

**THE ROLE OF MEDIATION IN DIVORCE AND CHILD CUSTODY DISPUTES IN WHICH DOMESTIC
VIOLENCE IS PRESENT: A RESEARCH PATHFINDER**

by

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I. INTRODUCTION

This research pathfinder provides a review of research regarding the role that mediation plays in divorce and child custody disputes involving domestic violence. The objective of this paper is to provide a summary of what is currently known about the role of mediation in such disputes and, in doing so, identify, for attorneys and communication scholars, areas that are open to further exploration.

In summary, mediation can be a useful tool for handling family matters otherwise slated for litigation or other judicial involvement. However, both opponents and proponents of mandatory mediation agree that unlimited mandatory mediation can be an unrealistic and dangerous approach to adopt when dealing with family-related issues where domestic violence is also present. Even so, if the necessary precautions are taken and the mediation process is adapted to acknowledge and to meet the needs of those involved in an abusive relationship, mediation is a valuable resource to those participating directly in the judicial system.

II. THE RISE OF MANDATORY MEDIATION

In the early 1980s, California implemented mandatory mediation¹ as a precursor to the judicial process.² Following California's example, several states implemented mandatory mediation programs, which were also without exclusion for divorce and child custody disputes in which domestic violence is present.³ At present, thirty-three states mandate the use of mediation

¹ Mediation, as defined by Folberg and Taylor, is the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. See JAY FOLBERG AND ALISON TAYLOR, A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION, (Jossey Bass 1994)..

² THOENNES, 33 FAM. & CONCILIATION CTS. REV. at 6.

³ LISA NEWMARK, ADELE HARRELL AND PETER SALEM, DOMESTIC VIOLENCE AND EMPOWERMENT IN CUSTODY AND VISITATION CASES, 33 FAM. & CONCILIATION CTS. REV. 30, 31 (1995).

in divorce and child custody disputes.⁴ Generally, the mediation process requires those involved in child custody and divorce disputes to attend a mediation session in an attempt to resolve their issues prior to their appearance in court.⁵ This implementation was due, in large part, to the fact that most state court systems are overly-burdened and must engage in alternative methods of dispute resolution in order to manage an ever-increasingly unmanageable case load.⁶

III. ARGUMENTS FOR AND AGAINST MANDATORY MEDIATION AND MEDIATION SERVICES FOR DOMESTIC VIOLENCE DISPUTES

Immediately following the implementation of a mandatory mediation, a number of groups, particularly Victims' Advocates, argued against mandatory mediation, stating that the procedure was not suited to handle situations in which the participants were either victims or perpetrators of domestic violence.⁷ These opponents believe that mediation decriminalizes domestic abuse and encourages a conciliatory approach that fails to hold the batterer accountable for his behavior.⁸ Also, many opponents believe there are inherent risks in mandatory mediation, because it permits a batterer to know the time and place his spouse will be present for the mediation session, thereby potentially enabling further abuse.⁹ Finally, many opponents are concerned about the quality of court and community-based mediation programs and the staff's ability to accurately and efficiently identify cases in which domestic violence is present.¹⁰

⁴ Id. See also JESSICA PEARSON, MEDIATING WHEN DOMESTIC VIOLENCE IS A FACTOR: POLICIES AND PRACTICES IN COURT BASED MEDIATION PROGRAMS, 14 MEDIATION Q. 319, 320 (1995).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

Proponents of mediation argue that mediation can be effective and is often the preferred method for victims as well as perpetrators.¹¹ They believe that many of the shortcomings attributed to mediation are also present during attorney-assisted negotiations and the litigation process.¹² In fact, many argue that the judicial system can escalate and prolong conflict such that the level of danger for the victim is greatly increased and prolonged.¹³ Finally, these proponents believe that the appropriateness of mediation and the format of the session depends upon the type of domestic violence at issue and whether the existence of such violence may be addressed via screening, individual meetings, and the use of advocates in mediation sessions so that victims may reap the benefits of the mediation process.¹⁴

Although there are differing points of view on court mandated mediation programs, there is agreement on many issues. While mandatory mediation may prove to be a very useful means of dispute resolution for those relationships in which domestic violence is not present, it is not proper for cases in which domestic violence is present.¹⁵ If domestic violence is not properly screened for and detected, the terms of the resulting agreement may compromise the victim's safety by, for example, giving the batterer access to her through joint custody and visitation agreements.¹⁶ In order to exempt cases from mandatory mediation, they should be screened for a history of, or the presence of, domestic violence.¹⁷

¹¹ NEWMARK, 33 FAM. & CONCILIATION CTS. REV. at 321..

¹² PEARSON, 14 MEDIATION Q. at 320.

¹³ *Id.* at 321-322.

¹⁴ *Id.*

¹⁵ See generally HART, 7 MEDIATION Q. at 317-330.; BARBARA DAVIES ET AL., A STUDY OF CLIENT SATISFACTION WITH FAMILY COURT COUNSELING IN CASES INVOLVING DOMESTIC VIOLENCE, 33 FAM. & CONCILIATION CTS. REV. 324 (1995); GAGNON, ENDING MANDATORY DIVORCE MEDIATION FOR BATTERED WOMEN, 15 HARV. WOMEN'S L.J. 272-294 (1992).; NEWMARK, 33 33 FAM. & CONCILIATION CTS. REV. 30-62 (1995).

¹⁶ HART, 7 MEDIATION Q. at 325

¹⁷ *Id.*

There is a strong belief that the victim's safety will be greatly jeopardized if she is forced to endure all that the mediation process entails.¹⁸ In disputes in which domestic violence is present, mandatory mediation puts battered women at risk for more abuse, contributes to their further disempowerment, and continues to protect their batterers from legal sanctions.¹⁹ There is a shared belief that the basic elements of the mediation process (voluntary participation, equality or rough parity of bargaining power, neutrality on the part of the mediator, and confidentiality) are lacking for those couples for whom domestic violence is an issue,²⁰ and thus should not be mandated.²¹

IV. PATHFINDER SOURCE REVIEW

Since the early 1980's, several researchers and scholars have engaged in intricate studies to examine the effects of mediation when domestic violence is present.²² These studies range from experiments with focus groups, to surveys of those who have personally experienced the mediation process, to analyses of recently implemented mediation processes designed to accommodate disputes in which domestic violence is present.²³ There is an abundance of information on the subject, yet there is an absence of a thorough examination and assembly of all of the available information on the role of mediation in child custody and divorce cases in which domestic violence is present. The various sources reviewed by the authors would be valuable to

¹⁸ NEWMARK, 33 FAM. & CONCILIATION CTS. REV. at 42-43. See HART, 7 MEDIATION Q. at 325-327. See also THOENNES, 33 FAM. & CONCILIATION CTS. REV. at 7.

¹⁹ NEWMARK, 33 FAM. & CONCILIATION CTS. REV. at 39. See HART, 7 MEDIATION Q. at 325. See also THOENNES, 33 FAM. & CONCILIATION CTS. REV. at 7.

²⁰ HART, 7 MEDIATION Q. at 326-27. See also THOENNES, 33 FAM. & CONCILIATION CTS. REV. AT 7.

²¹ See generally HART, 7 MEDIATION Q. 317-330.

²² See generally PEARSON, 14 MEDIATION Q. 319-335.; NEWMARK, 33 FAM. AND CONCILIATION CTS. REV. 30-62.; MILDRED PAGEDLOW, EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN AND THEIR CONSEQUENCES FOR CUSTODY AND VISITATION AGREEMENTS, 7 MEDIATION Q. 347-363 (1990).

²³ *Id.*

anyone interested in further examining the subject and are summarized in the following Literature Review section.

Literature Review

This section provides a brief summary, listed in alphabetical order by author, of each study and article reviewed.

Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power* 40 BUFF. L. REV. 441 (1992). In this article, the author argues that mediation only serves to empower the already more powerful husband. The author suggests that mediator intervention does not protect the lesser powered wife from disadvantageous outcomes. Moreover, the author argues that mediation fails to protect the divorcing wife from the husband's control over financial issues.

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). In this article, the authors interviewed seventy-six divorcing couples regarding the mediation process. They found that most mediating couples resolved one or more disputes; women and mediators reported more positive changes than did men; and success in mediation may be linked to the content and importance of the disputes and to the willingness to compromise.

Judge Chester B. Chance & Alison E. Gerencser, *Screening Family Mediation for Domestic Violence*, 70 FLA B. J. 54 (1996). This article, written in part by a family court judge, argues that judges should not order mediation in any cases involving domestic violence (disagrees with mandatory mediation) and should advise victims of alternatives to mediation. However, in instances where mediation is the chosen method, the authors argue that family court mediators should be trained and should act to ensure the victim's safety when violence is

discovered. The authors also believe that judges should scrutinize any mediated agreements when current or recent domestic violence is an issue and should suggest that questionable agreements be reviewed by counsel before given final approval.

David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 *MEDIATION Q.* 331 (1990). A policy of pre-mediation violence screening and counseling seems to help to differentiate adequately between the potentially small number of cases in which mediation is inappropriate and cases in which mediation has the same result as it does for nonviolence cases.

Lester Cohen, *Mandatory Mediation: A Rose By Any Other Name*, 9 *MEDIATION Q.* 33 (1991). This article examines California's mandatory mediation statute and concludes that mandatory mediation is distinct from mediation as it is traditionally known and as such, requires a separate model and application specific to the needs of the parties involved.

Kathleen Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303 (1990). In order to determine whether mediation is appropriate when there has been spousal abuse, one must first determine the present level of coercion or intimidation in the relationship. Such an investigation would include an examination of: abuse behaviors and characteristics within the relationship, the cycle of violence, limitations of conventional legal responses to domestic violence, and emerging approaches to domestic violence.

Barbara Davies et al., *A Study of Client Satisfaction with Family Court Counseling in Cases Involving Domestic Violence*, 33 *FAM. & CONCILIATION CTS. REV.* 324 (1995). Two groups' determinations of the value of mediation in domestic violence cases were collected. The first group, with 173 subjects, reported domestic violence as a significant issue. The second

group, with 112 subjects, did not report domestic violence. The results were that both groups considered mediation to have been helpful in resolving their issues.

Albie M. Davis & Richard Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 *MEDIATION Q.* 17 (1984). In this article, the authors argue that the mediation process, in itself, is very empowering. They also offer advice to mediators in situations in which there is an irresolvable power disparity (i.e. relationships in which domestic violence is present).

Melvin DeFleur et al., *FUNDAMENTALS OF HUMAN COMMUNICATION* (1998). The authors present theories of human communication.

Mary A. Duryee, *Mandatory Mediation: Myth and Reality*, 33 *FAM. & CONCILIATION CTS. REV.* 507 (1992). In this article, the author argues that mediation provides a disservice for women in that elements of mediation, primarily basic parity and voluntariness, are not present.

Mary A. Duryee, *Guidelines for Family Court Services Intervention When There Are Allegations of Domestic Violence*, 33 *FAM. & CONCILIATION CTS. REV.* 79 (1995). This study presents model guidelines for mediators and courts to follow when resolving cases in which domestic violence is a significant factor.

Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 *MEDIATION Q.* 377 (1990). In this article, the authors provide guidelines for mediating divorces in which the parties involved have experienced domestic violence. The authors support stringent screening processes and argue that cases of extreme domestic violence or a demonstrated history of domestic violence should be exempted from the mediation process.

Karla A. Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 *SMU L. REV.* 2117 (1993). In this article, the authors argue that mediation is

not the appropriate means of resolving disputes in which domestic violence is present or in which there is a history of domestic violence. The authors believe that one who is a victim of domestic violence cannot possibly be expected to mediate with equal-bargaining power. The authors also stress safety and equity of outcome concerns.

Jay Folberg & Alison Taylor. *A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION*, (Jossey-Bass 1984). In this book, the authors present a thorough guide to the mediation process.

Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992). In this article, the author argues that domestic violence cannot be separated from issues of custody, visitation, and property division. This being so, the author argues that courts should not compel women who have been victims of domestic violence to mediate such issues when seeking temporary orders or divorce.

Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151 (1990). As to professionals in the mental health, social service, criminal justice, and legal fields, recommendations are presented for dealing with power and other issues in abusive relationships.

Alison E. Gerenscer, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U.L. REV. 43 (1995). This law review article presents arguments in support of: (1) an exemption from mediation when participant screeners determine that, because of the level of domestic abuse, mediation is inappropriate, and (2) mandatory screening for domestic violence prior to mediation that includes mediator training.

Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (1990). This article presents the *Conflict Assessment Protocol* for

screening for domestic violence in divorce cases. This procedure involves: identifying the clients' patterns of making decisions, managing conflict, and expressing anger; eliciting responses relating to specific types of abusive behaviors; and conducting separate screening sessions.

Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). This author argues that mandatory mediation is not proper for those cases in which domestic violence is present. She believes that mandatory mediation is neither a more just nor a more humane alternative to the adversarial system of adjudication and therefore does not fulfill its promises. The author also argues that mandatory mediation can be destructive to women and some men because it requires them to speak in a setting they may not have chosen and often imposes a rigid orthodoxy as to how they should speak and make decisions.

Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479 (1995). This note examines the experiences of family law attorneys who often participate in mediation among family members. The note focuses on the arguments in favor of, and in opposition to, the use of mediation for families who have and/or are experiencing domestic violence. The note does not draw any conclusions, but presents actual opinions from practitioners on the issue.

Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990). This study concludes that mandatory mediation statutes and policies must exclude custody disputes in the context of domestic violence. It cites numerous studies that demonstrate that mediation is an inappropriate and dangerous alternative to the legal process for the resolution of custody disputes between batterers and battered women.

Barbara J. Hart, *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* (Sage Publications, Inc. 1993). In this book, the author examines the history of domestic violence law and provides a synopsis of the legal options available in most states to address the problem of domestic violence (e.g.. civil protection orders, mandatory arrest statutes, custody statutes, victims' rights statutes, and mandatory mediation for custody disputes).

Harvey I. Hauer, *Making Mediation Work*, 19 FAM. ADVOC. 26 (1997). The author examined various methods that may be used to effectively and safely utilize mediation in family law situations. The author found that effective screening may be used to determine whether the mediation process will be fair and voluntary, safe for the victim, and will result in an equitable outcome. The author does not believe that mandatory mediation is appropriate for cases involving domestic violence because it precludes any opportunity for screening and forces the victim into a potentially dangerous situation. However, the author found that mediation can work in cases in which there is proper screening for the presence and level, if any, of domestic violence and in which the mediation process is adapted to account for the presence of domestic violence.

Joan B. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 MEDIATION Q. 85 (1995). This article examines the nature of power imbalance in interpersonal relationships and presents a means of assessing conditions that create the potential for unequal power during mediation (i.e. the presence of domestic violence). The author suggests several techniques by which a mediator may empower the parties when power imbalances threaten the integrity of the mediation process and the ultimate agreement between the parties.

Barbara Landau, *The Toronto Forum on Women Abuse: The Process and the Outcome*, 33 FAM. & CONCILIATION CTS. REV. 63 (1995). This article describes the development of Toronto's protocols for mediation in cases involving domestic violence. This study presents a working framework for mediation programs dealing with domestic violence cases in the United States.

Francie Latour, *A Strategy to Fight Domestic Violence: New Court Session Set to Hear Cases*, THE BOSTON GLOBE, September 8, 2000, at B2.

Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984). In this article, the author argues that mediation not only fails to protect women from subsequent violence, but also perpetuates their continued victimization. She recommends that those programs in existence either be discontinued or offer protection to victims of abuse, make clear to the abuser that cessation of the violence is his responsibility, and allow enforcement of mediated agreements.

Holly A. Magana & Nancy Taylor, *Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol*, 31 FAM. & CONCILIATION CTS. REV. 50 (1993). This study describes a protocol developed in the Orange County, California mediation and investigative unit that provides protection to the alleged victim of violence through the use of assessment interviews, co-mediation, with a male-female mediation team, and the development of post-parenting arrangements that provide for protection and security.

Dennis Marthaler, *Successful Mediation With Abusive Couples*, 23 MEDIATION Q. 53 (1989). In this article, the author (who at the time of this piece was a custody and visitation mediator in St. Louis County, Minnesota) presents the manner in which he conducts a mediation

session. The author believes that cases in which there is a history and/or presence of domestic violence should be exempt from mandatory mediation.

Jennifer P. Maxwell, *The Use of Performance Art and Q Methodology for Increasing Mediator Recognition of Trauma and Domestic Violence*, 16 *MEDIATION Q.* 269 (1999). This article presents a study of mediation trainees' responses to a dramatization depicting victims' experiences with domestic violence. Some participants immediately recognized the presence of domestic violence, but others felt it inappropriate to view a personal and private problem. The article draws attention to the concern that some mediators will not recognize the presence of domestic violence during a mediation session.

Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence*, 37 *FAM. & CONCILIATION CTS. REV.* 335 (1999). This article examines the effects of domestic violence on the mediation process and argues against the use of mandatory mediation for cases in which domestic violence is present. The author then suggests ways that mediators might recognize and respond to the presence of domestic violence in such cases.

Anne E. Menard & Anthony J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 *MEDIATION Q.* 293 (1990). This study examines the effectiveness of Connecticut's Family Violence and Response Act, particularly its guidelines for mediation for families in which domestic violence is present. The study also examines closely the vulnerability of battered women to repeated violence or threats.

Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 *FAM. & CONCILIATION CTS. REV.* 30 (1995). This study examines victims' perceptions of their own empowerment within the judicial system. The author found that men, on average, feel more empowered within the court system than women.

Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347 (1990). This study presents arguments against mediation for violent couples and presents strategies for identifying victims and increasing protection during mandatory mediation. The study examines these changes in light of the best interests of the children involved in the dissolution of turbulent marriages.

Jessica Pearson, *Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319 (1997). This article looks at how mediators and program administrators say they have responded to the criticisms of advocates for victims of domestic violence by developing ways to gauge the capacity to mediate and to modify the mediation process in order to enhance safety.

Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991). This article serves as a response to Trina Grillo's article cited supra. The author argues that while mandatory mediation presents some real problems, society may be better served by attempting to correct those problems than by abandoning mandatory mediation in areas where it has already proved to be very helpful. Concerning the belief that mandatory mediation may be dangerous for women, the author argues that while anything can be dangerous to anyone at some time, mandatory mediation is generally helpful both to women and to men, and an overwhelming number of the women and men who have been through mandatory mediation approve of it strongly.

Peter Salem & Ann L. Milne, *Making Mediation Work in A Domestic Violence Case*, 17 FAM. ADVOCATE 34 (1995). In this article, the authors argue that, under particular circumstances, mediation is an effective means of reaching a settlement in cases involving

domestic violence. Such circumstances include: proper screening techniques, separate meetings with the couple, and representation of counsel during mediation.

Loretta Stalans & Arthur J. Lurigio, *Public Preferences for the Court's Handling of Domestic Violence Situations*, 41 CRIME AND DELINQUENCY 399 (1995). This study examined public opinion regarding court dispositions in domestic violence cases. Women and men preferred counseling significantly more than they wanted jail or probation. The most preferred disposition of respondents overall was court-ordered mediation.

Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6 (1995). This study summarizes policies and procedures used by various courts in the United States in responding to domestic violence. Many family court services appeared to recognize the strong likelihood of abuse between parents referred to mediation for resolution of custody and visitation disputes. Training in domestic abuse issues for mediators is widespread (70% of the programs) as are attempts to screen for domestic violence (80% of the programs).

Lenore Walker, *THE BATTERED WOMAN* (Harper and Row, 1979). The author presents and discusses theories, such as the Cycle of Violence, as relates to the battered woman.

Ann W. Yellot, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39 (1990). This study finds mediation can be an effective problem-solving intervention. Guidelines for structuring such a mediation program are presented, and a rationale is provided for including mediation as one of many intervention techniques available in communities for abused and abusive partners and their families.

V. IMPLICATIONS FOR FURTHER STUDY

The concepts of “mandatory mediation” and “mediation” still exist for those in divorce and child custody disputes who have experienced a history of domestic violence. Therefore, based upon the findings presented in this pathfinder, the authors recommend that further study be directed at:

- 1) gathering and analyzing actual participants’ opinions regarding the concept of mandatory mediation with particular emphasis on its role in divorce and child custody disputes where there exists a history of domestic violence among the participants;
- 2) conducting content analyses of current legislative acts that purport to regulate mandatory mediation in an effort to identify those acts that appear to provide more adequate protection for those who may be compelled to enter into mandatory mediation;
- 3) gathering and synthesizing the current state of, and content for, mediation training for mediators working in the areas of domestic violence, divorce, and child custody disputes;
- 4) examining current screening techniques in an effort to determine those that are effective as well as those that prove to be less than adequate; and
- 5) gaining a more complete understanding of the batterer and the battered to, at a minimum, develop more effective and comprehensive mediation training programs, mediation screening techniques, and possible amendments to current legislative acts.

Perhaps, enlightened by further research and deeper understanding, we may develop and sustain mediation programs that simultaneously address the court system’s backlog concerns, the

participants' desire for resolution, and the safety and well-being of all participants in the mediation process.