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Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel of Is a Train on the Track

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MEDIATION IN THE PRESENCE OF DOMESTIC VIOLENCE: IS IT THE LIGHT AT THE END OF THE TUNNEL OR IS A TRAIN ON THE TRACK?

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I. INTRODUCTION

Continuing dissatisfaction with the current legal system and its implications with respect to family law matters has led to an increased focus on various alternative dispute resolution (ADR) techniques. The most widely accepted ADR technique in the family law arena is mediation. Although mediation in various forms has an extensive history, the application of mediation to family disputes has a shorter history.[1] Mediation's appeal and application to family matters is not limited to the United States, but has found an international acceptance as an alternative to traditional divorce proceedings.[2]

Mediation is defined as "a process by which disputing parties together, with the assistance of an impartial, neutral person, who has no authoritative decision-making power, systematically isolate disputed issues and underlying interests in order to develop options, consider alternatives, and voluntarily reach a mutually acceptable settlement."[3] Mediation is most effective when issues being addressed are open to resolution through modification of perceptions, attitudes, and/or behaviors. It is also commonly recognized that the results of mediation are most acceptable when the parties are of relatively equal bargaining power.[4] It is the possibility of a power differential which has led to significant debate as to whether mediation is, in fact, a viable process when there are domestic abuse allegations.[5]

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1. Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3 (1983).

2. Kathy Foy, *Family and Divorce Mediation: A Comparative Analysis of International Programs*, 5 MEDIATION Q. 83 (1987).

3. UNIVERSITY OF NORTH DAKOTA CONFLICT RESOLUTION CENTER MEDIATION SEMINAR MANUAL 11 (1992) (training manual on mediation).

4. ROGER FISHER ET AL., GETTING TO YES 177-87 (2d ed. 1991).

5. It is this issue that has created a divergent view of mediation by the authors of this article. Following this initial survey, the authors have taken the opportunity to share their views in a point-counterpoint segment. This is not an isolated pocket of controversy; other theorists, mediators,

Several commentators, however, have argued that mediation is a vehicle for empowerment and an appropriate mode of intervention even when domestic violence has occurred.[6] The purpose of this brief review is to provide the reader with an overview of the issues relevant to mediation and family law so that additional thinking and reaction can guide the development of systems that are both empowering and sensitive to the needs of families and children.

II. MEDIATION: AN ALTERNATIVE TO THE ADVERSARIAL SYSTEM IN FAMILY DISPUTE MATTERS

It is readily accepted that the present adversarial system is at times a detriment to the establishment of a divorce outcome that serves the best interests of the child.[7] While there are those who would continue to support the adversarial approach to divorce and child custody, the overwhelming view by both social science professionals and judicial observers is that the adversarial system is simply inappropriate.[8] Moreover, it is widely understood that the time and expense of courtroom processes mandates the movement to other systems for resolving divorce and child custody issues.[9] Some jurisdictions have attempted to rectify this problem by developing co-parenting classes, initiating mandatory mediation, and assisting family courts to be more sensitive to the needs of families and children.

As we begin to recognize the need for parents to be responsible in their ongoing relationships with their children and ex-spouses, there has been a movement toward the standardization of joint custody awards.[10]

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educators, and advocates across the nation hold similar diverse opinions on the use of mediation as an alternate dispute resolution (ADR) technique in situations in which violence is present. Moreover, an entire issue of the *Academy of Family Mediators Journal* was dedicated to this issue. *See* 7 MEDIATION Q. (1990). *See also* Trino Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (criticizing mediation as "false reform" for the family court system); Anne E. Menard, *Judicial Response to Family Violence: The Importance of Message*, 7 MEDIATION Q. 293 (1990); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990). Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51 (1994).

6. *See generally* Joshua D. Rosenberg, *In Defense of Mediation*, 30 FAM. & CONCILIATION CTS. REV. 422 (1991); Robert Geffner, *Guidelines for Using Mediation with Abusive Couples*, 10 PSYCHOTHERAPY IN INDEPENDENT PRACTICE 77 (1992); Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303 (1990); Dianne Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227 (1992).

7. *See generally* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making*, 101 HARV. L. REV. 727 (1988) (describing the historical transition from an adversarial based family law system to the conciliation and the no-fault concept).

8. *See* ELLEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 13 (1992) (describing the results of an in-depth study of 1100 families).

9. *Id.* at 292-93.

10. *Id.* at 203. *See also* GORDON B. PLUMB & MARY E. LINDLEY, HUMANIZING CHILD CUSTODY DISPUTES: THE FAMILY'S TEAM, 13 (1990).

This has been viewed as a major accomplishment in the process of trying to establish co-parenting situations.[11] As we have seen recently, however, the joint custody movement has also led, in some cases, to further polarization of parents.[12] A negative impact on children is found when the two parents have such a conflictual relationship that they will do almost anything to insure that their child will not have ongoing contact with the other parent.[13] In extreme cases like these, false accusations of sexual abuse and/or parent alienation syndrome may be found.[14] Even if one ignores these problems, one cannot escape the fact that huge numbers of people are being affected by the current adversarial system. It is estimated that 87 million parents and children were affected by divorce between the years 1963 and 1993.[15]

As the search for new approaches has progressed, mediation has been the subject of much study and analysis. One comprehensive review of mediation outcomes concluded that mediation can indeed help parties establish solutions.[16] Even when the parties were involved in mandatory mediation, the review found that both parties felt the process was fair and satisfying.[17]

In order to understand the mediation process, it might be helpful for the reader to examine some of mediation's underlying assumptions.[18] It

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11. *See* MACCOBY & MNOOKIN, *supra* note 8, at 289.

12. *See* MAURICE R. FRANKS, WINNING CUSTODY 31-36 (1983); RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE 67-70 (1987).

13. PLUMB & LINDLEY, *supra* note 10, at 69.

14. GARDNER, *supra* note 12, at 67. Parent Alienation Syndrome is defined as "a disturbance in which children are preoccupied with depreciation and criticism of a parent-denigration that is unjustified and/or exaggerated." *Id.* at 67-68.

15. *See* GAY C. KITSON, PORTRAIT OF DIVORCE-ADJUSTMENT TO MARITAL BREAKDOWN (1992).

16. KENNETH KRESSEL ET AL., MEDIATION RESEARCH 18 (1989).

17. *See id.* at 19-21. *See also* Rosenberg, *supra* note 6, at 423-24 (citing Duryee, *A Consumer Evaluation of a Court Mediation Service*, Report to the Judicial Council of the State of California (1991)).

18. *See* Howard H. Irving & Michael Benjamin, *Therapeutic Family Mediation: Fitting the Service to the Interactional Diversity of Client Couples*, 7 MEDIATION Q. 115, 118 (1989) (discussing mediation's underlying assumptions). The following 12 areas are identified as broadly predictive of whether the mediation outcome is considered a success or failure:

1. Demand—the level of stress experienced by the spouses and . . . their children[;]
2. Divorce readiness—the extent to which spouses are prepared for [separation] and, in particular, whether their respective levels of readiness are congruent or divergent[;]
3. Communication—the ability of spouses to communicate their concerns clearly and coherently[;]
4. Conflict—the extent, intensity, and manner of marital conflict[;]
5. Resources—the resources available to each spouse, including financial, emotional, and social [resources;]
6. Trust—the extent to which each spouse perceives the other as trustworthy . . . [;]
7. Parenting—the perception by each spouse of the other's ability [to be an effective parent;]
8. Repertoire—the interactional flexibility of the spouses, both separately and together[;]

has been argued that the following eight assumptions generally underlie successful mediation.

1. "Conflict is healthy, but unresolved conflict is dangerous[;]"
2. "Conflict over issues is resolvable in mediation[, and] conflict over behavior is resolvable in therapy[;]"
3. "Almost everyone wants to settle[;]"
4. "Successful negotiations are more likely when the parties to a dispute require an ongoing relationship than when they see no future relationship[;]"
5. "The outcome is the responsibility of the parties[;]"
6. "The mediator is responsible for the process[;]"
7. "There is 'that of God' in everyone[;]"
8. "The mediator's behavior is situational."[19]

As the issues regarding the appropriateness of mediation in domestic abuse situations are presented, these assumptions frame a basic understanding of the process. In addition to basic mediation training, mediators who have received special training in divorce or child custody mediation are also taught how to help parents identify issues or areas that might be problematic for them or for their children.[20] In this way, parents also benefit by learning more about the needs of their children and the possible impact their behavior has on their children during and following their divorce.[21]

III. MEDIATION MAY NOT ALWAYS BE A FRIENDLY ALTERNATIVE TO THE DOMESTIC RELATIONS COURT

Tradition has long witnessed a different philosophy for "family law" matters in the legal system.[22] Mediation, when practiced and applied to the specific rigors of family law cases, can provide a philosophically

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9. Pattern—the dominant pattern[s] that characterize family interaction, especially the relationship between spouses[;]
10. Coping—how these spouses are coping with their perceived level of demand, both separately and together[;]
11. Attachment—the extent to which the . . . spouses have fully accepted the end of their marital relationship and, concomitantly, have ceased to be involved effectively and behaviorally with the other spouse[;]
12. Plan for the future—the extent to which spouses have begun to formulate some plan for the future. . . .

Id. at 118-19 (citations omitted).

19. JOHN M. HAYNES & GRETCHEN L. HAYNES, MEDIATING DIVORCE 3-19 (1989).

20. *See* ASSOCIATION OF FAMILY AND CONCILIATION COURTS, *Is Mediation For Us?* (1987).

21. *Id.*

22. One commentator suggests that family law has two aspects: apologetic and utopian. Fran Olsen, *The Politics of Family Law*, 2 LAW & INEQU. J. 1 (1984). Apologetic refers to the domination of women by men, and children by parents. *Id.* at 1-2. Utopian refers to the representation of human relationships in all their splendor. *Id.* at 2.

friendly alternative to the domestic relations court.[23] Mediation is frequently used in family law proceedings to address issues of property, custody, dissolution settlement, support, and visitation.

It is generally believed that mediators can provide an environment that is more conducive to a consensus decision-making process than the courtroom process or settlement conferences common to family law attorneys.[24] Thus, in mediation, the parties become more personally involved in arriving at a decision based on interest identification[25] and agreement, rather than acrimony and innuendo.[26] As the parties to the action become more focused on arriving at an agreement, the parties can then use their energies to assist their children through the psychological and social impact of divorce and separation.[27]

Mandatory mediation has been promoted in some jurisdictions in an attempt to achieve this positive result. However, it has been met with no greater acceptance than mandatory conciliation.[28] The sanctity of self-

23. *See* Kenneth Kressel, *Divorce Mediation: A Critical Overview*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 384 (Martha Minow ed., 1993) [hereinafter *Divorce Mediation*] (arguing that mediation offers a different atmosphere that promotes cooperation and a recognition of the need for compromise).

24. *See id.* at 385. *See also* Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter Of Perspective*, 75 CAL. L. REV. 1093, 1093-94 (1987); Grillo, *supra* note 5, at 1551-52; Hart, *supra* note 5, at 318 (describing the mediation process as promoting a cooperative relationship which allows the parties to focus on the needs of their children).

25. *See* Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 MEDIATION Q. 33, 39 (1989) (citing Pearson's research that women may prefer mediation as less remote and impersonal than the adversarial system).

26. *See* Kressel, *Divorce Mediation*, *supra* note 23, at 387 (opining that the legal system is built on coercion while mediation is built on consent).

27. *See* Andrew Schepard et al., *Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility*, 16 NOVA L. REV. 767, 770 (1992) (stating that mediation encourages focus on the tasks of parenthood); Rosenberg, *supra* note 6, at 427 (opining that mediation allows the parties an opportunity to participate in a forum to deal with issues and make decisions about their children).

Mediation is often criticized because the vast majority of mediated agreements propose joint custody awards which have been widely criticized in custody decision-making. However, joint custody awards are not always detrimental to the parties involved. *See* Bautz & Hill, *supra* note 25, at 39 (stating that couples engaged in a mediated agreement process report their post-divorce relationship as cordial and their perception of the process as somewhat fair); Christopher W. Camplair & Arnold L. Stolberg, *Benefits of Court-Sponsored Divorce Mediation: A Study of Outcomes and Influences on Success*, 7 MEDIATION Q. 199 (1990) (reporting psychological gains with respect to the family and reductions in hostility toward the former spouse). Interestingly, in a mediation study, women reported significant improvements in family and couple interaction with reduced hostility, while men did not make the same reports. *Id.* at 209. However, women were found to have more "major" problems with the mediation sessions than men. The authors of this study note that such results should dispel the assertion that mediation is a gender based process favoring men. *Id.* at 209.

28. Many mediators, as well as advocates, speak strongly against mandatory mediation. A task force in Ontario sponsored a 1992 meeting entitled "The Forum on Concerns About Mediation in Cases of Abuse to Women and Children," in which mediators and advocates were invited to join in a discussion as to the value of mandatory mediation. *Id.* at 117. One of the planks the groups agreed upon was that "mediation should never be compulsory by law." *Id.* at 118-19. Allen E. Barsky, *When Advocates and Mediators Negotiate*, 9 NEGOTIATION J. 115, 118-19 (1993). *See also* Grillo, *supra* note 5, at 1549-50. Grillo states that mandatory mediation may be destructive to both men and women. *Id.* Moreover, Grillo reports "[w]omen who have been through mandatory mediation often describe it as an experience of sexual domination, comparing mandatory mediation to rape." *Id.* at

determination and individual decision-making regarding private lifestyles and choices has been a cornerstone of the mediation concept[29] and seems to be in conflict with the promotion of mandatory mediation.[30]

Traditional adversarial marital dissolutions involving children often bring parents and caretakers close to this mandatory mind-set by requiring participation in classes or educational endeavors.[31] This participation, however, can be more easily accomplished when the task of dissolution is equally shared by the parents, most notably in a mediated arrangement.[32]

Certainly, the availability of the concept of no-fault divorce has created the jurisprudential environment for this type of shared resolution.[33] If fault was a necessary consideration in this context, the principles of mediation would be strained; the mediation model has no place for fault-based negotiations.[34] Many in the legal field agree that mediation as a concept has become popular because of the dissatisfaction with fault-based divorce and the failure of no-fault divorce to remediate the inequities and trauma of the marital dissolution.

1605. *But see* Rosenberg, *supra* note 6, at 428 (maintaining that mandatory mediation is a benefit to the parties as expressed by their levels of satisfaction when evaluating the process and agreements).

29. There has been great debate recently regarding private life-styles and self-determination (e.g., "Murphy Brown" vs. family values). Client self-determination has long been a tenent of social welfare and more recently of the mediation genre. *See* Bruce Balto, *Mediator Directiveness in Child Custody Mediation: An Exploration of Alternatives and Decision Making*, 7 MEDIATION Q. 215, 217 (1990). Barto states that "child custody mediation should, in principle, enhance client self-determination and diminish worker (or bureaucratic or legal or judgmental) authority." *Id.* at 217. He continues stating that "mediators or social workers are expected to enhance the self-determination of their clients—presumably, the parents or family members who are seeing a worker for divorce or child custody mediation." *Id.* at 221.

30. *See* Grillo, *supra* note 5, at 1581-85 (arguing that the dynamic of free choice as a means of empowerment is altered when mediation is mandatorily imposed).

31. *See* Schepard, *supra* note 27, at 772. Schepard argues for a mandatory educational program for divorcing parents. Schepard states that research and common sense indicate that early intervention is necessary to prevent trauma to children as their parents dissolve the marriage. While he uses the "PEACE" program (Parent Education And Custody Effectiveness), *id.* at 773, other jurisdictions use similar programs to pass information to parents and encourage them to act as responsible adults with the best interests of their children first and foremost throughout the divorce process. *See* Honorable Mary L. Davidson, *Judicial Case Management and Divorce With Dignity: An Overview* (Hennepin County, Minnesota, 1993) 3-7.

32. Schepard, *supra* note 27, at 770 (describing that divorce acrimony and "adversarial courtroom combat" are emotionally trying and take away from the parental tasks of child caretaking).

33. *See* Grillo, *supra* note 5, at 1558-59 (stating that no-fault divorce has increased the individual autonomy and unpredictability of the traditional matrimonial/divorce court).

> With the elimination of fault-based divorce and the advent of their crisis theory of divorce, helping professionals began to assert that adversarial concepts and procedures were inappropriate for resolving divorce and custody cases. . . . Social workers argued that an adversarial role was unnecessary—lawyers were not needed to prove grounds for divorce as they had been under the fault-based system.

Fineman, *supra* note 7, at 746.

34. *See* Grillo, supra note 5, at 1560.

> The informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context, be deemphasized or avoided. Mediators use informal sanctions to encourage the parties to replace the rhetoric of fault, principles, and values with the rhetoric of compromise and relationship.

As the issues of the initial divorce decree (custody, property, spousal maintenance, and child support) differ from the issues of the post-dispositional hearing (child support, visitation, custody), mediation must be analyzed with respect to both realms. While post-dispositional issues are troublesome for the court system because cases continually are presented to the court for modification of visitation due to aggravating factors such as holidays, vacations, remarriages, and allegations of abuse, mediation offers an alternative that is quicker and less expensive than the traditional adversarial method. Some experts also believe that parties more readily adhere to and accept mediation than the traditional adversarial process.[35]

There are arguably situations in which the initial decree would be best handled by the traditional legal system. These cases include cases in which one of the parties needs protection from the other party because of violence in the family (adult to adult or adult to child violence), cases in which the quality of counsel is obviously disproportionate (pro se applicants), cases in which sexual abuse allegations have been brought forth, and cases in which economic differences between the parties create a severe disadvantage to one of the parties. In these situations, mediation emerges as one alternative for post-dispositional decision-making to reduce relitigation and facilitate agreement and assent among the parties enabling them to "live with" the resolution.[36]

Opportunities also arise for the courts to suggest that a particular issue should be resolved through mediation, or for the attorneys to suggest to the parties that they should seek mediation for the resolution of a particular issue (for example, issues such as ownership of the parties' house or vacation home, amount and placement of money in a trust for the children, and visitation schedules). In this type of situation, when the parties arrive at a mutually satisfactory resolution through mediation, it will become incorporated into the divorce decree or stipulated agreement. The remaining issues, which are not mediated, will either go forward for court resolution or will be addressed in another forum.

Numerous models of mediation are available for marital dissolution, and each model should include a provision requiring consultation with a separate attorney for each party.[37] This will ensure that each party under-

35. *Id.* *See* Kressel, *supra* note 23, at 387.

36. *See* Camplair & Stolberg, *supra* note 27 at 208-12 (providing study results on party satisfaction and assent with respect to mediated agreements for child custody and the post-dispositional issues of child support and visitation).

37. *See* Corcoran & Melamed, *supra* note 6, at 312 (stating that attorneys and advocates can be included in the mediation process to balance the negotiating power and eliminate intimidation because mediation is flexible enough to meet the individual needs of the parties). *See also* Grillo, *supra* note 5, at 1597-98 (involving attorneys in the mediation process to protect the rights of the parties); David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 MEDIATION Q. 331, 332 (1990) (stating that attorneys usually do not

stands the legal implications of his or her mediated agreement and the legal and economic implications to them and their children.[38]

With increased discussion of gender inequities in the legal system and speculation that family law cases harbor the majority of the inequities,[39] there may be strong societal pressures pushing the courts to continue their overseer function in mediated arrangements. It may also be appropriate for the courts to oversee divorce mediation when children are involved to assure that the arrangement is in keeping with the general best interests of the children[40] and with contemporary issues of shared parenting (for example, the primary caretaker philosophy). Moreover, courts may play a role in holding the mediator responsible for producing documentation that assures all of the issues have been considered and discussed with the parties.[41]

IV. THE APPROPRIATENESS OF MEDIATION IN DOMESTIC ABUSE SITUATIONS

Family relation cases which involve allegations and documented incidents of domestic abuse yield widely divergent views when mediation is introduced as an ADR technique.[42] While there is general agreement about the issue of violence as a form of power and control, the dynamics of violence, or the need for necessary protection in response to violence, there is disagreement as to whether a consensus model of mediation exists

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participate in mediation sessions, but they can still advise their clients as to their rights and alternatives during the process).

38. *See* Nancy Kaser-Boyd & Forrest S. Mosten, *The Violent Family: Psychological Dynamics and Their Effect on the Lawyer-Client Relationship*, 31 FAM. & CONCILIATION CTS. REV. 425 (1993). Boyd argues that when the dynamics of violence exist, both attorneys and mediators need special skills, sensitivity, and knowledge for advising clients or working with family relations cases. *Id.*

39. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 160-69 (1989) (citing gender inequities in the family structure, the economic structure, and the legal system when relationships dissolve). *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (describing no-fault divorce and the economic realities for divorced women).

40. *See In re* Marriage of Rosson, 224 Cal. Rptr. 250, 253-57 (Cal. Ct. App. 1986) (requiring the mediator to assist the parents in reaching an agreement by being an advocate for the best interests of the child). Also, the court could appoint an attorney or guardian ad litem to assume this role as overseer of the child's rights and interests.

41. *See* Bautz & Hill, *supra* note 25, at 45-46 (opining that the mediator retains the power to influence the parties and may be able to shape an outcome by using the bias and beliefs of the parties within his or her broad ethical framework). *But see* Balto, *supra* note 29, at 216 (stating that the role of "judge" may compromise the fundamentals of the mediation process); Saunders, *supra* note 5, at 55 (stating that "unqualified application of family systems [therapy] and mediation models can be . . . . ineffective or. . . .hazardous for battered women and their children").

42. *See* Corcoran & Melamed, *supra* note 6, at 310 (maintaining that "[w]ith our justice system increasingly utilizing mediation to resolve a wide variety of disputes, the issue of the appropriateness of mediation in cases in which there has been spousal abuse has emerged"); Hart, *supra* note 5, at 317 (stating that "mediation of custody poses more risks to battered women and children than it offers benefits"); Saunders, *supra* note 5, at 55 (stating that "unqualified application of family systems [therapy] and mediation models can be . . . ineffective or . . . hazardous for battered women and their children").

for addressing domestic abuse in family relations cases.[43] Opponents of a consensus model frequently cite the unequal distribution of power between the parties as an impediment to a true mediation process.[44]

Generally, the debate on the appropriateness of mediation in cases of domestic violence has focused on the following issues:

1. Whether cases should be screened for the dynamics of violence;
2. Whether mediation is appropriate when one of the parties may be vulnerable during the mediation process;
3. Whether mediation should be mandatory;
4. Whether mediation is appropriate when there is a power imbalance during the mediation process; and
5. Whether training and credential requirements should be required for mediators.

Statutory references[45] and mediator guidelines often caution the mediator to "screen" cases for evidence of domestic abuse before the mediation process begins.[46] Almost all literature finds mediators and

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43. *See* Barbara Hart, *Gentle Jeopardy: The Endangerment of Battered Women and Children in Custody Mediation* 1 (Draft 1, Nov. 1989) (stating that "[c]ustody mediation, both in theory and practice, fundamentally compromises the interests of battered women and their children"); *see also* Maine Court Mediation Serv., *Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risk? The Final Report of the Domestic Abuse and Mediation Project* (1992) [hereinafter *Final Report*]. In this project, the members, a very experienced and knowledgeable group from across the country, could not agree on the appropriateness of mediation for family disputes involving violence. *Id.* at iv-viii.

> All of the project members were concerned about the harm caused by and minimization of domestic abuse. They agreed about the importance of protection from abuse statutes in addressing domestic abuse. Consensus existed about the significance of the message against domestic abuse which these laws embody, and the group shared a commitment not to allow this message to be diluted. Despite these areas of common agreement and commitment, two divergent views emerged in the project about the use of mediation in protection from abuse cases.

Id. at 13.

44. *See* Hart, *supra* note 5, at 318-19 (describing the unequal distribution of power between battered women and their batterers); Saunders, *supra* note 5, at 55 (citing Jaffe et al. and stating, "Mediators may believe that they can equalize the power difference but battered women carry with them a terror that makes them prone to give in").

45. *See* NEV. ST. 3.500 (2)(b) (Michie Supp. 1993) (providing that courts may exclude from the mediation program cases in which there is a history of child abuse or domestic violence); CA. CIV. CODE 4607.2 (b) (West Supp. 1993) (providing that agencies can require the parties to complete an intake process form so that if one party alleges domestic violence, the agency can require parties to meet with the mediator separately); IL. ANN. ST. ch. 750 para. 5/607.1(c)(4) (Smith Hurd 1993) (providing that courts may order counseling or mediation, except in cases in which there is evidence of domestic violence); and N.D. CENT. CODE § 14-09.1-02 (1991) (providing that the court cannot order mediation if the custody, support, or visitation issue involves physical or sexual abuse of any party or the child of any party).

46. *See* Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365, 365 (1990). "A mediator needs to know the dynamics of power between the parties so that he or she can use power-balancing techniques to help them negotiate fairly and arrive at an agreement that is entered into freely and without coercion." *Id.* Girdner promotes Conflict Assessment Protocol (CAP) to identify issues of violence and to determine the appropriateness of mediation. *Id.* at 366. She refers to this as a form of "mediation triage." *Id.* at 366. *See also Final*

advocates agreeing that some screening should take place and that some situations are never appropriate for the mediation process. The complexity grows as the general applications move to specific situations. Some mediators would propose involving certain parties in the mediation process, while others would not consider the same parties appropriate for mediation. The degree of violence and discord between the parties and how that degree of violence and discord will affect the mediation process and the tenor of the agreement is where the debaters part company. Thus, the breadth and depth of screening for domestic violence can strongly affect the mediator's stance as to whether mediation is appropriate for the individuals or the couple.

Mediators should receive sufficient training in the preparation process to enable them to encounter these dynamics and seek appropriate information from the parties when considering the family violence quotient.[47] This education is crucial as mediation is wholly unregulated as a field, with professional designation and regulation frequently coming from other disciplinary areas such as law, psychology, social work, sociology, education and counseling. Such professional designation and regulation results in a population of mediators with vastly different credentials, backgrounds, knowledge, philosophical foundations, and training.

Mediators must be also be attuned to the issues of family violence, including child violence, before and during their work with the parties. Because of the correlation between incidents of domestic abuse and child

Report, *supra* note 43, at 19 (describing considerations for a comprehensive screening process); Chandler, *supra* note 37, at 344-45 (finding that screening was effective in assuring that inappropriate cases did not reach mediation and that pre-mediation counseling was successful in preparing victims for mediation).

47. *See* Hart, *supra* note 5, at 325 (describing the safety risks to consider when working with battered women, particularly during divorce and separation proceedings); Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 MEDIATION Q. 377, 378 (1990) (stating that "the mediator must have special skills and must employ a process that is tailored to the complex dynamic of spousal abuse"); Chandler, *supra* note 37, at 345 (stating that mediators should identify "mediation-relevant attributes of violence, such as current fear and ability to communicate, so that appropriate, mediation-relevant distinctions can be identified").

violence,[48] mediators must consider safety and protection issues for those potentially vulnerable parties.[49]

If safety concerns emerge from the mediation process, particularly in post-dispositional cases, the mediator must have an immediate plan of action ready to assess the problem and must be ready to refer the case to the appropriate agency in order to diminish the harm to the parties or their children.[50] As research indicates, the mediation process in the past may not have fully taken into account or comprehended the danger to women and children during negotiations in the post-dispositional divorce process. Current mediation must take such dangers into account.

V. CONCLUSION

As mediators, advocates, and attorneys weave their way through issues of consensus and disagreement about what cases should proceed to mediation, at what stage such cases should proceed, who is qualified as a mediator, and when mandatory mediation should be allowed, they must not lose sight of the tangible and individual needs of their clients—the families and children they represent. As two respected commentators in their field have said, "disputes are cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kinds of remedies are acceptable."[51] We all can agree that the cultural milieu will be the stronger for the impassioned discussion this topic has entertained.

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48. *See* Mary McKernan McKay, *The Link between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 CHILD WELFARE 29, 37-38 (1994) (stating that the link between domestic abuse and child abuse is strong and that domestic violence and child welfare advocates should coordinate their assessments to address this documented correlation). "The exposure of the children of battered women to these risks is not speculative or hypothetical. The risk of future abuse that may be inflicted on children if the batterer is not appeased or placated renders the battered woman unequal in her investment in the outcome of the custody dispute." Hart, *supra* note 5, at 322. *See also* Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347, 348 (1990) (stating that "[t]he preponderance of research shows that children of domestic violence are victims, including those who observe but are not the direct targets of parental aggression"); Saunders, *supra* note 5, at 51-55 (citing correlative factors between woman abuse, family violence, and child abuse).

49. *See* Corcoran & Melamed, *supra* note 6, at 314. "The issue has evolved . . . to whether there is present intimidation, control, or coercion that jeopardizes the abused's safety or ability to effectively negotiate in mediation. If intimidation, control, or coercion exist and cannot be effectively neutralized by representation, legal protections, and remedial therapy, then mediation should not take place." *Id. See also* Hart, *supra* note 5, at 324 (maintaining that separation is one of the most dangerous times for women even though they may no longer be living with their abuser).

50. *See Final Report*, *supra* note 43, at 31-35 (detailing procedures and techniques for mediators to use when addressing immediate safety and risk issues).

51. Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Re-examining the Concept of Dispute*, 9 JUST. SYS. J. 151, 157 (1984).

"PRO" POSITION ON MEDIATION IN THE PRESENCE OF FAMILY VIOLENCE [52]

During the training of mediators, perhaps no other concepts or techniques are so significantly stressed as those having to do with the empowerment of the parties to develop and create their "own" agreements. The parties are encouraged to examine their own interests and to develop skills for decision making. Their opinions and their special interests in the child are to be valued and supported. As a clinical psychologist who has appeared in numerous court cases and has seen and heard the testimony of parents, it is clear to me that parents come out of court proceedings often feeling that their special interests have not been heard and appreciated. Courtrooms are not used to teach the parents to cooperate or learn skills for mutually arriving at decisions that respect everyone's interest, particularly the children's.

One criticism that has been directed at the mediation process by those concerned about victims of domestic violence, is that the mediation process does not validate the victim's anger or emotions. They argue that there is a need for such validation in order for there to be some therapeutic gain for the victim. The critics assert that mediation may make the victim feel guilty and selfish.

My experience, however, leads me to believe that the courtroom is the place where victims most often feel humiliated, embarrassed, controlled, and discredited, because the opposing attorneys attempt to "win" the case at the cost of the parents working together in the best interest of themselves and/or their children.

It is true that in most instances, mediation will be conducted with both parties present, thus generally forcing the victim to confront the offender. One can understand the hesitancy and fear of the victim being placed in a position in which he or she must confront the offender. However, there are procedures in mediation designed to protect the safety of the victim and reduce the anxiety associated with this process. In some jurisdictions, the parties can have a third party or an advocate accompany them to the mediation process. In other jurisdictions, a type of "shuttle diplomacy" might be used in which the mediator moves between the two parties without the parties being in direct contact with each other.

Mediation cannot be judged separately from the quality of the mediators who provide the service. Often, criticism leveled at mediation as a process is really directed at "poor" mediation conducted inappropriately. Well-trained mediators can and frequently do develop processes and establish guidelines that empower and enlighten the victims in

52. This section was written by Douglas D. Knowlton.

domestic disputes. Such mediators balance power and ensure that a safe and supportive environment is established. If the mediators cannot ensure such an environment, they will not proceed with the mediation process. These types of mediators are much more likely to validate the parties feelings and perceptions and they provide a better balance of power among the parties than any courtroom process that I have observed in my fifteen years of clinical practice. There may be better techniques for resolving domestic disputes, and it is always important to keep an open mind, but to summarily dismiss mediation as an inappropriate process simply is another blow in our attempts to extricate our children from a system that continues to undermine their real needs and interests.

"CON" POSITION ON MEDIATION IN DOMESTIC VIOLENCE SITUATION[53]

Mediation is unequivocally wrong when the dynamics of violence exist in a relationship. If you accept the tenets of many theorists in this area and regard violence as a means of power and control, a process which brings parties to the table as equals is faulty and ill-suited in the presence of these dynamics.

Once violence occurs in a relationship, the equation of intimacy is changed forever. Prior to the violent event, the parties may have been able to approach the mediation table on "equal ground" (although some have asserted that the lack of relative economic parity of genders has never allowed parties to approach the table equally). After the violent event, the intimacy of the relationship will never again hold such equality.

Until mediators begin to understand, and are properly trained, skilled, and educated to recognize the velocity, force, and coercive power of even a simple involuntary movement (a hand gesture, a blink) and the effect it can have on a victim of intimate violence, they will never understand how the balance of power is inextricably changed with an episode of violence. The velocity of a look, a movement, a word cannot be controlled by a neutral and detached third party seeking to arrive at a consensus decision. Victims will frequently recount that they have become experts at interpreting the verbal and nonverbal cues of their batterers. A movement or word that appears benign to a mediator can have tremendous impact on the level of fear of the victim and the outcome of the session.

The mediator might suggest that when the victim receives the appropriate intervention to secure safety, the balance of power is restored. This is a faulty notion because it does not recognize the long-term impact of

53. This section was written by Tara Lea Muhlhauser.

power and control. Physical safety alone does not erase the effects of psychological terrorism.

Further, it is well documented that mediated resolutions frequently favor shared custodial arrangements, including liberal visitation. Recent studies show that in families where the mother is being battered, 70% of the children in those families are also being physically abused. Further, even where children are not the direct recipients of physical violence, studies now show that the children suffer psychological trauma. Research and anecdotal information suggest that the fear, danger, and sense of vulnerability (as well as opportunity for danger and injury) is very great for all parties in shared custodial arrangements. Victims report that it often takes years, literally, for them to regain a sense of security about their personal safety and the safety and well-being of their children.

Given this dynamic, how could we, in good conscience, justify or promote mediation in these cases? What conceivable social policy justification would stand to require victims to submit to this process? It would be unjust, incompassionate, and dangerous to require that divorcing or separating partners submit to mediation when the circle of intimacy has been pierced by violence.

Mediators must examine their skills, abilities, knowledge, and training to recognize the dynamics of violence, screen their clients for the presence of violence in relationships, and allow the traditional judicial process to provide the rigors of justice for these cases.

Just as violent partners do not belong in conjoint marital therapy, they do not belong at a mediation table while the dynamics of violence are present. To do so is a compromise that threatens to do harm, where no harm should rest.