes.	In any separation, divorce, child custody, visitation, child support, alimony, or community property proceeding, no spouse or parent who satisfies the court that he or she, or any of the children, has been victim of family violence perpetrated by other spouse or parent shall be ordered to participate in mediation.		No.
<b>Maine</b> ME REV. STAT. ANN. tit. 19-A § 251 (West 1999).	Cases involving divorce and separation, parental rights and child support, when there are minor children of the parties.	No exemption for DV. Upon motion supported by affidavit, the court may, for extraordinary cause shown, waive mediation requirement.		
<b>Maryland</b> Md. R. 9-205(b)-(c) (1998).	Limited to custody or visitation unless parties agree otherwise.	If a party or a child represents to 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.		No.
<b>Massachusetts</b> No mediation statute.		No mediation statute.	No.	No.
<b>Michigan</b> MI R. SPEC. P. MCR 3.216 & 2.403	All domestic relations cases.	Court has discretion to exempt case from mediation based on domestic abuse, unless attorneys for both parties will be present at mediation session.		No.
<b>Minnesota</b> MINN. STAT. ANN. § 518.619, (West 1999).	Contested custody, visitation and nonwelfare child support issues	If court determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by the other party, the court shall not require or refer the parties to mediation or any other process that requires parties to meet and confer without counsel, if any, present.		No.
<b>Mississippi</b> No mediation statute.		No mediation statute.		
<b>Missouri</b> No mediation statute, but some local court rules	Child custody, visitation.	Some local rules exempt DV cases.		

<b>Montana</b> MONT. CODE ANN. § 40-4-3013.	Anything related to the termination of marriage, child custody or support.	The court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.	No.	No.
<b>Nebraska</b> NEB. REV. STAT. §§ 43-2906, 43-2908, 28-711, 28-710 (1999).		Any disclosure of abuse made during the mediation process shall be confidential, except that reports of child abuse or neglect made during the mediation process shall be timely reported to the district judge and an in-camera hearing shall be held to determine whether a report of child abuse should be made and if further investigation is merited.		No.
<b>Nevada</b> NEV. REV. STAT. §§ 3.475, 3.500(2)(b) (1998).	Child custody, access or visitation.	In counties that have mediation programs, the program must authorize the court to exclude a case from the program for good cause shown, including, but not limited to, a showing that there is a history of child abuse or domestic violence by one of the parties.		No.
<b>New Hampshire</b> N.H. REV. STAT. ANN. § 458:15-a (1999).	Any domestic relations matters may be mediated, but only if all parties consent.	The court may choose not to order mediation if there is: (a) An allegation of abuse or neglect of the minor child. (b) A finding of alcoholism, drug abuse, or domestic abuse as defined by statute. (c) An allegation of serious psychological or emotional abuse.	Yes.	No.
<b>New Jersey</b> N.J. Ct. R. 1:40-4, 1:40-5, 1:40-10 (2000).	Any domestic relations dispute may be mediated.	No matter shall be referred to mediation if there is in effect a preliminary or final order of domestic violence entered pursuant to the Prevention of Domestic Violence Act. In matters involving domestic violence in which no order has been entered or in cases involving child abuse or sexual abuse, the custody or parenting time issues shall be referred to mediation provided that the issues of domestic violence, child abuse or sexual abuse shall not be mediated in the custody mediation process. The mediator or either party may petition the court for removal of the case from mediation based on a determination of good cause. The mediator or a participant may terminate the session if (a) there is an imbalance of power between the parties that the mediator cannot overcome, (b) a party challenges the impartiality of the mediator, (c) there is abusive behavior that the mediator cannot control.		No.
<b>New Mexico</b> N.M. STAT. ANN. § 40-4-8	Contested custody cases.	If a party asserts or it appears to court that domestic violence or child abuse has occurred, court shall halt or suspend mediation unless the court specifically finds that (a) the following three conditions are satisfied: (1) mediator has substantial training concerning effects of domestic violence or child abuse on victims; (2) party who is or alleges to be victim of domestic violence is capable of negotiating with other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of alleged domestic violence; and 3) mediation process contains appropriate provisions and conditions to protect against imbalance of power between the parties resulting from alleged domestic violence or child abuse; or (b) in the case of domestic violence involving parents, the parent who is or alleges to be victim requests mediation, and mediator is informed of alleged domestic violence.	Yes. See column 3.	No.



## APPENDIX A: Court-sponsored Mediation Programs *continued*

<p><b>New York</b> No mediation statute.</p>		<p>No mediation statute.</p>		
<p><b>North Carolina</b> N.C. GEN. STAT. § 50-13.1 (1995).</p>	<p>Child custody and/or visitation.</p>	<p>For good cause, by motion of either party or on court's own motion, court may waive mandatory mediation of contested custody or visitation matter. Good cause may include: allegations of abuse or neglect of minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems.</p>		<p>No.</p>
<p><b>North Dakota</b> N.D. CENT. CODE § 14-09.1-02.</p>	<p>Any domestic relations cases may be mediated.</p>	<p>The court may not order mediation if the custody, support, or visitation issue involves or may involve physical or sexual abuse of any party or the child of any party to the proceeding.</p>		<p>No.</p>
<p><b>Ohio</b> OHIO REV. CODE ANN. § 3109.052, § 2919.25 (West 1999).</p>	<p>Any domestic relations issue may be mediated.</p>	<p>When the court determines whether mediation is appropriate, it shall consider whether either parent previously has been convicted of or pleaded guilty to domestic violence involving a victim who was a member of the family or household that is subject of proceeding, whether either parent previously has been convicted of or pleaded guilty to an offense involving a victim who was a member of family or household that is subject of proceeding and caused physical harm to victim in commission of offense, and whether either parent has been determined to be the perpetrator of the abusive act that is basis of an adjudication that a child is an abused child. If either parent has pleaded guilty or been convicted of above crimes, court may order mediation only if it determines that it is in best interests of parties and makes specific written findings of fact to support its determination.</p>		<p>No.</p>
<p><b>Oklahoma</b> 12 OKLA. STAT. ANN. tit. §§ 1801-1813, 43 OKLA. STAT. ANN. tit. § 107.3 (West 1999).</p>	<p>Issues of property, separate maintenance or custody.</p>	<p>The court: 1. may refer issues to mediation if feasible unless party asserts or it appears to court that domestic violence or child abuse has occurred, in which event court shall halt or suspend mediation unless court specifically finds that: (a) the following three conditions are satisfied: (1) mediator has substantial training concerning effects of domestic violence or child abuse on victims, (2) party who is or alleges to be victim of domestic violence is capable of negotiating with other party in mediation, either alone or with assistance, without suffering an imbalance of power as a result of alleged domestic violence, and (3) mediation process contains appropriate provisions and conditions to protect against an imbalance of power between parties resulting from alleged domestic violence or child abuse; or (b) in the case of domestic violence involving parents, parent who is or alleges to be victim requests mediation and mediator is informed of alleged domestic violence. When custody is at issue, court may order, in addition to or in lieu of provisions of paragraph 1 of this subsection, that each of parties undergo individual counseling in a manner that court deems appropriate, if court finds that parties can afford counseling.</p>		<p>No.</p>

<p><b>Oregon</b> OR. REV. STAT. §§ 107.765, 107.755, 107.097, 107.138, 107.718 (1998).</p>	<p>Any contested family issue. The mediator shall not consider issues of property division or spousal or child support in connection with mediation of dispute concerning child custody, parenting time, or otherwise, without written approval of both parties or counsel.</p>	<p>Except in matters involving a temporary protective order and a temporary status quo order regarding child custody or upon a finding of good cause, courts shall require parties in all cases in which child custody, parenting time or visitation is in dispute, to attend mediation orientation session prior to any judicial determination of the issues. Courts must have developed plan that addresses domestic violence issues and other power imbalance issues in context of mediation orientation sessions and mediation of any issue in accordance with the following guidelines: (A) All mediation programs and mediators must recognize that mediation is not an appropriate process for all cases and agreement is not necessarily the appropriate outcome of all mediation; (B) Neither existence of nor provisions of a restraining order may be mediated; (C) All mediation programs and mediators must develop and implement: (i) Screening and ongoing evaluation process of domestic violence issues for all mediation cases; (ii) Provision for opting out of mediation that allows a party to decline mediation after party has been informed of advantages and disadvantages of mediation or at any time during mediation; and (iii) Set of safety procedures intended to minimize likelihood of intimidation or violence in orientation session, during mediation or on way in or out of building in which the orientation or mediation occurs.</p>		<p>Yes.</p>
<p><b>Pennsylvania</b> PA. STAT. ANN. tit. 23 § 3901. No unified statute.</p>	<p>Any domestic relations issue/scope determined by local rule</p>	<p>The court shall not order an orientation session or mediation in a case where either party or child of either party is or has been a subject of domestic violence or child abuse at any time during pendency of an action under this part or within 24 months preceding the filing of any action under this part.</p>		<p>No.</p>
<p><b>Rhode Island</b> R.I. GEN. LAWS § 15-5-29 (1998).</p>	<p>Any matter involving child custody and/or visitation.</p>	<p>No exemption mentioned.</p>		<p>No.</p>
<p><b>South Carolina</b> S.C. CODE ANN. § 20-7-420 (Law Co-op. 1999).</p>	<p>Family courts have jurisdiction to require parties to engage in mediation in cases involving custody or visitation.</p>	<p>No statewide mediation statute.</p>		<p>No.</p>
<p><b>South Dakota</b> SD CODIFIED LAWS § 25-4-56 (Michie 1999).</p>	<p>In any custody or visitation dispute</p>	<p>No DV exemption, but exception for cases "court deems it inappropriate under facts of the case."</p>		<p>No.</p>

## APPENDIX A: Court-sponsored Mediation Programs *continued*

<p><b>Tennessee</b> TENN. CODE ANN. §§ 36-4-131, 36-6-305 (1999).</p>		<p>In any proceeding for divorce or separate support and maintenance, if an order of protection issued in or recognized by this state is in effect or there is a court finding of domestic abuse or any criminal conviction involving domestic abuse within the marriage which is the subject of the proceeding for divorce or separate support and maintenance, the court may order mediation or refer either party to mediation only if: (1) Mediation is agreed to by victim of alleged domestic or family violence; (2) Mediation is provided by certified mediator who is trained in domestic and family violence in specialized manner that protects safety of victim; and (3) Victim is permitted to have in attendance at mediation a supporting person of victim's choice, including, but not limited to, attorney or advocate. No victim may provide monetary compensation to nonattorney advocate for attendance at mediation.</p>	<p>Yes.</p>	<p>No.</p>
<p><b>Texas</b> TEX. FAM. CODE ANN. § 6.602.</p>	<p>Suit for dissolution of marriage.</p>	<p>A party may, prior to final mediation order, file written objection to referral of suit to mediation on basis of family violence having been committed against objecting party by other party. After objection is filed, suit may not be referred to mediation unless, on request of other party, a hearing is held and court finds that a preponderance of evidence does not support the objection. If suit is referred to mediation, court shall order appropriate measures be taken to ensure physical and emotional safety of party who filed objection. The order shall provide that parties not be required to have face-to-face contact and that parties be placed in separate rooms during mediation.</p>		<p>No.</p>
<p><b>Utah</b> UTAH CODE ANN. §§ 30-6-4.6, 78-31b-7 (1999).</p>		<p>In any case brought under the provisions of Cohabitant Abuse Act, the court may not order the parties into mediation for resolution of issues in a petition for an order for protection. A party may file with the court an objection to referral, which may be granted for good cause.</p>		<p>No.</p>
<p><b>Vermont</b> 15 VT. STAT. ANN. § 666.</p>	<p>If parental rights and responsibilities are to be shared, procedures involving disputes may include mediation.</p>			<p>No.</p>
<p><b>Virginia</b> VA. CODE ANN. § 20-124.4 (Michie 1999).</p>	<p>In any appropriate case, court shall refer parents or persons with legitimate interest to dispute resolution evaluation session.</p>	<p>In assessing the appropriateness of a referral, the court shall ascertain upon motion of a party whether there is a history of family abuse.</p>		<p>No.</p>

<p><b>Washington</b> WASH. REV. CODE ANN. § 26.09.015(1) (West 1999).</p>	<p>Any proceeding dealing with contested domestic relations issue may be set for mediation.</p>	<p>No specific exemption for DV.</p>		<p>No.</p>
<p><b>West Virginia</b> W. VA. CODE § 48-9-202</p>	<p>Legislature encourages mediation of disputes when children are involved.</p>	<p>The [highest court] shall promulgate rules that will provide for premediation screening procedures to determine whether domestic violence, child abuse or neglect, acts or threats of duress or coercion, substance abuse, mental illness or other such elements would adversely affect safety of a party, ability of party to meaningfully participate in mediation or capacity of party to freely and voluntarily consent to any proposed agreement reached as a result of mediation. Such rules shall authorize judge to consider alternatives to mediation that may aid parties in establishing a parenting plan. Such rules shall not establish a per se bar to mediation if domestic violence, child abuse or neglect, acts or threats of duress or coercion, substance abuse, mental illness or other such elements exist, but may be basis for court, in its discretion, not to order services under subsection (a) of this section or not to require a parent to have face-to-face meetings with other parent.</p>		<p>Statute directs highest court to develop rules for screening for DV</p>
<p><b>Wisconsin</b> WIS. STAT. ANN. § 767.11 (West 1999).</p>	<p>In any action affecting the family in which it appears that legal custody or physical placement is contested, court shall refer parties to director of family court counseling services for possible mediation of contested issues, except in cases of spousal abuse, child abuse, drug and alcohol abuse, or where a party's health or safety is endangered.</p>	<p>A court may, in its discretion, hold a trial or hearing without requiring attendance at the session under par. (a) if court finds that attending the session will cause undue hardship or would endanger health or safety of one of parties. In making its determination of whether attendance at the session would so endanger the party, court shall consider evidence of the following: (1) That a party engaged in abuse, as defined by statute, of child as defined by statute. (2) Interspousal battery as described under criminal statute or domestic abuse as defined by statute. (3) Either party has a significant problem with alcohol or drug abuse. (4) Any other evidence indicating that party's health or safety will be endangered by attending the session.</p>		<p>Yes. The initial session with mediator shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation.</p>
<p><b>Wyoming</b> No mediation statute. Wyo. R. Civ. P. 40.</p>		<p>No mediation statute.</p>		

**APPENDIX A: Court-sponsored Mediation Programs *continued***

<p><b>Puerto Rico</b> No family mediation statute. USDC DCPR Local Rule 83.10.</p>	<p>Any civil case is eligible for mediation.</p>			
<p><b>U.S. Virgin Islands</b> TERR. CT. R. 116</p>	<p>Any matter cognizable in family division may be referred to mediation and governed by rules of court except where special circumstances of family court make their application inappropriate.</p>	<p>No DV exemption</p>		

**APPENDIX B  
FORM 1  
Screening Cases for Suitability for Mediation  
IN-PERSON SCREENING TOOL**

The following introductory information should be provided to the person being interviewed: This interview will help me determine if mediation or other forms of alternative dispute resolution will be appropriate in your case. In mediation you and the other person will be asked to meet with a neutral third party. The mediator will help you and the other person discuss and possibly reach an agreement in all or some aspect of your case. It is a voluntary process, and you do not have to reach an agreement. For mediation to be successful, those participating must be "equals" who are able to talk with one another and agree or disagree without being fearful or intimidated. These questions will help me determine whether mediation may be appropriate in your case. Please answer these questions as truthfully as possible. What you say to me here is confidential and will not be disclosed to the court or your partner. The document I complete will be destroyed after our interview and will not be placed in the court record. There are some exceptions to that confidentiality. If you tell me about a child who is being abused, or about your intent to hurt someone, I may be required by law to report that information to authorities.

SCREENING QUESTIONS	Party 1 YES	Party 2 YES
1. How do you generally resolve differences with your spouse/partner?		
2. Is there anything that you feel you can't say in front of your spouse/partner?		
3. Is there anything that goes on at home that makes you feel afraid?		
4. Has your spouse/partner ever physically hurt or threaten you or your child? Has he/she ever: Hit you? Pushed you? Smacked you? Kicked you? Bit you? Pinched you? Choked you? Hit you with an object other than a hand? <i>[Check YES if any of the above are indicated]</i>		
5. Does your partner/spouse verbally abuse you? Call you names? Put you down?		
6. Has your spouse/partner ever destroyed your clothing, objects, or something you especially cared about?		
7. Have the police ever been called to your house to settle a dispute or because of violence?		
8. Have protective services ever been involved with your children?		
9. Has your spouse/partner ever forced you to have sex when you didn't want to? Make you do sexual things you don't want to do?		
10. Has your spouse/partner ever prevented you from leaving the house, seeing friends, getting a job, or finishing school?		
11. Has your partner/spouse ever used or threatened to use a weapon against you?		
12. Has your spouse/partner ever hurt or threaten to hurt pets?		
13. Is your spouse/partner excessively jealous? Does he/she accuse you of having affairs? Does he/she check up on what you have been doing and not believe your answers?		
14. Does your spouse or partner abuse drugs or alcohol? What happens?		
15. Do you have any concerns about your case being sent to mediation?		
<b>Number of boxes checked YES in each column:</b>		
	If ONE or more in this column, MEDIATION is NOT APPROPRIATE	If ONE or more in this column, MEDIATION is PROBABLY NOT APPROPRIATE

**APPENDIX B**  
**FORM 2**  
**SCREENING OUTCOME**  
**Note to File re: Suitability for Mediation**

Circuit Court for \_\_\_\_\_ Case No. \_\_\_\_\_  
CITY OR COUNTY

Name \_\_\_\_\_ VS. Name \_\_\_\_\_  
PLAINTIFF DEFENDANT

The following individuals were interviewed separately to determine the appropriateness of this case for mediation.

Name \_\_\_\_\_ Name \_\_\_\_\_

Based on those interviews:

- This case IS NOT appropriate for mediation.
- This case MAY BE appropriate for mediation.

Date \_\_\_\_\_ Screener Signature \_\_\_\_\_

**APPENDIX B**  
**FORM 3**  
**INSTRUCTIONS FOR SELF-REPRESENTED LITIGANTS**  
**Where Mediation May Be Inappropriate**

During your meeting with staff of the court's self-help program, you were asked questions to determine whether mediation would be appropriate in your case. Based on the information you provided, it was determined that:

MEDIATION IS NOT APPROPRIATE IN YOUR FAMILY CASE.

**Steps You Should Take:**

1. Consider getting a lawyer to represent you in your family case.
- Call the local lawyer referral service: \_\_\_\_\_ (phone number).
  - Call the following legal services providers: \_\_\_\_\_ (name)  
\_\_\_\_\_ (phone number).
2. If you or your child(ren) need protection from abuse, contact the following service provider who may be able to provide you with a safe place to stay, help in getting a civil protective order, or information on how press criminal charges, if appropriate:
- \_\_\_\_\_ (name of provider)  
\_\_\_\_\_ (telephone number)
3. When you file the papers to begin a divorce, custody or other family case in the Circuit Court, check off the following boxes on the Civil Domestic Case Information Report (DCIR) indicating that:
- Mediation is NOT appropriate; and
  - There is an allegation of physical or sexual abuse of a party or child.
4. Do NOT put your address or other contact information on any court papers. Tell the Clerk of Court when you file your papers that you want your contact information kept CONFIDENTIAL.



**APPENDIX B**  
**FORM 4**  
**Screening Cases for Suitability for Mediation**  
**PLEADINGS STAGE SCREENING TOOL**

Case Caption: \_\_\_\_\_  
 Case Number: \_\_\_\_\_

Screening Date: \_\_\_\_\_  
 Screener (Name): \_\_\_\_\_

Document to be Examined	Inquiry	Additional Inquiry Warranted	Conclusion
<b>1. DCIR Forms</b> [EXAMINE DCIRs ATTACHED TO BOTH THE COMPLAINT AND THE ANSWER]	A. Under the section "Alternative Dispute Resolution Information" did the party indicate NO to any form of ADR?	If the party checks YES to mediation, and NO to other forms of ADR, they may be suggesting only mediation is appropriate and not other types. If they check NO to some types of ADR, but there appear to be no references to family violence issues and no indication as to why mediation is not appropriate, it may be necessary to telephone counsel or the party for clarifying information.	<input type="checkbox"/> Party or counsel believes mediation is inappropriate because of family violence issues or other safety concerns.
	B. Under the final section "Is there an allegation of physical or sexual abuse of party or child?" The party or counsel have indicated "YES."		
<b>2. Complaint/ Counter-complaint, Petition or Motion</b> [EXAMINE THE INITIAL PLEADINGS OR OTHER RELEVANT DOCUMENTS FILED BY BOTH PARTIES]	A. Related Case Information: I. Does the party list any domestic violence, peace order cases, child-in-need-of-assistance cases from Maryland or other states that might suggest there has been a history of family violence?  II. Does the party list any related domestic cases or other case types?	If the cases are old, it might be appropriate to contact counsel to gauge their sense of whether mediation is appropriate.  If either party is self-represented, it might be advisable to call the parties or bring the parties in for individual in-person screenings.  If the party lists other related cases, it might be necessary to look those up in the court's information system to see if they include allegations of domestic violence or child abuse, or suggest a history of family violence.	<input type="checkbox"/> There are cases known to the court that suggest a history of family violence.
	B. Grounds (divorce cases only): I. Does either party seek a divorce on the grounds of cruelty or excessively vicious conduct [alleging pattern of physical and/or psychological abuse] against him or herself or the minor child?  II. Does either party seek a divorce on the grounds of criminal conviction where the underlying complaint stems from family violence or abuse of a child?		

2. Complaint/ Counter-complaint, Petition or Motion (continued)	III. Does either party seek a divorce on the grounds of constructive desertion [when defendant's conduct causes plaintiff to leave marital home to preserve her safety, health and self respect] where underlying allegations refer to family violence or abuse of a child?		
	C. Allegations: Read the factual allegations detailed in the petition. Does the party state any facts that suggest that the complaining party, the opposing party or a child have been the victim of abuse or are at risk of harm?	If facts are alleged that raise a concern about the safety of either party or a child, but it is not clear whether or not there is risk, it may be wise to request both parties appear in court for an individual, in-person safety screening.	<input type="checkbox"/> A party has alleged facts that suggest that one or more parties, or a child may have been a past victim of violence or at risk of future harm.
	D. Forms of Relief: Even when a party has not stated that he or she or their children have been a victim of family violence or are at risk of harm, they may seek forms of relief that put the court on notice. Does the party request some type of stay-away order, no contact provision, or protection from threats or actual harm?	If some type of protective relief is requested, but no facts are stated that support those forms of relief, it may be wise to request both parties appear in court for an individual, in-person safety screening.	<input type="checkbox"/> A party has requested protective relief of some type, suggesting a history of family violence.
3. Answer	A. Affirmations, Denials and Other Allegations: I. Does the answering party confirm allegations of abuse?  II. Does the answering party allege new facts that suggest a history of family violence or future risk of harm?  III. Does the answering party refer to any other related cases that suggest a history of family violence?		<input type="checkbox"/> The answering party affirms or has not denied allegations suggesting a history of family violence or future risk of harm.  <input type="checkbox"/> The answering party has alleged new facts suggesting a history of family violence or future risk of harm.  <input type="checkbox"/> The answering party has identified cases suggesting a history of family violence.
4. Other Documents	Review other documents in the file that may be relevant to determining if there are family violence issues that would suggest the case was inappropriate for mediation.		<input type="checkbox"/> Other documents in the file suggest the presence of family violence issues.

NOTE TO SCREENER: If one or more conclusions are checked, the case is NOT appropriate for mediation.

\_\_\_ Based on a review of pleadings only, this case **MAY BE APPROPRIATE** for mediation or other forms of ADR.

\_\_\_ This case is **NOT APPROPRIATE** for mediation or other forms of ADR.

\_\_\_ This case requires **in-person, individualized** screenings to determine if mediation or ADR would be appropriate.

NOTE: This screening was based on a review of the pleadings only and may NOT have identified all possible domestic violence issues.