Canadian Journal of Family Law

Volume 35
Number 1 *Domestic Violence and Access to Justice Within and Across Legal Systems*

2023

Mediator Discretion in Cases Involving Intimate Partner Violence

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MEDIATOR DISCRETION IN CASES INVOLVING INTIMATE PARTNER VIOLENCE

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Mediation is a centerpiece in the 'agreement culture' around family law litigation. It is recognized by the courts as offering inherent protections to deal with challenging cases such as those involving intimate partner violence. To learn more about how mediators invoke and view the process's protections, we conducted a series of interviews with senior mediators, trainers, and policymakers in the field. This article synthesizes current views within the mediation field about how to identify and screen for IPV, and implications for process management. At the heart of these interviews was the theme of mediator discretion: mediators describe and value discretion as endemic to the assessment of a person's capacity and agency— to the assessment of contextual factors which may affect decision-making, engagement, and outcome. This article summarizes interview data around practical issues, such as how to navigate screening conversations, and also broader tensions surrounding the mediator's work, such as the need to balance impartiality with capacity-building

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[**] We wish to thank Payton Eckert for editing assistance.

inside a process designed to help parties prepare for the future.

INTRODUCTION

In December 2021, the Supreme Court of Canada acknowledged the problem of vulnerability in family legal disputes inside a system which is moving—through participatory and consensus-seeking processes—towards an "agreement culture."[1] The court left the trial judge's conclusion (that a binding agreement had been reached between the parties) undisturbed but disagreed over whether the mediator's summary notes ought to have been used as evidence of a contract. Justices in the majority applied the exception to settlement privilege defined earlier by the same court in the commercial setting. Justices in the minority refused to import this rule, reasoning that family conflict is uniquely "wrought with emotional turmoil, power imbalance and vulnerability."[2] All agreed with the goal of settlement promotion, but diverged in their views of the volatility that can surround the mediation process and the risk experienced by some parties, and in their faith that mediation's procedural safeguards will "serve to counter this vulnerability."[3]

Key to the majority's reasoning was this assumption:

> …family mediation is a mechanism of civil justice that involves inherent protections to guard against the possibility that vulnerable

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1 *Association de mediation familiale du Québec v Bouvier*, 2021 SCC 54 at para 49 [*Bouvier*]. See also: *Colucci v Colucci,* 2021 SCC 24; and *Barendregt v Grebulinas*, 2022 SCC 22.

2 *Bouvier*, *ibid* at para 135.

3 *Ibid* at para 55.

> parties will unknowingly end up bound by an ill-considered agreement. The process is guided by impartial third parties, who are certified and specially trained to address the psychological and legal needs of spouses and parents. Mediators are subject to strict professional obligations and have, among other things, the power to put an end to the mediation process in order to avoid irreparable prejudice.[4]

Justice Karakatsanis, writing for the minority, reasoned that intended procedural protections in mediation will not always work as power imbalances cannot be eliminated and mediators will not always be able to intervene in protective ways.[5] The balance between these two perspectives of the court lies in the execution of the mediator's role and their perceived responsibilities.

To learn more about how mediators invoke and view the mediation process's protections, we conducted a series of in-depth interviews in 2020-2021.[6] We spoke with people in various positions of leadership across Canada: program designers for government-driven family mediation, trainers, and educators specializing in the topic of Intimate Partner Violence (IPV) and mediation, as well as public/private mediators and lawyers with considerable

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4 *Ibid* at para 88.

5 *Ibid* at paras 155, 156.

6 Interviews were transcribed, coded by both primary and secondary researchers, and analyzed using a grounded theory method.

experience dealing with these types of files. Twenty-three interviewees were mediators; twenty were lawyers; ten were social workers or psychologists; and all had two (if not three) of these professional backgrounds. While a few individuals that we interviewed were more recent entrants to the arena, the vast majority had decades of experience.

The following discussion is broken down by topics which attracted the most attention in our interviews. We explore how IPV is seen in mediation now, defined as what mediators are looking for (including the emerging focus on coercive control) and what tools help them identify these dynamics.[7] From there, we discuss the nuances of screening, from the perspectives of the professionals we interviewed, as well as how they begin to make process decisions once IPV is identified as a concern. We present what they described during their interviews about the way that mediators work in the family law system, along with their reported working patterns and the informational gaps that they identify in the system. We conclude with a discussion of the competing goals mediators embrace, and the way they explore contextual factors (such as culture, trauma, and other complex variables) while testing for self-determination within the grey areas of the process.

The narrative we heard about the mediator's work offers an important context for the dissent in *Bouvier*. Experienced mediators describe and value *discretion* at all

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[7] While concerns about children and family violence were in the background, these interviews focused on intimate partner violence and the mediator's engagement with the parties themselves, as a first step in understanding how mediators deal with the challenges inherent in these cases.

stages in the design and management of a mediation process where intimate partner violence is present. Paired with trust, education, and experience, a commitment to discretion can result in a process which is carefully protective of and responsive to the needs of people who have experienced IPV. However, the centrality of discretion as a lever for effective mediation of these cases creates challenges for those who desire predictability and regulation. It may also trigger a broader concern about the extent to which such discretion is capably exercised by mediators.

I. INCREASED SCOPE IN THE ASSESSMENT OF RISK IN MEDIATION

Family mediation is viewed as an important alternative to litigation, increasing the parties' power over the outcomes of separation and divorce even in difficult cases.[8] Mediation offers more privacy to families in crisis, can calm the adversarial behaviors which litigation inflames,[9] and increases compliance with agreements.[10] It has also been seen as carrying risks which coalesce around two

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8 See Amy Holtzworth-Munroe et al, "Intimate Partner Violence (IPV) and Family Dispute Resolution: A Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation, and Litigation" (2021) 27:1 Psychology, Public Policy, and Law 45 at 46.

9 See Karla O'Regan et al, "Family Law Mediation in Family Violence Cases: Basics & Best Practices" (2022) 13 Family Violence & Family Law Brief 1 at 4, online (pdf): *Muriel McQueen Fergusson Centre for Family Violence Research* <fvfl-vfdf.ca/briefs/Atlantic-FVFL-Brief-Issue-13---MARCH-2022-EN.pdf>.

10 See *supra* note 8.

variables.[11] One concern is that mediation puts victims of IPV at risk of added physical or psychological harm.[12] The other is that the presence of IPV causes power imbalances which leads to unfair outcomes, and to decisions which are not self-determined, where one party simply gives in.[13] Until the early 2000s, therefore, the predominant belief in the mediation field was that the presence of IPV in a relationship would disqualify those people from the process, with risks categorically outweighing any potential benefits.[14]

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11 Research at the time that MASIC emerged (in 2010) revealed that mediators (and lawyers) were not asking enough about IPV and that—even when they asked—not enough information was being collected; many clients reported that they were not screened for IPV and did not disclose family violence even when asked. See Robin H Ballard et al, "Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening" (2011) 17:2 Psychology, Public Policy, and Law 241 at 244, 256; Linda C Neilson, "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases" (2014) 52:3 Family Court Review 529 at 532.

12 See Desmond Ellis, *Managing Domestic Violence: A Practical Handbook for Family Lawyers* (Toronto: LexisNexis Canada, 2019); Ballard et al, *supra* note 11 at 241–242; Canada, Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*, vol 1 (Ottawa: Department of Justice, November 2013) at 132 [Canada, Report of FPT].

13 See Neilson *supra* note 11; Connie JA Beck & Lynda E Frost, "Defining a Threshold for Client Competence to Participate in Divorce Mediation" (2006) 12:1 Psychology, Public Policy and Law 1 at 3; *supra* note 8.

14 For discussions of those policy shifts see Nancy Ver Steegh & Clare Dalton, "Report from the Wingspread Conference on Domestic Violence and Family Courts" (2008) 46:3 Family Court Review 454.

Contemporary views capture a wider lens on the benefits and risks in mediation. As one study participant described it, the "nuanced and informed approach"—which characterizes best practices now—means "adapting intentionally and in a sophisticated way to mitigate problems and maximize positive outcomes."[15] Litigation is expensive and may not correct for complex power differentials. It imposes outcomes that may make one or both parties unhappy, providing less incentive for parties to comply, sometimes adding enforcement costs or additional litigation burdens. It adds to emotional difficulty and volatility.[16] These realities leave mediators "always weighing against the alternatives of what's to happen outside of the process, if [the file] were to be excluded" from mediation.[17] Observations from family lawyers about what happens in court confirm these views:

> I've spent twenty years litigating. In the first part of my career, that's all people did in family law. They litigated; they litigated; they litigated. And, from my perspective, having done both, I think that we need to be careful about assuming that litigation

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15 Participant 10.

16 Beck & Frost, *supra* note 13.

17 Participant 10. See also *supra* note 9 at 8: "[T]he mediator can navigate the power imbalances in a way that formal adversarial litigation processes cannot."

> safeguards victims of domestic violence more than mediation does.[18]

Accompanying this is a system-wide adoption of a wider lens on what puts people at risk in a relationship, as one interviewee explained, "[c]oercive control actually has more impact on the mediation itself."[19] The assessment of coercive controlling behavior has shifted mediators' attention to deeper behavioral dynamics that may not include violence but nevertheless cause the manipulation of an intimate partner.[20] The challenge for mediators is how to pinpoint degrees of coercive control and degrees of impact on the victim in mediation.[21]

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18 Participant 21.

19 Participant 3; see also Amy Holtzworth-Munroe, Connie JA Beck & Amy G Applegate, "The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48:4 Fam Court Rev 646 at 649.

20 See *ibid*.

21 Mediators in this study felt that it was important to distinguish between isolated violent incidents and ongoing patterns of violence or control, or between high conflict relationship dynamics and domestic violence, and were influenced by typologies such as those developed by Kelly and Johnson and others to categorize types and levels of intimate partner violence. They felt that typologies helped them name common patterns and often used them as an entry point or organizational framework to help them investigate the distribution of power and capacity to negotiate. For examples of typologies, see Joan B Kelly & Michael P Johnson, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions" (2008) 46:3 Fam Court Rev 476; Fernanda S Rossi et al, "Subtypes of Violent Separating or Divorcing Couples Seeking Family Mediation and Their Association With Personality and Criminality Characteristics" (2020)

Our interviews revealed that mediators look primarily at the impact of coercive dynamics on dialogue and decision-making. Mediators described themselves watching for red flags[22] and patterns,[23] "name calling, stalking, harassment, comfort levels around making decisions, independence,"[24] "financial control, a sense of worthlessness and helplessness, bottomless pit of despair and tears, lack of social connection, lack of family support, children who disrespect their mother,"[25] and "signs of jealousy."[26] One participant described, "I look at how they're interacting. If I see someone retreating or shutting down, that is an indication they don't want to be here or feel they don't have a voice. And that could be an indication of power imbalance."[27] Assessing both safety issues and impediments to autonomous decision-making is challenging—yet mediators also expressed faith in the possibility that mediation may still be productive, leaving parties (including victims) in a better position if IPV is properly identified.

10:4 Psychology of Violence 390; Connie J Beck et al, "Patterns of Intimate Partner Violence in a Large, Epidemiological Sample of Divorcing Couples" (2013) 27:5 Journal of Family Psychology 743.

22 Participant 22: "Online stalking, like phone calls and social media … is a red flag."

23 Participant 2; See also Neilson, *supra* note 11.

24 Participant 26.

25 Participant 20.

26 Participant 3.

27 Participant 15.

II. MEDIATOR JUDGMENT IN THE SELECTION AND USE OF SCREENING TOOLS

As noted in earlier studies, mediators continue to use a wide variety of screening tools to assess safety risks and overall suitability for mediation, with the central tool being the Mediator's Assessment of Safety Issues and Concerns (MASIC).[28] Although behaviorally specific, detailed

[28] Most used MASIC, and other tools mentioned were: DOVE, DOORS, the Michigan Court screening tool, iDetermine, DA, ODARA, SAFER, HCR-20, FIVR, SAM, and SARA. The newly developed HELP Toolkit—which is less of a screening tool and more of an educational and harm-reduction strategy for legal professionals—was also frequently mentioned. Department of Justice Canada, *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers* (Ottawa: Department of Justice, 2021) [HELP Toolkit]. See also Pamela C Cross et al and Department of Justice Canada, *What You Don't Know Can Hurt You: The Importance of family violence screening tools for family law practitioners*, (Ottawa: Department of Justice Canada, 2018); Canada, Report of FPT, *supra* note 12; Kamaljit K Lehal et al, *The Exploration of the Effectiveness of Current BC Methods of Family Mediation in cases of Violence against Women and Lessons to be learned from Other Jurisdictions Models (BC Family Mediation VAW Project)* (2017) at 17 online (pdf): *Lehal Law* <www.lehallaw.com/wp-content/uploads/2021/01/bc-family-meditation-vaw-project-lehal-k-et-al.pdf>; Amy G Applegate et al, "In a Time of Great Need, a New, Shorter Tool Helps Screen for Intimate Partner Violence" 26:3 Dispute Resolution Magazine 29; Helen Cleak et al, "Screening for Partner Violence Among Family Mediation Clients: Differentiating Types of Abuse" (2018) 33:7 Journal of Interpersonal Violence 1118. Some tools require specialized training, see: Connie J A Beck, J Michael Menke, & Aurelio Jose Figueredo, "Validation of a measure of intimate partner abuse (Relationship Behavior Rating Scale–Revised) using item response theory analysis" (2013) 54:1 Journal of Divorce & Remarriage 58; Jennifer E McIntosh, Yvonne Wells, & Jamie Lee, "Development and validation of the Family Law DOORS" (2016) 31:6 Psychological Assessment 750;

screens, with more items inquiring about different violent behaviors, uncover more cases of party reported IPV victimization than broader, less specific screens with fewer items, many mediators reported that administering a battery of questions had repercussions.[29] Mediators indicated that the personal and emotionally charged content of screening questions made clients uncomfortable, which interfered with the mediator's ability to build rapport and gather information. "It's really important that you are warm in the way that people see you and perceive you. And if I then say, '*[h]as someone ever choked you?'*—that doesn't create [rapport]. That causes cognitive dissonance."[30] Most mediators use MASIC in a discretionary way, weaving questions into conversation, rather than asking its questions as a series of sequential inquiries, or a form of interrogation.

Against this backdrop, the search for a common screening tool was viewed by some participants as reducing the quality of screening (and subsequent process development) that can be achieved with the situation-based or contextual approach. While all favoured the concept of *rigour* and accepted that especially less-experienced mediators would benefit from clear standards,[31] most also

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Barbara Landau et al, *The Family Dispute Resolution Handbook*, 6th ed (Toronto: LexisNexis, 2014).

29 Rossi et al, *supra* note 21 at 247.

30 Participant 25. Conversely, MASIC's most significant contribution is its focus on behaviourally specific screening questions. See Holtzworth-Munroe et al (MASIC), *supra* note 19.

31 Engaging with standardized tools such as MASIC as a battery of questions was still viewed as a useful learning phase for new mediators, and a valuable check-and-balance for experienced ones.

wanted the freedom to focus on relationship-building and rapport, gauging client needs and choosing screening methods which best serve those greater intentions in the moment.[32]

Mediators therefore emphasized the importance of interviewing skills as central to accurate information-gathering and to the management of discomforts around disclosure.[33] Half of the people we interviewed spoke about cognitive distortions which affect victims, including that "[t]hey have been convinced they are responsible,"[34] "are groomed to avoid disclosure,"[35] "are so numb to the threat";[36] and "have not self-identified as experiencing domestic violence."[37] Many talked about the mediator's educational role in helping victims to reframe their own experiences, to "shape the narrative," offering examples along with a message that such experiences are not the victim's fault.[38] They spoke about the screening environment as one of non-judgmental "relationship-building," "rapport" and "trust,"[39] to "empathize, and take

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32 O'Regan et al, *supra* note 9 at 10 also mention the "inadequacy of a "one size fits all" approach to screening."

33 The value of interviews over written questionnaires has already been noted by Holtzworth-Munroe et al (MASIC), *supra* note 19; Ballard et al, *supra* note 11 at 258.

34 Participant 1.

35 Participant 7.

36 Participant 3.

37 Participant 9.

38 Participant 1.

39 Participant 4.

another person's perspective… to be in your client's world."[40] Others described the screening conversation as "intimate"[41] and involving a "bond"[42] or a "connection,"[43] a "therapeutic partnership" or "working relationship."[44] While the imagery differed, study participants universally agreed that a careful environment had to be created as a precondition (or companion) to difficult screening conversations.

Mediators described nuance in the strategies they employed in the early stages. They often begin with a broad, information-gathering approach (a sweeping open question), followed by careful listening and a well-crafted next question. They provide examples and anecdotes woven into the conversation, as a way of "helping [parties] find language,"[45] emphasizing the importance of humility as well as an attitude of quiet curiosity. One participant explained that "[e]very behavior makes sense. I want to understand why this person is behaving this way."[46] "When they do share, I have to receive that information in a way that they feel safe."[47] Mediators may use tools such as

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40 Participant 10.

41 Participants 2, 9.

42 Participant 9.

43 Participant 24.

44 Participant 3.

45 Participant 7.

46 Participant 4.

47 *Ibid*. Lawyers are advised to communicate that they are open to their clients' distress, "by sitting quietly and showing your concern…" and to "respond to the client's trust in you and willingness to talk about

MASIC to fill in the blanks[48] but primarily rely on their skills as they listen, respond, and engage, "I want them to feel that they have not just gone through a checklist but are engaging with me. That's invaluable to the success of the next step, and the next step and the next step."[49] While screening, the mediator therefore navigates broader objectives to build a sustainable and effective process with and between the parties.[50]

Overall, study participants were reluctant to view screening as a *task* (a discrete procedural step for the mediation file) and more inclined to discuss it as a *role orientation*—one that is also integrated, client-focused and process-building. All described the screening exercise as something that happens throughout, rather than a single event:[51] "Screening begins as soon as I'm touching the file. And it goes on the whole way through."[52] They described themselves as continually "scanning,"[53] "always watching and listening for indicators of IPV,"[54]

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these difficult issues with gratitude and non-judgment." HELP Toolkit, *supra* note 28 at 15.

48 Similarly, the HELP Toolkit is more of a trauma-informed approach, designed to build the confidence of legal professionals to talk and connect with their clients. *Ibid,* HELP Toolkit.

49 Participant 3.

50 Lehal et al, *supra* note 28 at 17 reports that "each professional wanted enough information to make an informed decision, but not so much as to create challenges for the participant."

51 Participants 9, 10, 17.

52 Participant 14.

53 Participant 21.

54 Participant 2.

> If you don't have this fundamental competency… then your process is flawed. Period. The process should be built around screening. You can't do it as an add-on. Screening should be the foundation of what we do…. I don't know that tools are the answer. This is a process—*an informed, knowledge-based experience*.[55]

We heard about a growing practice of family lawyers using third-party screening services, on the basis that an external specialized interviewer can spend more time and get a more accurate picture.[56] Most mediators in our study thought that this was not a good idea for mediators, expressing the worry that third-party screening would be yet another silo of information on issues that should instead be gently and intimately understood by all justice professionals working with these clients.

III. ADAPTIVE RESPONSES TO IPV IN MEDIATION

The majority's confidence in *Bouvier* that mediators can respond protectively to prevent further harm to vulnerable parties was based in part on the COAMF *Standards of Practice in Family Mediation*[57] requiring the mediator to

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55 Participant 9.

56 The cost of having such an assessment done can be low. Neilson, *supra* note 11 recommends third-party screening before parties enter judicial dispute resolution.

57 The Committee of Accrediting Organization in Family Mediation, ed, *Standards of Practice in Family Mediation* (Montréal: COAMF,

"act competently while taking into account the particular issues within a domestic violence context"[58] and to consider "an end [to] the mediation process or its continuation in an adapted fashion."[59] Our interviews suggest that 'the devil is in the details.' Experts largely agree that mediation in serious cases of IPV should not be considered[60] but there is a debate about what constitutes a serious case.[61] Each case requires the weighing of safety concerns and the need to ensure that all parties are free from coercion, against the benefits of mediation, relative to other dispute resolution methods such as trial.

Overall, our study participants universally believed that the presence of IPV ought not—on its own—rule out mediation, with one participant stating that "[t]he more acknowledged and managed it is, in terms of them both telling the same truth about what happened in their past and both of them having received some kind of support or counselling—that is what makes the difference."[62] Other

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2016), online: *Ordre des psychoéducateurs et psychoéducatrices du Québec* <www.ordrepsed.qc.ca/~/media/pdf/Soutien_professionnel/Guide_MediationFamilialeCOAMF%202016_ANG.ashx?la=fr>.

58 *Ibid* at 21 (see 5.2.2).

59 *Ibid* (see 5.4.1).

60 Lehal et al, *supra* note 28 at 5; Kelly Browe Olson, "Screening for Intimate Partner Violence in Mediation" (2013) 20:1 Dispute Resolution Magazine 25; Neilson, *supra* note 11 at 533; Ver Steegh & Dalton, *supra* note 14; Eduardo RC Capulong, "Family Mediation after Hendershott: The Case for Uniform Domestic Violence Screening and Opt-in Provision in Montana" (2013) 74:2 Mont L Rev 273.

61 See Rossi et al, *supra* note 21.

62 Participant 3.

study participants offered several examples of circumstances where they would not mediate, including:

- An ongoing criminal matter and/or a no contact order (although others talked about the capacity to design a mediation process around such an order);
- A "heavy power imbalance";[63] "If somebody can't negotiate on their own behalf",[64] or if "I don't feel that they can make a decision without being concerned about the repercussions";[65]
- A combination of violence and current shared living arrangements;
- Stalking behavior;
- The violation of parameters set in mediation, even if progress had been made in the process;
- Where one party is attempting "to wear the other side down",[66] "has no regard for the process, or for me";[67] or if it "is just another forum for bullying."[68]

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63 Participant 8.

64 Participant 14.

65 Participant 18.

66 Participant 19.

67 Participant 21.

68 Participant 25.

On the other hand, many mediators spoke passionately about their desire to value the victim's right to choose. [69]

> If I was to say *you know what, I don't think that you could do this*, I am actually taking away their right to self-determination around process…. If all we leave for the vulnerable person are the adversarial processes, then we're not giving them choice.[70]

> … Ultimately, they should have a choice. My job, at a bare minimum, is to just make sure that they understand what the choices are, the consequences associated with different processes. They know their situation best.[71]

A few pointed out that mediation can produce outcomes more quickly and that physical safety issues may be more pronounced in the courtroom.[72] Mediators are more apt to listen for client needs without judging them:

> It's not about proving whether the abuse existed or not. Even if it didn't, it's a dynamic between the parties that you have to adjust to, to make sure they both feel safe. Let's say that no physical abuse took place,

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69 Some authors argue that victims of IPV ought not be denied the opportunity to mediate and that mediators should be trained to empower victims who choose to mediate. Capulong, *supra* note 60.

70 Participant 2.

71 Participant 16.

72 Participants 2, 16, 21.

> but you've got a party who is terrified, maybe from previous trauma, in front of you. It does not change the fact that this person doesn't feel safe until you address that issue … In the adversarial process, you are more likely to get the lecture about how objectively unreasonable that fear is.[73]

Where mediators divert a case from mediation, or terminate it once started, they employ significant discretion in the choreography of this step. Safety planning at this juncture "is a critical piece."[74] Some provided examples of how to disengage without heightening risk to a vulnerable person, for example choosing a smaller issue—such as a non-contentious piece of disclosure "that involves both of them calling their own professionals and exchanging it in a way that they are not meeting each other in person, such as email"—so that "they both feel like they had a mediation" and do not know they are ultimately being screened out. Another example cited was simply saying that the mediator is reviewing the file to provide more time to encourage the victim to shore up a safety plan.[75]

If mediation proceeds, mediators are more apt to use discretion to design process adjustments than to follow uniform templates or checklists.[76] Mediators talked about

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73 Participant 16.

74 Participant 18.

75 Participant 25.

76 For examples of checklists, see: Amy Holtzworth-Munroe, Connie J. Beck, and Amy G. Applegate, "MASIC-4 MEDIATOR CASE EVALUATION as of January 9, 2020" (2020) at 3, online (pdf):

various strategies from tight management of interactions between the parties, having parties arrive and leave mediation at different times to using shuttle mediation or video meetings,[77] prohibiting private meetings between the parties in between sessions, and otherwise limiting communication between them.[78] Other prerequisites include continued careful assessment by the mediator and the creation of an open and consultative environment—asking clients what process makes them feel safest, ensuring that clients are comfortable enough to disclose concerns.[79] Even how the mediator communicates with clients may need to change depending on the circumstances of the clients. Presumptions of privacy around various communication methods may not be wise.[80]

All mediators we interviewed managed the timing of arrivals and departures, the addition of support people and advocates, and the separation of parties through shuttle

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Maurer School of Law <law.indiana.edu/publications/faculty/2020/applegate-a_masic-4-mediator-case-evaluation.pdf>. Also see Ellis, *supra* note 12 at 57, 58.

77 Cases identified as "high risk" were more likely to be recommended for shuttle mediation, where the mediator meets separately with each party; Rossi et al, *supra* note 21 at 248. Clients in shuttle or video mediation also felt safer than those who returned to court, Holtzworth-Munroe et al, *supra* note 8 at 55.

78 Participant 9; Hilary Linton, "Safety Planning in Family Law Cases: An Emerging Duty of Care for Lawyers?" (2014), online (pdf): *Riverdale Mediation Ltd.* < www.riverdalemediation.com/wp-content/uploads/2017/09/Linton-Safety-Planning-in-Family-Law.pdf>.

79 Participant 9.

80 For example, both a client and their partner may have access to the same email account, see HELP Toolkit, *supra* note 28 at 60.

processes where needed. Most were more interested in talking about what they are looking for *deeper* in the process of communication, information-sharing and decision-making, to improve the quality of the process for the participants, particularly for the victim. "With process design," described one participant, "it's a nuanced thing—as much about the negotiation scenario between the parties (what would help reach a resolution for the parties) as it is about violence and safety."[81]

"The beauty of mediation, why it is so powerful, is that it's a customizable process"[82] and most mediators seemed to approach process adjustments that way: "[m]ore often than not, it's the stuff you do in the moment."[83] They described these customized adjustments in the following ways:

(a) Interrupting patterns: "challenging … interrupting the dynamic";[84] giving someone "time to be able to circle back and say *no, I don't want to give in to this type of stuff*";[85] educating the parties about patterns of communication and decision-making.

(b) Understanding cues: "How will I know if you're uncomfortable in a situation, without your telling me? An indication of

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81 Participant 10.

82 Participant 25.

83 *Ibid*.

84 Participant 3.

85 Participant 2.

what somebody's going to say or how they're going to act if they are uncomfortable in that situation";[86] This could also include discussing language, e.g. "what's on and off the table, for language."[87]

(c) Pacing: making space for a party to regain strength to negotiate, to consult, to get support; "Figuring out the map of power"[88]; taking breaks; changing the way information is provided (visuals and charts); meeting with other professionals or advisors in between meetings; going "at the rate of the slowest person in the room," pacing so that the "slowest person catches up to speed, and they feel comfortable and can make good decisions";[89] as one participant described: "[i]n most contexts I think they need to sleep on it and think about it," while others "sometimes say 'yeah, but then they may not agree to it the next day.'" But, "that's the point. They need to be able to live with it.[90]

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86 Participant 7.

87 *Ibid*.

88 Participant 10.

89 Participant 23.

90 Participant 27.

While developing process adjustments in individual cases, mediators described wrestling with deeper tensions in their role, which we articulate below.

IV. INSTABILITY IN THE TRANSFER OF INFORMATION

The distribution of power in a negotiation can also be shifted or leveled as parties access resources or even gain information about available supports. Information can be powerful because "*perceptions* about the relative potency of resources and the willingness and ability of the parties to use them effectively are more reliable determinants of outcome than the objective potency of resources and actual differences in the willingness and ability to use them effectively."[91] It is perhaps not surprising, then, that mediators described having a role of resource hub for the parties.

Mediators cited two reasons for acting as resource hubs. The first, as part of a safety-planning process, and the second as a capacity-building exercise within negotiation and beyond ("so that they can have a more lasting effect of balancing things out").[92] Examples of resources that they have tried to connect clients to included crisis lines, local services such as shelters, therapists, psychologists or counselors for the party or the children (free or fee-for-service), financial experts, language/interpretation, divorce coaches, as well as resources to help with general mental health needs, housing issues or safety planning itself.

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91 Ellis, *supra* note 12 at 59.

92 Participant 3.

Indeed, as one participant put it, "[r]esourcing people is how you choose to customize your process."[93]
However, some mediators identified tensions beneath this "mediator as resource hub" role, encapsulated by the following:

- offering information "in a way that honours and respects their right to self-determination"[94] but being willing to initiate conversations with outside professionals or service-providers on a party's behalf;

- recognizing that parties (especially at points of crisis) can only absorb information in a limited or gradual way: "we don't want to dump that whole list on people in the intake ... We might suggest it lightly earlier on, and then bring it back pointedly: *I think this is getting in the road, unless you can do some homework with that*"[95];

- considering the need for balance and potential referrals for the abusive partner. "There are all sorts of emotional supports that the abuser needs, too… all sorts of

93 Participant 25.

94 Participant 2.

95 Participant 3.

> reasons why people behave the way they do."[96]

Beneath these reflections, mediators were clearly inclined to fill gaps in a siloed, under-serviced justice system—a system that struggles to address legal problems alongside the social, psychological, financial and health problems, too. This raises the question as to whether mediators are adopting the role of resource hub to avoid the implications of having unsupported clients in mediation. The ethical tensions for mediators are tricky as there can be a perceived breach of impartiality as mediators help parties obtain community services,[97] even though this may be vital to the mitigation of risk and the preparation of a disadvantaged party to safely and effectively participate in mediation.

Although mediators described themselves as "sitting in the middle of it all," attempting at times to build a network around vulnerable parties, the exchange of information between mediation processes and other related legal processes is inconsistent at best. In some cases, information about clients' involvement with other legal processes is provided by lawyers, and sometimes mediators will require clients to sign releases allowing mediators to look for related legal matters in the courts.[98] While the

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96 Participant 20.

97 Shereen G. Bingham, Kerry L. Beldin, Laura Dendinger, "Mediator and survivor perspectives on screening for intimate partner abuse" (2014) 31:3 Conflict Resolution Quarterly 305 <doi.org/10.1002/crq.21090>.

98 Some researchers in the field have recommended that mediators "conduct background research on the parties: if possible, obtain any court or police records that might address parties' violent or abusive

methods vary, they still result in spotty access to information about the file. Although the status of various legal proceedings and any conditions or orders affecting issues in mediation or the parties' ability to interact with each other were considered important to know by participants, "information is never transferred as a matter of course from another legal process."[99] For the most part, mediators described receiving information about other legal processes from the clients themselves.

Getting accurate information about related legal processes directly from clients can be difficult. Clients generally do not have the expertise to understand or name and communicate details about related legal processes. They may be under significant stress, and in some cases they may be traumatized. For examples, participants described it in the following ways,

> When I was doing criminal law, a third to half of my files had family law overlap. It was incredibly frustrating for me, as a well-qualified, articulate professional, to exchange—and get—information. Especially creating parenting schedules with no-contact

content." Amy Holtzworth-Munroe, Connie J. Beck, and Amy G. Applegate, "Instructions for Using the MASIC-4: As of May 22, 2020," at 1 online (pdf): *Maurer School of Law* <law.indiana.edu/publications/faculty/2020/applegate-a_instructions-for-using-masic-4.pdf>.

99 Participant 15. Sometimes intake officers may gather information about related proceedings, and clients may be requested to disclose or upload documents.

> orders. It was arduous for me… let alone for the client.[100]

> People who are in crisis can't problem-solve and retain information. Period. Those skills are gone. So, making those people be the messenger never works. Even when the parties are able to pass on information to the mediator about existing orders, they rarely use the right terminology, nor do they appreciate the differences among various legal labels. [101]

Mediators may have to advocate for amendments in no-contact orders to allow a mediation to occur or structure the process so that the parties are never in the same location. In some programs, information about an ongoing criminal matter is necessary to determine if mediation can proceed at all.

Also noted were the duplication of efforts and loss of information through separate screenings or risk assessments.

> Risk assessments are done by police or front-line service providers, and then not shared in a way that is helpful to the person at risk. Those gaps exist. I'm not sure how to address that other than some very serious

[100] Participant 7.

[101] Participant 7.

> collaborative work and information sharing agreements, which can be challenging.[102]

Victims' advocates raised concerns about the impact of repeated screening, causing re-traumatization or fatigue of clients who must repeatedly tell their story as they engage in different legal processes. On the other hand, they noted that it would not be an easy solution to inherit screening information prepared by others. Mediators may not be confident in the quality of screening obtained through other legal processes and may ultimately want to gather information themselves as part of a process-building strategy.

Overall, study participants expressed a general desire for service-providers to collaborate with courts and for courts to collaborate with each other. In certain circumstances, mediation may be used as a site for integrative problem-solving of combined legal issues. However, mediators and lawyers were conflicted about how to manage issues of privacy and procedural protections for clients—or how to overcome the "big disconnect" between systems which do not necessarily share the same goals.[103] Despite efforts to have a comprehensive view of files, mediators acknowledged that the relationship between family law issues and other legal issues are systematically overlooked. The interplay

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[102] Participant 13.

[103] Participant 16; see also Linda Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection) A Family Law, Domestic Violence Perspective,* 2nd ed, (Department of Justice Canada, 2013), s 1.4.

between criminal and family proceedings where IPV is at issue is foreseeable, but other potential links (such as immigration) are even more likely to be missed.

Even the involvement of lawyers does not guarantee a smoother transfer of information. Some mediators reported hearing about IPV concerns in advance from lawyers, but a significant portion of study participants expressed low confidence in lawyers' ability to detect IPV, while others viewed lawyers as underutilized professional partners in the process. Participants recognized the legitimate constraints lawyers inherit in their role including the pressures of "zealous advocacy", limits of legal education,[104] reality of time and cost pressures, and worries about the use or protection of sensitive information about IPV and risk in the family home.[105]

One participant worried that lawyers may be affected by emerging advice that the lawyer should not challenge a client's desire to share or not share sensitive information about IPV.[106] This is a difficult dynamic for lawyers to manage if there are processes underway where knowledge about the client's concern may be important to

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104 As one mediator pointed out, lawyers are trained to value the legal framework, and not necessarily "psychological safety… emotional safety… spiritual safety" (Participant 2).

105 See also Canada, Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems,* vol 1 (Department of Justice, November 2013) at 65; Deanne Sowter "Full Disclosure: Family Violence and Legal Ethics" (2020) 53:1 UBC L Rev at 141–178.

106 Participant 15.

the efficacy of the process. Lawyers may be left informally signaling to each other, or to other justice professionals, that IPV is an issue.

Like lawyers, mediators often experience tension around obligations of confidentiality in the mediation process. Aside from confidentiality exceptions, such as concerns about imminent harm and child protection, mediators will prefer to disclose information to advocates and support people only with consent and rely on indirect signaling in their communications with adjudicators. One participant described that

> [w]e wanted to send a message, but we couldn't. In [our] program, we have a very good reputation. If we send a file back in under four sessions, and our letter says something like *not appropriate for mediation* then that is likely to send a clear message to a judge.[107]

Mediators agreed that they were obligated to share and sometimes withhold information in the interests of safety. However, there was no agreement or explicit procedure about how to make these judgments.

> If I'm working with a lawyer that I know is going to put a woman at risk because they're not going to keep it quiet, then I don't tell them.[108]

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[107] Participant 10.

[108] Participant 1.

> I might say *okay, this information has come to light now, we need to let somebody know, and who would you like to be the person to know?*… It's not uncommon for me to talk to their lawyers to say, *we're really struggling here*.[109]
>
> Even in situations where I have learned about lesser levels of domestic violence, I've shared that information, 100%, with both of the lawyers.[110]

The image of the mediator as a resource hub (by default or design) is consistent with other themes we heard in the interviews centered on mediation's protean nature, namely its capacity to adapt to different forces and needs. From this vantage point, we were again interested in exploring how mediators viewed their screening responsibilities.

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109 Participant 2.

110 Participant 7.

V. EMBRACING MEDIATION'S PROTEAN NATURE IN CASES INVOLVING IPV

In the broader world of mediation, ideas about impartiality can keep mediators in the center, inhibiting them from attempting to call out or address deep imbalances in power.[111] We did not see this in the interviews. Mediators embraced the value of connecting with a client, particularly the victim, while reflecting on—and reconciling—their ethical responsibilities in these complex files. Mediators described wrestling with the following deeper tensions in their role:

1) BALANCING HEALING, ACCOUNTABILITY AND PROBLEM-SOLVING

The mediator might be making space for each person's psychological journey, while trying to keep the practical side of the mediation as productive as it can be. "A client might be in a therapeutic process of learning to label abuse in the therapist's office, for their own healing, but labeling as you are trying to figure out how to get your son to hockey is not as helpful," which requires the mediator to "live in these dual worlds, and to be able to talk about that with the person with some nuance."[112] At the same time, the mediator may be having "coaching conversations" to help the other party (who might be experiencing both guilt and frustration) know "the risks of crossing lines," to "get to a point where they can speak more honestly, and take

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111 See e.g., Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, 1st ed (San Francisco: Jossey-Bass, 2004).

112 Participant 3.

more accountability of the history, if that needs to happen. To start to rebuild a level of functionality, so that this storm is something that can be moved past."[113] "The strategies include a whole lot of challenging, trying to get the temperature down so that they have an ability to absorb, to gain insight."[114] Around all of this "there is an enormous tension between exposing the vulnerability and staying safe."[115]

Mediators offered examples of situations where they stopped meetings, created breaks and distance from the pressure to make decisions, helped clients balance short-term emotional needs with longer term pragmatic or rational interests, gave them space to be heard and sought to level the playing field. Inside this grey area, mediators can be choreographing the dialogue: "When I went back into the other room, it was like *we presented your idea; it was a really good idea, and took a bit of discussion, and she's agreeable to it*. I needed to handle it differently with him. He needed to hear that he had presented a good idea."[116]

> It's a co-regulation dynamic, in a way. I don't want to be a trigger, so I have to make sure that they feel really safe with me. Non-judgmental. Respected. When I'm able to do that, their triggers calm down. Then we're

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113 *Ibid*.

114 *Ibid*.

115 Participant 24.

116 Participant 15.

> able to have a meaningful discussion and they are able to negotiate effectively.[117]

2) USING PROCESS ADJUSTMENTS TO EXPLORE A BROADER VISION THAT INCLUDES CAPACITY-BUILDING.

Where IPV is acknowledged then process adjustments can evolve as the capacities of the parties are built. Parties who have had successful dialogue in mediation may start to feel that staggered arrivals and departures no longer make sense for them or begin exchanging the children at the house rather than in a supervised location, mediators assess these adjustments by indicating to parties "[h]ere's what you need to do to show me that you can 'graduate to' these changes. We may not quite be there yet. Although things are feeling good and you've been having some successes, let's look at what can go sideways."[118] The setting of process boundaries can be an opportunity for the parties to experience "mini-agreements" in the mediation,[119] part of an "overall shift of the family system to something that's much less likely to have a violent outcome—to figure out their conflicts in a discussion instead of acting out".[120]
The embedded view of screening as process-building fit better with mediators' orientation to their work: "building

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117 Participant 4.

118 Participant 3.

119 Participant 19.

120 Participant 3.

better relationships," "healing and taking responsibility and being able to move forward in a better way."[121]

> Families have challenges that are social, relationship, parenting, financial. It's untangling [those] that help people to get supports they need to build skills so that they can move forward. If we're dealing with this as social, relationship, parenting, healing—then the screening disappears. You're actually dealing with the underlying problem.[122]

> A huge part of our role is having people imagine a new future. *When we came into your world, things weren't working. When we leave, how are there going to be enough structures or supports to make sure that it does work*?[123]

[121] Participant 6.

[122] *Ibid*.

[123] Participant 3.

3) EMBRACING ASSERTIVE AND EVALUATIVE INTERVENTIONS.

Watching for destructive patterns may invite evaluative interventions. One mediator described working with an older low-income earning couple when the issue of the Canada Pension Plan came up. Splitting it would generate a significant monthly benefit to her on retirement, and she was the more vulnerable party, financially, yet her spouse was refusing to agree to a split.

> How evaluative do I become? How do I frame this to him? It was turning into coaching in between sessions. And it wasn't working. He wasn't shifting his ground. After doing some research, I found out that you can unilaterally apply if it is excluded from the agreement—so I ended up excluding it from the agreement altogether. I put her onto independent legal advice with somebody who knew what the issue was, who was going to be able to encourage her and go through the process with her if she wanted.[124]

This example underscores how mediators will watch for the fairness of agreement outcomes, particularly in these types of cases. "Because a coercive client can use the technical details of a policy against another person," one participant noted "you need to know it better than they do."[125] In these cases, the way mediators are mediating "is

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[124] Participant 10.

[125] *Ibid.*

in a much more directive and evaluative framework, because they need to."[126] Other mediators talked about mediating more assertively[127] or using "a very clear structure—no tangents," and staying "within this box."[128] Our interviews revealed mediators actively and consciously trying to balance competing forces, the distribution of negotiation power, and their own obligations in the process.

Many will watch for end results that will better serve the parties: "where does this agreement leave them, post-process, in terms of escalating or de-escalating?"[129] Mediators planned for agreements with:

(a) More structure and less communication around the parenting arrangement: "parallel parenting,"[130] with "fewer back-and-forths" involving the children: "While we might ordinarily think that 2-2-5-5 might work better, here we might think that a week on/off is better: less back-and-forth."[131] More pick-ups and drop-offs through the school rather than at home. More parameters around digital access with children, to avoid visual access to

126 Participant 24.

127 Participant 7.

128 Participant 26.

129 Participant 5.

130 Participant 14.

131 Participant 5.

the vulnerable partner's home. "Setting boundaries in the agreement."[132]

(b) Planning around financial issues to create more stability: "If this person loses their job or gets a raise, then this formula will be applied. To create *a roadmap* for as many scenarios as possible, so they don't have to come back into negotiation and stir everything up."[133]

Helping a family plan its transition to a healthier future can be riddled with challenges for the mediator: the need to protect vulnerable persons, deliver on a process with balance, and value or accept the needs of both (or all) parties in the process. To accomplish these objectives, mediators valued the absence of rigidity in their role. In contrast to rule-bound processes such as litigation, mediators describe that they "have the privilege that we don't have so many rules. We have an opportunity for narratives to emerge, and as a result, we're able to pick things out, probe deeper and respond—modifying the process or creating support even outside of mediation."[134] Another participant indicated that mediators "do have that informal, rule-breaking kind of role, where they can sort of do whatever works…. Very few get it, how flexible that role is."[135]

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132 *Ibid.*

133 *Ibid*.

134 Participant 4.

135 Participant 10.

Flexibility may attract additional tensions when it comes to transparency. While all mediators talked about staggered arrival and departure times for in-person meetings, some were more open than others with the parties. Some came up with benign reasons as to why one party (the abuser) was being asked to stay late, and others told the parties outright that this was about accountability and the rebuilding of trust. Either may be the right judgment call, if the mediator approaches it as a process-design issue based on the parties' particular needs.

> We carry a lot of responsibility in this work, to elevate it. I don't think enough research has been done. When people slip through the cracks … we are just trying to minimize it more and more. We are often the ones that work *in the cracks*, so to speak.[136]

> This is where the idea of screening runs into what you are doing: which is providing a non-judgmental and supportive process for people. You have to have a mental orientation to balance these things. If you get out of the right territory—the moment you start judging—then you are actually increasing the risk. It's very intellectually challenging to balance these things.[137]

136 Participant 4.

137 Participant 9.

VI. "CONTEXT IS KEY": MEASURING CLIENT SELF-DETERMINATION

In addition to mediators' comfort with the process's protean nature, a second deeper theme which emerged from our interviews was mediator willingness to consider how autonomy and agency can be confirmed (or clouded) in individual cases. On the one hand, it is essential for mediation to adapt to the needs of the parties, the context of the conflict, and the style and capacities of the mediator. In that sense, the structure of mediation can seem elusive. On the other hand, it must deliver on at least two commitments: party self-determination and informed decision-making, which go hand-in-hand. In other words, the mediator helps each party to identify genuine priorities and to let those priorities guide their negotiation, as they make decisions which are fully informed by the non-negotiable realities surrounding them. A coercive, controlling relationship may lead a mediator to conclude that autonomy and agency, or *enough* autonomy and agency, are not possible—or to conclude that these are possible to achieve *only if* the process is built a certain way.

What self-determination means in mediation is obviously complex. It could be viewed as a dimension of capacity or "competence" to participate in the mediation, requiring that a party have:

1. A rational and factual understanding of the situation;

2. An ability to consider options, appreciate the impact of decisions, and make

> decisions consistent with their own priorities; or
>
> 3. An ability to conform their behavior to the ground rules of mediation.[138]

It is the issue of power imbalances which problematizes self-determination in mediation. The HELP Toolkit recommends against mediation if a person cannot express themselves freely and fully or is trying to get through the process faster to be free of the other party's control—but also suggests that one consider the capacities of the mediator and arrangements to elevate the client's capacity to negotiate effectively.[139]

Conceptions of client empowerment often came up in our interviews, expressed through the idea of "choice": *procedural choice* (choice of process) and *substantive choice* (choice of guiding priorities and outcomes in negotiation). Some described a vision of collaborative design: "bringing this person on as an informed co-creator of a process—someone who at every stage of the game has some authorship in the assessment of whether or not this is a good case for mediation."[140]

> In many cases, this person needs to go away and process the information that they've shared with you, to look at it through a number of lenses, to get all of the supports

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138 Beck & Frost, *supra* note 13 at 25.

139 See HELP Toolkit, *supra* note 28 at 33.

140 Participant 3.

> and safety planning before they can make a decision about whether to proceed.[141]
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> We're constantly speaking for the woman, and saying, *Okay so you've been in this abusive relationship, you shouldn't go back. You should do this; you should do that.* We're asserting another form of power and control over her. If she feels she would like to have an opportunity to have mediation structured safely, then that should be done.[142]

Mediators tend to bring this back to the vulnerable party's capacity to negotiate, asking them questions like: "*Do you have any concerns about disagreeing? Can you take a stand for something that the other person is demanding? If you think it's inappropriate and not safe, can you get what you want?*" As one participant reported, "[i]f you don't get the sense that they will stand up, then that's a problem.[143]

Once in the process, mediators also talked about the importance of agency, describing that "working with clients on not only informed consent—really informed consent about process choice—but also informed consent about settlement decisions along the way." One participant indicated "I think victims of intimate partner violence or family violence sometimes have tougher choices to make as to what to assert in the negotiation. . . where to say *this is a good enough resolution that also keeps me safe*. Those

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141 Participant 9.

142 Participant 15.

143 Participant 24.

are tough conversations and decisions to navigate."[144] Another participant reported that, as lawyers, there is training "about the rights and obligations, but that is only one part of somebody's very complex menu of things they're wanting to have addressed."[145] Balancing a protective stance with one that leaves room for self-determination is one of the most significant challenges in this type of mediation, as there is great "difficulty is maintaining a range of conflicting priorities and values." Mediators must weigh "[s]elf-determination versus the duty of caring, to protect vulnerable people."[146] Participants raised two other factors affecting agency: the impact of trauma, and the intersectionality of issues around culture and gender identity.

THE IMPACT OF TRAUMA

While the literature around IPV and mediation does acknowledge the risk of re-traumatization in processes that can exacerbate a person's pain, it does not tend to provide guidance on the impact of trauma on self-determination in mediation. Trauma was recognized by study participants as being relevant in two ways. First, trauma can result from the experience of IPV and the link between being subjected to violence and experiencing post-traumatic stress is well-established.[147] However, parties can also bring a history of

144 Participant 5.

145 Participant 2.

146 Participant 10.

147 See Mary Ann Dutton, "Pathways Linking Intimate Partner Violence and Posttraumatic Disorder" (2009) 10:3 Trauma, Violence, & Abuse 211; Michelle F Dennis et al, "Evaluation of Lifetime Trauma

trauma into their relationships, which compound the challenges. Some mediators referred to negative collective group experiences which impacted individuals, such as those affecting Indigenous peoples. The concept of trauma was also used throughout our interviews with a broad meaning, including negative life experiences (prior to or inside the spousal relationship) and stressors which produce maladaptive behaviours in the context of mediation.

Second, mediators and others noted that traumatized clients could have reduced capacity to understand and process information, a reduced ability to make decisions rationally, or a likelihood to become extremely emotionally distressed during the mediation. Such traumatized clients seemed hesitant to make decisions, disengaged from the mediation process, forgetful, or irrational. Mediators emphasized that this may be a time to ask more questions, or to "recognize what may be happening" and to "offer more support."[148]

Exposure and Physical Health in Women with Posttraumatic Stress Disorder or Major Depressive Disorder" (2009) 15:5 Violence Against Women 618.

148 Participant 4. See also Karla O'Regan *supra* note 9 at 9; HELP Toolkit, *supra* note 28 at 41–42 (Tab #1).

CULTURAL COMPETENCY

Study participants also reflected on the impact of culture, religion, socioeconomic status, and gender identity on self-determination in mediation where concerns involving IPV have been identified.[149] They viewed such factors as relevant to the identification of violence or coercive control (sometimes originating from within a broader family system rather than just the partner relationship) and to the reasoning and choices of parties inside mediation. Mediators typically used a case-by-case approach where they tried to avoid making assumptions about the clients' wishes and values, preferring to let clients explain their cultural practices and values to them. One participant described that cultural competency

> is sometimes [about] capturing… non-explicit rules, and bringing them to the surface. So, if you don't have the lens to see it, then we have to make sure that we somehow ask the right questions to bring it out.[150]

Some mediators thought that understanding the relational positioning of clients was the best way to discover unanticipated values and priorities. To do this, some mediators used a family systems theory lens—where mediators mapped clients' social relationships to try to appreciate the source and effect of different influences and

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149 See also Ellis, *supra* note 12 at 1, 12; HELP Toolkit, *supra* 28 at 43–46 (Tab #2).

150 Participant 4.

stresses. In one scenario, a participant described a situation where

> the eldest brother was going to do all the talking, and at the end of the day, the women didn't really speak. But when we had the breakout sessions, their voices were heard there. If you were to plot out the power, the women were the ones who ended up making the agreement. But the eldest brother had to be seen to be the one in charge.[151]

Mediators who worked with clients from collectivist cultures reported greater influence from extended family or community and religious leaders, and more concern with family reputation.[152] "These are the kinds of questions that you need to ask," participants indicated, "*how are decisions made in the family?*"[153] and "[i]s there anyone else that they need to have at the mediation that is going to be an influencer in decision-making? I'd rather have them at the mediation… I need to have whoever's driving the bus in the room."[154] However, they also noted that "by exposing this abuse, you may actually add pressure to stay in the relationship. If the abuser is well-connected, or the survivor's parents are in the community, they don't want to necessarily share all this

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151 Participant 19.

152 See Ellis, *supra* note 12 at 8.

153 Participant 4.

154 Participant 15.

information. It's a privacy issue."[155] Abuse can also be perpetrated as a group or by someone other than a spouse, and a victim may be socially isolated especially if she has immigrated. "People need to be trained to screen the family, not just the parties,"[156] one participant stated, raising the importance of understanding the role of networks and communities on experiences of abuse.

Mediators noted that clients in same-sex relationships could be vulnerable in similar ways. Some clients may have less social support due to stigma or secrecy surrounding their relationship, increasing the extent to which they rely on their partner for social support. This can make problems in the relationship extremely distressing. We also heard mediators caution about generalizing heterosexual patterns of IPV to same-sex patterns of IPV.

In the quest to protect the principle of self-determination, mediators must make room for both situational as well as cultural factors, to avoid drawing assumptions about the dominant influences which shape a client's behavior or choices. The concern for context and intersectionality was indeed described as another lens in the assessment of a party's needs and capacities in mediation.

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155 Participant 4.

156 Participant 25.

CONCLUSION

Against a backdrop of significant change in the way that IPV is viewed and understood in the past fifteen years, mediator discretion has become a central compass in the design and execution of the process. The mediators we interviewed acknowledged the inherent tension between clinical fact-gathering (rigour) and trust-building environmental management—the latter being an essential role of the mediator in developing a problem-solving framework in a complex dispute. Mediators employ external screening tools but reportedly rely equally on their intuitive and conversational skills tied to the problem-solving tasks in their work.

A 'best practices' framework for mediators working with IPV cases clearly includes operating from an understanding of coercive control and its impact on how the parties interact and make decisions. The subsequent task of knowing *how* to assess (and then moderate) these interactions involves a complex menu of mediator approaches and tools. Thorough screening tools such as MASIC tend to be modified, and combined with other existing and self-created tools, to allow the mediator to adapt in the moment. Mediators prioritize the environment—the quality of connection and interaction (especially with vulnerable parties)—over the technical benefits of a checklist of criteria/questions. They emphasize *how* questions are framed and followed up on, *how* narratives are teased out and respected, and describe these as equally important to the choice of a screening tool.

Since fewer cases are viewed as automatically inappropriate for mediation, more care must go into the

process's adaptation to foster a continued assessment of vulnerability. In the past, the 'usual' adaptations included shuttle mediation, the presence of advocates, and staggered arrivals/departures. We found that mediators preferred to talk about deeper, more-nuanced adjustments including interrupting patterns, understanding cues, slowing down and pacing, and educating. They also spoke about the ethical tensions around balance and impartiality on one side of the equation, and capacity-building on the other side, often leading them to more evaluative interventions. Mediators also reported often serving primary roles as information hubs, whether or not by design.

Mediators in our interviews conveyed a sense that they are "working inside the cracks"—trying to compensate for the failures of other justice processes while developing a future-focused solution for the parties and the family unit. They generally do not know a lot about the history of a file (relying instead on unreliable updates from parties themselves) and feel responsible to guard information gained through private dialogue within mediation (while using party consent to reach out to other professionals where they can). In that sense, mediation may be a less constrained opportunity to work with parties at the center of a legal dispute, but—not unlike other processes—remains siloed in the system.

Invited to reflect, participants in our study spoke of two larger opportunities in terms of their orientation to the process, which represent themes that were not as likely to appear in the literature. They were inclined to abandon the view of screening as a discrete task, to embrace it as an integrated aspect of building a process which needs continual accommodation for human needs and

constraints, from start to finish. This can involve monitoring for the content of final agreements, having coaching conversations with the parties, transitioning the family, and capacity-building for the future. Mediators also use discretion to assess whether and how clients might be acting in (sufficiently) self-directed ways. A mediator's lens includes understanding trauma, and the impact of social networks or experiences affected by culture, family systems, and gender identity.

While recognizing these new priorities, our study participants acknowledged these orientations have yet to be swept out into the field. Blind spots or barriers still exist around culture and complex family needs, but these have been identified as priorities for next-generation trainers, program designers and policymakers. Important questions remain to be studied. For example, we did not investigate how mediators might differently approach screening interviews with perpetrators, especially given common patterns of denial and blame. Nor did we focus on the children's best interests, input from children, and/or concerns about ongoing exposure of children to coercive control post-separation. Finally, more work needs to be done to envision and articulate how lawyers, mediators, and other justice professionals can work to support clients in a more cohesive way.

Even so, progressive discussions with experienced mediators and other leaders in the field in Canada do help to build an "empirically informed understanding of how each component of the legal system" responds to cases involving IPV—a crucial step in moving towards a system-

wide response.[157] While confidence has grown in mediation's capacity to invoke "inherent protections" for vulnerable parties—as envisioned by the Supreme Court of Canada in *Bouvier*—this study shows that mediator discretion is endemic at every stage. Discretion is indeed viewed not as a by-product, but as a lever to help mediators respond effectively to the challenges inherent in cases involving IPV. The preservation of discretion creates natural challenges when it comes to the governance of such processes. More research is needed to explore how mediator discretion looks at the ground level in Canada, how mediators across the board can be better prepared for the nuanced approaches that best serve the parties, and what part mediation can play in a more predictable and planned system-wide response to the challenges surrounding domestic violence.

[157] Neilson, *supra* note 103, s 1.4.