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Family Mediation: Screening for Domestic Abuse

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FAMILY MEDIATION:
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Allison Gerencser
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I. INTRODUCTION

A recent family mediation began with the father shouting, "Do you know what I'd do if my son ever came home with an earring? I'd cut off his ear." He was responding to the mother's request that he stop berating their son.

This outburst was no surprise. In a pre-mediation screening questionnaire, the mother said the father had abused her. Although she wanted to try mediation, she was unsure whether she could participate on an equal basis with the father. As the mediation progressed, the mother willingly acquiesced to the father's visitation demands in his presence. However, she said privately that she did not want him near her or their children, and that she had agreed to his demands only because she was afraid of him. The mediation ended in an impasse, with no reported mention of the father's abusive history or the mother's fear of further abuse based on her conduct at the mediation.1

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1. Mediation by Alison Gerencser, Alachua County (Florida) Courthouse, Spring 1994.
This case illustrates a situation in which earlier participants in the case should have noted the existence of domestic violence and exempted the case from mediation. "Participants" refers not to the parties, but to those participating in the family law process: lawyers representing the parties, the clerk of the court, the judge, and the family mediator.

Ultimately, the mediator in a family case must screen for domestic abuse to determine whether mediation is appropriate. However, this determination should not be the sole responsibility of the mediator. Long before the mediator sees the case, other participants should screen for such abuse by asking the parties about domestic violence. Because some parties may not be literate, screening should include a personal interview in addition to a written questionnaire. Preferably, someone other than the mediator will conduct the interview.

Unfortunately, this does not usually happen. No state requires screening for domestic violence and abuse before mediation begins. In fact, some states do not provide an exemption from mediation even when screening indicates that a significant history of abuse exists. As a result, courts may send cases to mediation despite domestic violence and abuse, either because participants are unaware of the violence and abuse, or because no mechanism for exemption exists.

This practice must change. Legislatures must require screening by participants at every level, and an exemption from mediation when participants find domestic abuse. Legislatures also must require that all participants, especially family mediators, be trained to recognize

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2. Section 44.102(2)(b), Florida Statutes, provides in relevant part: "A court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse which would compromise the mediation process." Fla. Stat. § 44.102(2)(b) (Supp. 1994).

3. Georgia has proposed court guidelines that include mandatory domestic violence screening for court-based family mediations, with intake procedures to identify cases that should not be referred to mediation. COMMITTEE ON ETHICS, GEORGIA COMMISSION ON DISPUTE RESOLUTION, MEDIATION IN CASES INVOLVING DOMESTIC VIOLENCE (Proposed Draft, Mar. 30, 1995).


5. Carol A. Caldwell, Mediation in Cases of Domestic Violence in Florida's Eighth Judicial Circuit 76 n.39 (Spring 1994) (unpublished manuscript, on file with the author) (citing Letter from Linda Harvey, Family Mediation Director, Mediation Center of Kentucky, to Carol A. Caldwell, student, University of Florida College of Law, Mar. 8, 1994, stating that just 10 percent of mediators screen cases, and most of those screen superficially by telephone).

signs of domestic violence and abuse. Participants must know about domestic abuse, screen each case to identify abuse, and assume that any alleged abuse did actually occur. If mediation is inappropriate, they should offer alternatives to mediation.

In incorporating concerns about domestic abuse into mediation statutes, legislatures should provide guidance to the participants by defining the types of abuse that might compromise the process and, therefore, should be identified during the screening process. Screening procedures must be simple enough to ensure wide use and uniform application, with precautions for the parties' safety. In order to screen effectively, participants must be trained to detect domestic

7. See Report from the Toronto Forum on Woman Abuse and Mediation i (Paul Charbonneau ed., 1993) [hereinafter Toronto Report]. Mediation associations should establish standards for training family mediators in the following areas: "abuse in intimate relationships and its consequences for mediation; the unique needs of culturally diverse populations; procedures, instruments, and skills to screen for abuse and assess safety risks; specialized skills and interventions to ensure safety and provide a specialized mediation process; alternatives to mediation." Id.; see also Nancy Thoennes et al., Mediation and Domestic Violence, Fam. & Conciliation Cts. Rev., Jan. 1995, at 6, 10-11 (stating that one-third of represented programs provide "in-house" training; 30 percent of state mediators are trained through state-level conferences or training programs; 20 percent report training from the local domestic violence community; 6 percent describe a local university as the primary provider).

In Florida, a proposed amendment to the Mediation Training Standards and Procedures suggests the following changes: (e) Standards of Conduct/Ethics for Mediators (requiring that mediators understand the statutory constraints of mediation cases where domestic violence exists and understand confidentiality as it relates to child sexual abuse); (f) Community Resources and Referral Process (requiring that mediators understand when to refer parties to services for child protection, domestic violence, and elder abuse, and develop a list of social service resources for domestic violence situations); (h) Psychological Issues in Separation and Divorce and Family Dynamics (requiring that mediators identify the indicators of domestic violence and understand the impact domestic violence has on the parties and their capacity to participate in the mediation); and (j) Florida Family Law (requiring that mediators understand domestic violence as it relates to family mediation). Florida Supreme Court Committee on Mediation and Arbitration Rules, Florida Dispute Resolution Center, Mediation Training Standards and Procedures Part III, § 3.0, at 20-22 (Proposed Draft, 1995).


9. Alternatives to mediation include negotiation, arbitration, and adjudication. Id. at 25.

10. Id. See Thoennes et al., supra note 7, at 11. Twenty percent of surveyed programs conducted no screening of mediation referrals. Id. Eighty percent specifically asked about spousal violence. Id. at 12. Eighty-three percent said the party alleging spousal abuse would be asked follow-up questions if abuse allegations came to light. The programs' screening questions included: 1) general concerns about mediation (71 percent of programs asked); 2) drug and alcohol problems (52 percent asked); 3) arrests and police involvement (51 percent asked); 4) methods of conflict resolution (46 percent asked); 5) whether domestic violence exists (72 percent asked); 6) perceived ability to disagree safely in mediation (40 percent asked); 7) perceived safety of mediation (60 percent asked); 8) specific violent behaviors (45 percent asked); and 9) restraining or no contact orders (66 percent asked). Id. at 14.
abuse. To maximize the detection of abuse, screening must be performed at every level.

Commentators have stated that the "initial wave of unabashed enthusiasm for divorce mediation and alternative dispute resolution (ADR) in general has given way to sober reassessment." Feminists and battered women’s advocates object to the use of mediation when there has been any domestic abuse and believe mediation may be harmful for women. However, abuse is not unusual in

11. See Lenore E. Walker, The Battered Woman 42-54 (1979). Education is important, because victims may have stopped trying to escape punishment after learning that nothing they do will prevent the battery. Id.; see also Margaret H. Launius & Carol U. Lindquist, Learned Helplessness, External Locus of Control, and Passivity in Battered Women, 3 J. INTERPERSONAL VIOLENCE 307, 308 (1988) (stating that symptoms of learned helplessness include apathy, passiveness, lack of assertiveness, depression, anxiety, and problem-solving deficits).


Researchers further criticize mediation procedures as stripping women of advantages they have won through litigation. See, e.g., Tina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1547 (1991). But see Lynn H. Schafran, Gender Bias in Family Courts, FAM. ADVOC., Summer 1994, at 22 (stating that women have not made great strides through court processes, and contending that women are still economically harmed by divorce).

Gender bias provokes post-divorce economic disparity between men and women because of inequitable awards of marital property and alimony. Schafran, supra, at 24. Studies from
Some form of domestic abuse occurs in most divorces before the separation is final, and it may affect the capacity of either or both parties to mediate effectively. Domestic violence or abuse itself can never be mediated. Abusers must know that domestic abuse is criminal, with no potential for any conciliatory process. Once abuse is detected, participants must have a method for exempting a case from the mediation process. However, if the parties can reach agreement on equal terms and neither party controls the other, family mediation, including matters such as child custody, visitation, and support, may be appropriate even though some abuse has occurred in a relationship.

Part II of this Article provides an overview of the mediation process. Part III proposes that all legislatures mandating family mediation allow exemption from mediation when participant screeners determine that, because of the level of domestic abuse, mediation is inappropriate. Part IV argues that legislatures also must mandate that all participants screen for domestic violence. To implement the required screening, participants must receive training about domestic violence. Part V concludes by discussing the multi-tiered screening.


16. See David B. Chandler, *Violence, Fear and Communication: The Variable Impact of Domestic Violence on Mediation*, Mediation Q., Summer 1990, at 331, 338 (stating that, in one screening study of couples seeking voluntary mediation, 23 percent of the women reported abuse in their marriages); see also Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, Mediation Q., Summer 1990, at 377, 388 (estimating that more than half of all couples who divorce have a history of some type of abuse).


19. Id. See Dianne Post, *Mandatory Mediation and Domestic Violence*, Maricopa Law., July 1992, at 13 (stating that mediation focuses on the relationship, which is not in a battered partner's best interests and may lead to physical injury or death); see also Hart, *supra* note 13, at 319 (stating that batterers believe they are entitled to control their mates and have learned they may not suffer adverse consequences from using violence as a control tactic).

20. See Germene et al., *supra* note 14, at 175.
process and the roles of the various participants in screening for domestic abuse.

II. MEDIATION

Court-sponsored mediation is prevalent today in the United States and in foreign countries, including Canada and England. In some states, only two percent of filed cases are resolved by adjudication. Many cases are sent to mediation, and approximately seventy percent settle at the mediation conference. Most of the remaining thirty percent settle before trial, often as the result of the process begun in mediation. For example, the number of reported mediated cases in Florida increased from 34,000 in 1989 to almost 50,000 in 1991. This movement toward mediation reflects a relatively long-term trend in Florida's judicial system.

In mediation, a neutral third person encourages and facilitates the resolution of disputes. The mediator has no coercive power or


22. See Ann Milne, Mediation: A Promising Alternative for Family Courts, 42 Juv. & Fam. Ct. J. 61, 61 (1991). Mediation has a long history in many cultures. Id. In a Liberian village, a palaver hut in the center of town serves as a gathering place for resolution of disputes. Id. Mediation was the principal means of dispute resolution in ancient China and is still practiced. Id. The Japanese also use conciliation services. Id. Religious institutions also have played a part in dispute resolution. In the New Testament of the Bible, Paul encouraged the Corinthians to appoint members of their own community to resolve disputes rather than going to court. Id. at 62.

23. Interview with the Honorable Claire L'Heureux-Dube, Justice of the Canadian Supreme Court, in Gainesville, Fla. (Jan. 15, 1994) [hereinafter L'Heureux-Dube Interview]. Justice L'Heureux-Dube stated that voluntary mediation is practiced throughout Canada. Id.

24. Clare Dyer, Quick, No-Fault Divorce Plan, MANCHESTER GUARDIAN WKLY., Dec. 12, 1993, at 1. The Lord Chancellor of London introduced no-fault divorces, available on demand after a 12-month wait. Id. Where divorces appeared inevitable, couples were to be referred immediately to mediation. Id.


26. Id.

27. Id.


29. James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"? 19 FLA. ST. U. L. REV. 47, 50 (1991). In Florida, mediation was used to resolve "minor" criminal and civil cases in the 1970s. Id. In 1975, Florida's first court-connected mediation programs were established to resolve community disputes. Id.

30. Section 44.1101(2), Florida Statutes, defines mediation as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties." FLA. STAT. § 44.1101(2) (Supp. 1994); see generally John G. Mebane III, Comment, An End to Settlement on the Courthouse Steps? Mediated Settlement
authority to decide on behalf of the parties, or even to require the parties to agree. Mediation is a process of conflict resolution that returns to the parties the responsibility for making decisions. The goals of mediation include: reducing the court's docket, reducing the demand on judicial resources, accelerating the rate of case resolution, reducing the cost of resolving conflicts, increasing the litigants' satisfaction with the court system, and improving relationships between disputing parties.

Mediation is especially helpful in family disputes because of the unique nature of family law. Family matters involve not only the law and facts, but also feelings. An increase in the number of divorces and of children born outside marriage has caused states to seek methods other than litigation to solve family disputes involving child visitation, as well as financial matters. Mediation is one such method.


33. Elizabeth Koopman et al., Professional Perspectives on Court-Connected Child Custody Mediation, 29 Fam. & Conciliation Cts. Rev. 304, 306 (1990). Parents who reach agreements through mediation are more likely to honor them. Id. A 50 to 75 percent reduction in custody hearings was reported when parents participated in court-based mediation programs. Id.


34. Press, supra note 21, at 1035.

35. Milne, supra note 22, at 63.


37. Gagnon, supra note 14, at 272. California established court-connected conciliation services in 1939. Id. See Milne, supra note 22, at 62. The initial focus was to provide marriage counseling aimed at reconciliation. Id.

In 1974, O.J. Coogler, an attorney and marriage and family counselor, established the Family Mediation Center in Atlanta, Georgia. Id. Coogler helped popularize the concept of divorce mediation in his book, Structured Mediation in Divorce Settlements: A Handbook for Marital Mediations (1978). Id.

In the United States, various ethnic institutions provide for the resolution of disputes. Chinese immigrants established the Chinese Benevolent Association, which offers mediation for members of the community and within families. Id. The Jewish Beth Din has resolved disputes for many generations. Id. The Jewish community established its own mediation forum, the Jewish
Mediation is an attractive alternative in family disputes, because it empowers the parties to devise agreements that meet their specific needs. Unlike the adjudicatory process, the emphasis in mediation is placed on establishing a workable solution, rather than on determining who is right or wrong. Decisions are made by the parties, not delegated to a judge. Mediation of divorce disputes began because of increasing court costs, delay, and escalation of conflict caused by dissatisfaction with the traditional method of solving family matters through litigation. To address this dissatisfaction, lawyers and therapists offered to help their clients settle cases in a non-adversarial manner.

The mediation process helps reduce parties’ hostility and children’s trauma from the divorce process. This is particularly significant when the parties are parents and will remain in contact after the marital

Conciliation Board, in 1920. Id. Recently, the Christian Conciliation Service established offices to train and provide church mediators for personal disputes. Id.

38. See Rosenberg, supra note 31, at 467.


41. Christy L. Hendricks, The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview, 32 J. FAM. L. 491, 494 (1994). See Milne, supra note 22, at 63. Mediation reduces hostility by encouraging direct communication and promoting cooperation through a structured process. Id. Litigation tends to reinforce hostilities and harden disputants’ anger. Id. The adversarial process, with its dependence upon lawyers communicating on behalf of their clients, tends to deny parties the opportunity to take control of their own situations. Id. Mediation can help the parties focus on their issues and recognize the mutual advantages of cooperation. Id.

42. Hendricks, supra note 41, at 494.

43. Milne, supra note 22, at 64; see also Treuthart, supra note 14, at 719 (stating that mediation can be a way to avoid expensive litigation involving lawyers who ignore clients’ emotional needs because of alleged concern about their own economic interests).

44. Milne, supra note 22, at 64. Successful mediation clients move through the legal divorce process faster than those not using mediation. Id. Milne found that average file-to-trial time for mediation clients was 8.5 months. Id. Those not using mediation averaged 10.9 months file-to-trial time. Id.

45. Milne, supra note 22, at 64. Mediation reduces post-divorce litigation. Id. In one study, more than two-thirds of successful mediation clients stated they were “highly satisfied” with the mediation process, and 93 percent said they would mediate again in the future or recommend the process to others. Id. More than half the individuals who successfully mediated reported the process was fair and saw both parties as equally influential in determining outcomes. Id. By contrast, only one-fifth of those not mediating described the outcome as fair. Id. Contacted six to twelve months after mediation, parties with mediated agreements remained the most confident about their ability to solve problems and to modify agreements. Id.

46. See Grillo, supra note 15, at 1551.

47. Bowman, supra note 39, at 558. See Milne, supra note 22, at 64 (stating that improved relationships were noted for almost one-third of the parties in one study).
relationship ends.\textsuperscript{48} The process encourages the parties to work together, isolate the issues, and learn through cooperation.\textsuperscript{49} Mediation produces stable agreements that are more likely to inspire long-term compliance by the parties.\textsuperscript{50} In addition, even when the parties do not reach agreement during the mediation process, research indicates that family cases often settle prior to trial as a result of issues discussed in mediation.\textsuperscript{51}

Family mediation is available through public\textsuperscript{52} and private forums.\textsuperscript{53} Some states have enacted statutes providing either mandatory or discretionary mediation of family matters.\textsuperscript{54} Additionally, some state


\textsuperscript{49} Id.; see Barbara Landau, Mediation: An Option for Divorcing Families, 9 Advoc. Q. 1, 8 (1988) (stating that most divorce and custody disputes involve such emotions as “lost self-esteem, anger, betrayal, and disappointed expectations,” which are better considered by the parties themselves than by judges).

\textsuperscript{50} Bowman, supra note 39, at 550; see Jessica Pearson & Nancy Thoennes, Mediating and Litigating Custody Disputes: A Longitudinal Evaluation, Fam. L.Q., Winter 1984, at 497, 505. Eighty-five percent of those who successfully mediated reported that their ex-spouses at least “generally” complied with the agreements. \textit{Id.} Successful mediation clients are more likely to feel they can resolve subsequent problems without resorting to litigation. \textit{Id.} Research has shown that the long-term effects of mediation include parties who: 1) remain the most confident about their ability to work out problems without litigating; 2) feel satisfied with their divorce decrees and final order; and 3) maintain better relationships with their ex-spouses. \textit{Id.}

\textsuperscript{51} Hendricks, supra note 41, at 494.

\textsuperscript{52} “Public mediation” refers to the many types of court-based programs in the United States. See Susan Myers et al., Divorce Mediation in the States: Institutionalization, Use and Assessment, State Ct. J., Fall 1988, at 17, 20 (stating that 42 percent of public mediation programs are court-annexed and 44 percent are court-sponsored).

\textsuperscript{53} See Marion Z. Goldberg, Divorce Mediation: Panacea or Just Another Tool? Trial, Sept. 1992, at 12 (stating that “private mediation” refers to a mediation completed by a non-court-based program; these mediations may or may not occur pursuant to court order).

courts have instituted mediation by court policy without statutory guidelines. At least thirty-four states and the District of Columbia have some type of court-based mediation program for domestic relations cases. State programs are used to resolve custody, child support, and other financial issues, such as alimony and property distribution.

The widespread use and increased acceptance of mediation require a lawyer to advise the client about mediation. The Model Rules of Professional Conduct support this proposition. Professors Robert H. Aronson and Donald T. Weckstein have addressed the issue of whether, generally, lawyers have a professional responsibility to


Arizona counties, rather than the state, mandate mediation as follows: ARIZ. REV. STAT. ANN., COCHISE COUNTY, LOCAL RULES OF PRACTICE 10 (1993) (mandatory mediation, with exemption by judge "if to do otherwise could cause undue hardship"); ARIZ. REV. STAT. ANN., PIMA COUNTY, LOCAL RULES OF PRACTICE 8.7 (1993) (mandatory mediation with waiver by the court for "substantial good cause").


Gagnon, supra note 14, at 279-82. For example, Massachusetts uses mediation through court policy without statutory guidelines. Id.

Id.

Id.
inform their clients about mediation. They suggest that, because of the increasingly well-known advantages of mediation, clients may expect their lawyers to discuss mediation. Family-law practitioners may have an obligation to discuss mediation, just as litigators may have an obligation to discuss settlement options. Regarding the Model Rules of Professional Conduct, Aronson and Weckstein state:

Model Rule 1.2(a) requires a lawyer to consult with a client as to the means by which the client’s objectives are to be pursued. The Comments add that “the lawyer . . . should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Certainly exploration of use of [Alternative Dispute Resolution] procedures as a means of pursuing client objectives impacts on the expense to be incurred and may incorporate concern for third parties, for example, children in a marital dissolution matter . . . .

In advising a client, a lawyer is not limited to strictly legal concerns. See RPC 2.1, Comment [2]: “Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people, are predominant.” Consultation regarding ADR options can effectuate this broader advisory role of the lawyer.

Some experienced family lawyers and mediators conclude that a lawyer has an ethical duty to inform a domestic relations client about the option of mediation, and that failing to do so could result in findings of malpractice. More than 150 law firms in the United States have agreed to a statement promising to encourage the use of alternative dispute resolution by their clients. These firms promise that “the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.” Likewise, Canada requires lawyers to include with an original petition a statement attesting to efforts for settlement and dispute resolution. Even where such information is

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61. Aronson & Weckstein, supra note 60, at 452-53.

62. Id.

63. Id.

64. Moberly, supra note 28, at 725. The statement was drafted and distributed by the Center for Public Resources, Inc., a New York-based nonprofit organization dedicated to reducing the costs of litigation through use of ADR. Id."

65. Id.

66. L’Heureux-Dube Interview, supra note 23.
not required, the family-law practitioner should inform clients of the availability of family mediation.

Traditionally, mediation has been a voluntary process. Recently, some jurisdictions have adopted mandatory mediation, requiring the parties to mediate. Given the concept of self-determination inherent in mediation, mandatory mediation appears to be a contradiction in terms. However, these statutes merely mandate the mediation process, not an agreement by the parties. In 1981, California became the first state to require mandatory mediation. Now, many jurisdictions have similar statutes. Regardless of whether a statute requires mediation or authorizes mediation, once a court orders participation in the mediation process, the parties must mediate unless a statute provides for exemption.

67. Mebane, supra note 30, at 1867.
68. Goldberg, supra note 53, at 12.
69. Mebane, supra note 30, at 1867 (citing George Ferrick, Three Crucial Questions, Mediation Q., Fall 1986, at 61, 64).
70. Mebane, supra note 30, at 1867. Commentators have focused on whether mediation is mandatory or voluntary. See, e.g., Christy L. Hendricks, Mandatory Mediation, 32 J. Fam. L. 491 (1993-94); Tina Grillo, supra note 15, at 1545; Junda Woo, Mediation Seen as Being Biased Against Women, WALL ST. J., Aug. 4, 1992, at B1, B9; Carol Ruch, And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-being in the United States, 2 Int'l J. L. & Fam. 106 (1988).
72. See supra note 54.

In Kurtz v. Kurtz, a former husband challenged a post-dissolution order requiring family mediation. 538 So. 2d 892, 893 (Fla. 4th DCA 1989). The husband argued that the order, which deferred ruling on his motions for visitation and contempt, deprived him of his constitutional right to a court hearing and access to the courts, and illegally delegated judicial functions to mediators. Id. at 894. The appellate court found the trial court's order within its authority because the contempt motion involved the husband's visitation rights and was thus intended for family mediation. Id. Additionally, the appellate court found that the mediation order was a legal delegation of judicial responsibility, because mediation is not a binding court proceeding. Id. at 894, 895. After an unsuccessful mediation, the parties would return to court for further proceedings, the court explained. Id. at 895.

The trial judge may waive family mediation if, pursuant to § 44.102(2)(b), Florida Statutes, the parties demonstrate a substantial history of domestic abuse. Fla. Stat. § 44.102(2)(b) (Supp. 1994). Otherwise, mediation is either voluntary or mandatory, depending on the court's administrative order.

If ordered to mediation, a party is deemed to "appear" at a family mediation conference if the party is physically present; participation is not required. Fla. R. Civ. P. 1.740(d). In Avril v. Civilmar, the court did not require that a party make an offer at mediation. 605 So. 2d 988, 990 (Fla. 4th DCA 1992).
III. Exemption From Mediation

Not all states mandating mediation provide an exemption from mediation in the face of domestic violence.\textsuperscript{74} However, exemption from family mediation is necessary because spousal abuse is pervasive in our society.\textsuperscript{75} Abuse is estimated to occur in thirty percent of marriages.\textsuperscript{76} Most victims of abuse are women; only five percent of reported spouse abuse victims are men.\textsuperscript{77} Mediation in domestic relations cases raises concerns about safety, because studies find more abuse after mediation sessions than after trials.\textsuperscript{78} Mediation also may be unsuccessful because of an imbalance of power between the parties, as well as a limited capacity of the parties to advocate effectively for themselves.\textsuperscript{79}

Some state legislatures have responded to the need to exclude abused parties from mediation. New Mexico enacted the first exemption statute,\textsuperscript{80} and many states followed.\textsuperscript{81} Recently, California amended its statute to provide an exemption for domestic violence.\textsuperscript{82}

The wording of these exemptions and the degree of evidence of "domestic violence" required to waive mediation differ among the states. Depending on the jurisdiction, parties are exempt from mediation when either party has been the victim of: "domestic violence,"\textsuperscript{83} "physical

\textsuperscript{74} See supra note 54.
\textsuperscript{75} William O. Johnson, A National Scourge, Sports Illustrated, June 27, 1994, at 92. Domestic violence is the leading cause of injury among women aged 15 to 44. \textit{Id}. Each year, about 4,000 women die in the United States of injuries suffered in domestic violence. \textit{Id}.
\textsuperscript{76} Myra Sun & Laurie Woods, National Center on Women's and Family Law, A Mediator's Guide to Domestic Violence 6 (1989); see also Gerencser Study, infra notes 137-143, and accompanying text.
\textsuperscript{77} Kathleen O. Corcoran & James C. Melamed, From Coercion to Empowerment: Spousal Abuse and Mediation, Mediation Q., Summer 1990, at 303.
\textsuperscript{78} See Lerman, supra note 14, at 57.
\textsuperscript{79} Karla Fischer et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU L. Rev. 2117, 2120 (1993). \textit{See generally} Caldwell, supra note 5.
\textsuperscript{81} See supra note 54.
\textsuperscript{82} Cal. Fam. Code § 3181 (West 1994) (exemption where party claims it has been victim of physical or psychological abuse by the other party).
\textsuperscript{83} N.M. Stat. Ann. § 40-4-8 (Michie Supp. 1994). The court must halt mediation if there is domestic violence, unless 1) the mediator is substantially trained concerning the effects of abuse; 2) the party is capable of negotiating without an imbalance of power; and 3) the "mediation process contains appropriate provisions to protect against an imbalance of power." \textit{Id}. 
abuse,'84 "emotional abuse,"85 "emotional distress,"86 "spousal abuse,"87 "sexual abuse,"88 "domestic abuse,"89 "family violence,"90 "drug or alcohol abuse,"91 or when there is "good cause"92 which includes allegations of alcoholism, drug abuse, or severe psychological, psychiatric, or emotional problems.93 New Hampshire requires exemption when either party asserts abuse has occurred "unless the alleged victim . . . requests mediation, and the mediator is made aware of the alleged abuse."94 Ohio permits the court to consider abuse, but allows mediation if the court finds it appropriate.95 In Illinois, the court may order mediation for visitation disputes, except where there is evidence of domestic violence.96 North Carolina courts

84. Colo. Rev. Stat. Ann. § 13-22-311 (West 1989 & Supp. 1995) (court not authorized to refer a case to mediation if one of the parties claims physical or psychological abuse by the other party); Minn. Stat. § 518.619 (Supp. 1995) (court must determine whether there is probable cause for charges of physical or sexual abuse); Mont. Code Ann. § 40-4-301 (1993) (court not authorized to permit mediation if a party reports physical abuse); N.D. Cent. Code § 14.09.1-02 (Michie 1991) (court may not order mediation if there is physical abuse).

85. Mont. Code Ann. § 40-4-301 (1993) (mediation not permitted "if the court has reason to suspect that one of the parties or a child of the party has been physically, sexually, or emotionally abused by the other party").

86. Or. Rev. Stat. § 107.179 (1990) (court may waive mediation upon finding it is "likely that participation in mediation will subject the party to severe emotional distress").


89. Iowa Code Ann. § 236.13 (West 1994) (exemption if direct physical harm or significant emotional harm is likely to result from mediation); Me. Rev. Stat. Ann. tit. 19, § 768.5 (West Supp. 1994) (exemption in actions brought under "protection from abuse" statute).


91. Wis. Stat. Ann. § 767.11 (West 1993 & Supp. 1994) (requires initial session of mediation, but a court may, in its discretion, hold a hearing and not require the parties to attend mediation if the court finds child abuse, spousal battery, alcohol or drug abuse, or evidence that attending the session will endanger a party's health or safety).


95. Ohio Rev. Code Ann. § 3109.052(A) (Baldwin Supp. 1994). The court must determine that mediation is in the best interests of the parties and make written findings of fact. Id. In North Dakota, a court may order mediation, but may refrain if the issue involves physical or sexual abuse of any party or child. N.D. Cent. Code § 14-09.1-02 (1991). North Dakota does not provide a mechanism for identifying the abuse. Id.

may waive mediation in cases involving domestic violence. North Carolina provides a mediation waiver for "good cause," including allegations of abuse and neglect of a minor child, alcoholism, and drug abuse. Utah provides an exemption from mediation where mediation "would cause undue hardship to or threaten the mental or physical health or safety of either of the parties or a child or children of the parties." Maine's child-custody statute requires the mediator to consider any history of domestic abuse. Florida provides a mediation exemption if there is a "significant history of domestic abuse which would compromise the mediation process."

Critics of mediation observe that mediation is desirable only when the parties' bargaining power is relatively equal. Recognizing this fact, some states have provided exemptions when mediation is "inappropriate under the facts of the case," or when a party can show good cause against mediation. In various exemption provisions, state legislatures mandate subjective judgments by the participants. When participants have the power to decide whether abuse has reached a level that would compromise the process, or meets a required "good cause" standard, they have the flexibility and discretion to determine the appropriateness of mediation. All participants, including lawyers, clerks, judges, and mediators, must have the ability to make that determination.

98. Id.
99. Id.
100. UTAH CODE ANN. § 30-3-22 (1995) (court must consider the following four factors in determining whether mediation would endanger health or safety of a party or child: (a) a party has abused a child; (b) a party has committed or experienced domestic violence; (c) a party has problem with drug or alcohol abuse; (d) other evidence that attending mediation will endanger a party or child's health or safety).
101. ME. REV. STAT. ANN. tit. 19, §§ 214(5)(K-1), 581(5)(K-1), 752(5)(K-1) (West 1994) (court may not mandate mediation in actions brought under statute concerning "protection from abuse").
102. FLA. STAT. § 44.102 (Supp. 1994).
103. Bowman, supra note 39, at 559.
104. S.D. CODIFIED LAWS ANN. § 25-4-56 (Supp. 1995); see also Wis. STAT. ANN. § 767.11 (West 1993 & Supp. 1994) (court shall determine appropriateness of mediation, taking into account factors such as battery and drug or alcohol abuse).
105. See Hendricks, supra note 41, at 499. Section 44.102(2)(b), Florida Statutes, states: "A court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse which would compromise the mediation process." FLA. STAT. § 44.102(2)(b) (Supp. 1994).
106. Lorraine A. Rimson, Divorce Mediation and Partner Abuse, NEWSLETTER (Florida Dispute Resolution Center, Tallahassee, Fla.), Spring 1992, at 4 (stating that determining whether abuse is significant enough to compromise the mediation process is "a judgment call" for participants in Florida).

Legislatures in two states have included caveats that should be considered by all states mandating mediation. New Hampshire provides an exemption unless the alleged victim requests mediation.\textsuperscript{108} New Mexico requires the court to halt mediation if there is evidence of domestic violence unless: 1) the mediator has substantial training concerning the effects of abuse; 2) the party is capable of negotiating without an imbalance of power; and 3) the mediation process contains appropriate provisions to protect against an imbalance of power.\textsuperscript{109}

In providing statutory exemptions from family mediation, legislators must establish detailed guidelines. These guidelines should address participants' discretion in implementing exemptions, as well as methods of implementing screening safeguards.\textsuperscript{110} Unfortunately, no bright-line test distinguishes cases where limited abuse does not preclude effective mediation from cases where power imbalances make mediation inappropriate. All participants are responsible for making these difficult determinations. Therefore, implementation of multi-tiered screening procedures for domestic abuse is necessary.

Legislators are likely to encounter difficulty during the process of defining domestic violence and abuse for the purpose of exempting parties from mediation.\textsuperscript{111} Ideally, legislators will define domestic violence along variables indicating severity.\textsuperscript{112} The variables should be incorporated into screening tools identifying the violence and rating its severity.\textsuperscript{113}

Some authorities recommend expanding the definition of domestic violence beyond physical assault\textsuperscript{114} to include economic, emotional,

\textsuperscript{110} Gagnon, supra note 14, at 283 (stating that courts may consider evidence of child abuse, interspousal battery or domestic abuse, alcohol or drug abuse, and other evidence indicating that mediation would endanger a party's health or safety); see Treuthart, supra note 14, at 763-64 nn.137-40 (stating that, despite a statutory exemption from mediation for domestic violence cases, a recent study indicated that some Minnesota courts continue to order mediation in domestic violence cases or to "press" parties into "voluntary" mediation).
\textsuperscript{111} Fischer et al., supra note 79, at 2117; see Richard Gelles & Murray Straus, Intimate Violence: The Causes and Consequences of Abuse in the American Family 59 (1988) (defining physical abuse as "specific, definable acts of omission and commission that are harmful to individuals in families").
\textsuperscript{112} Caldwell, supra note 5, at 18.
\textsuperscript{113} Id.
\textsuperscript{114} Maine Project, supra note 8, at 5. Most research on domestic violence has focused on physical assaults. Id. However, there is growing professional recognition of emotional and sexual abuse as included in "domestic violence." Id. To gain control, abusers also may employ economic abuse, by limiting a partner's access to money, and property abuse, by destroying personal property. Id.; see also Mildred D. Pageelow, Family Violence 310 (1984) (stating that husbands who beat their wives also tightly control their wives' actions and money; they do not want the women to leave them).
and sexual assault. Florida defines domestic violence as "any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit." In screening for domestic violence, however, the broader term "domestic abuse" better defines acts of intimidation, harassment, coercion, and violence perpetrated by an abuser against a current or former intimate partner.

IV. SCREENING FOR DOMESTIC ABUSE

Identifying cases to exempt and cases to mediate is difficult. When there has been a "culture of battering," an exemption for spouse-abuse cases is necessary. When the abuse has been less severe, involving only isolated acts of abuse that did not allow one party to control the other, often the parties can safely and fairly mediate.

In relationships with a culture of battering, three elements are present: first, there is always some abuse, either physical, emotional, sexual, or economic; second, there is a systematic pattern of domination and control by the batterer; third, and finally, the victim hides, denies, and minimizes the abuse. Once the parameters of abuse are defined, a participant must determine whether the abuse has

115. MAINE PROJECT, supra note 8, at 5.
117. MAINE PROJECT, supra note 8, at 5.
118. Fischer et al., supra note 79, at 2117; see also Lerman, supra note 14, at 101-113 (arguing that mediation is not a desirable remedy for abuse cases).
119. Fischer et al., supra note 79, at 2117.
120. In one study, half of the women reporting domestic violence did not believe the abuse had impaired their ability to communicate on an equal basis. Thoennes et al., supra note 7, at 120. However, women who did feel a lack of power were more apt to end mediation with no agreement. Id.; see generally Liz KELLY, SURVIVING SEXUAL VIOLENCE (1988). See also Holly A. Magana & Nancy Taylor, Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol, 31 FAM. & CONCILIATIONCTS. REV. 50 (1993). Magana and Taylor reviewed a sample of domestic violence cases in Orange County, California, in 1991. Of the sample, 85 percent had existing temporary restraining orders. Id. at 55. The researchers developed a protocol to assess the seriousness of domestic violence. Among their criteria were: frequency of violence, injuries, assaults, threats and allegations regarding child abuse, substance abuse, criminal and psychiatric history, abduction of children, and suicide threats. Id. at 59. Their research found that, despite the seriousness of the violence in many cases, approximately half came to agreement in the first mediation session. Id. at 62. Many of the agreements contained specific protective elements such as monitored visitation, no visitation, or exchanging the child through a third person. Id.; see Thoennes et al., supra note 7, at 14 (noting that respondents to a survey indicated that less than five percent of the cases were eliminated because of spousal abuse allegations).
121. See Fischer, supra note 79, at 2120.
122. Id.
123. Id.
affected a relationship to the extent that mediation is inappropriate.\textsuperscript{124} In order to make such a determination, each participant screens both parties. The screener asks questions about the many levels and forms of abuse, including physical, sexual, economic, and emotional.\textsuperscript{125}

Discerning the parties' degree of risk and need for safety may be a hard task.\textsuperscript{126} Fearing threats or injury, a battered party may have difficulty responding to screening questions, thereby hiding signs of domestic violence.\textsuperscript{127} Secrecy and distortions shroud the complex dynamics of domestic violence.\textsuperscript{128} Therefore, a screener should not minimize any disclosure, even an isolated incident, of abusive behavior.\textsuperscript{129}

Screeners need an understanding of a party's exposure to violence and abuse, the strategies used for protection of the victim, and the ways violence affects a party psychologically, physically, economically, and socially.\textsuperscript{130} The screener should understand that domestic abuse is a "pattern of interaction that inevitably changes the dynamics of the intimate relationship within which it occurs."\textsuperscript{131} This abuse is not simply a pattern of episodes occurring over time\textsuperscript{132} or a list of aggressive behaviors calculated to see who won a fight.\textsuperscript{133} Often both parties understand the meaning of specific actions and words within the context of their relationship.\textsuperscript{134} A simple statement, such as "remember last Thanksgiving," can serve as a control mechanism, acting as a reminder of past battering and a warning to beware. Abused parties must comply or suffer the consequences.

\textsuperscript{124} Id.
\textsuperscript{125} See MAINE PROJECT, supra note 8, at i, x. Physical acts may include shoving, slapping, and hitting. Id. Emotional, sexual, and economic abuse are increasingly recognized as part of the term "domestic violence." Id. at 5.
\textsuperscript{126} See TORONTO REPORT, supra note 7, at 13. When abuse is revealed or suspected, the screening process should assess: 1) threats and risk of homicide or suicide for either client; 2) the strength of the abuser's sense of entitlement to the abused woman; 3) the abuser's desperation due to threatened loss of ownership of his partner; 4) the woman's capacity to estimate accurately risks to herself and her children; 5) the safety plan; 6) the need for safe housing; 7) the need for legal counsel or police advice; and 8) the availability of other sources of support. Id.
\textsuperscript{128} Id.
\textsuperscript{129} Linda Girdner, Mediation Triage: Screening for Spouse Abuse in Divorce Mediation, MEDIATION Q., Summer 1990, at 365, 370-71.
\textsuperscript{130} Dutton, supra note 127, at 24.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. (citing A.L. Cantos et al., Injuries of Women and Men in a Treatment Program for Domestic Violence, 9 J. Fam. VIOLENCE 113, 113-123 (1994)).
\textsuperscript{134} Id. This phenomenon is similar to what occurs concerning the meaning of "silent treatment," "glaring looks," or a critical tone. Id. The meaning of these communications may extend far beyond what is actually being said or done. Id.
Before each proposed mediation, screeners must distinguish between a relationship where the parties still are able to mediate on equal terms,\footnote{135. See Toronto Report, supra note 7, at 14-15. Mediators need to assess an abused woman's ability to represent her own interests reasonably, effectively, and separately from the interests of her abuser. Id. Likewise, the abuser's ability to mediate should be assessed by determining whether he has stopped his abusive behaviors, accepts responsibility for the abuse, and recognizes his partner's right to autonomy. Id.} despite prior episodes of abuse, and a relationship experiencing a culture of battering,\footnote{136. See Fischer et al., supra note 79, at 2117.} in which mediation on equal terms is impossible. Even a trained mediator is likely to find this task difficult.

During its first year, the Alachua County Mandatory Family Mediation Program in Florida received written responses to a pre-mediation screening questionnaire from seventy-eight women and seventy-four men.\footnote{137. Alison Gerencser, Domestic Violence Screening Questionnaire, Family Mediation Project, Eighth Circuit Family Court, Alachua County, Florida (Jan. 1995) (unpublished study on file with the author) [hereinafter Gerencser Study].} Asked whether there was physical abuse in their relationship, thirty-seven women and twenty-two men answered "yes."\footnote{138. Id. In one survey, when asked if they had ever called the police requesting protection, 14 women and six men indicated they had made such a call. Id.} When asked about mental or emotional abuse, fifty-six women and thirty-seven men "yes."\footnote{139. Id. Statistically, this response is clouded by the fact that one questionnaire combined "emotional" and "sexual" abuse.} Twenty-one women and sixteen men also reported alcohol or drug abuse during their relationships.\footnote{140. Id.}

If either party fears the other, mediation on equal grounds is unlikely. When asked if they currently felt afraid for any reason, twenty women and eleven men stated "yes."\footnote{141. Id.} However, when asked if they were currently afraid of physical harm, six women and four men answered "yes."\footnote{142. Id. Twenty-four women and sixteen men indicated they feared their partners' ways of expressing anger.} Results of these limited screening questionnaires suggest that abuse is more common in relationships than the national statistics indicate.\footnote{143. Id.} The survey also asked questions to determine whether parties communicated despite abuse. The first screening survey asked general questions regarding communication. When asked whether they were less able to communicate on an equal basis because of the anger level or abuse, twenty-nine women and twenty-three men answered "yes."\footnote{144. Id. See supra notes 75-77 and accompanying text.} When asked if they
had an "equal say" in their relationship, sixteen women and twenty-three men indicated they did.\textsuperscript{146}

Although the initial survey did not specifically ask about communication during mediation, a revised survey asked specific mediation questions, for example: "Do you believe you would be able to communicate with your spouse on an equal basis in mediation sessions?" Thirty women and thirty-one men responded to the revised survey. Of these, fourteen women and twenty-six men said "yes."\textsuperscript{147} Asked whether they were concerned about mediating in the same room as their partner, three women and two men said they were.\textsuperscript{148}

Although abuse is prevalent (in only three cases did both parties indicate no abuse), few respondents indicated that they felt unable to mediate. In private pre-mediation interviews, following the screening questionnaires, every respondent indicated a desire to try mediation.\textsuperscript{149} This response was surprising, given the expectation that some parties would say they did not want to mediate.

Possibly, the mediator's presence during pre-mediation interviews influences the parties.\textsuperscript{150} Other circumstances that may make parties feel compelled to mediate include: notice of the procedure, presence of the parties at the designated place for mediation, and presence of their lawyers. Therefore, if a mediator screens, the mediator should be just one component in the overall screening process.

Screening instruments are aids to assessment and should not replace high levels of investigative interviewing and assessment. However, simply asking whether a party has abused, or has been abused, is not likely to elicit an accurate response. Screening tools administered in a perfunctory manner may fail to uncover abuse. Furthermore, the abused person may describe serious verbal, psychological, or other abuse, and merely see it as a part of daily life.\textsuperscript{151}

Therefore, screening should be multi-tiered, conducted by all participants.\textsuperscript{152} At some point, a neutral person trained in recognizing symptoms of domestic abuse should interview both parties.

If pre-mediation screening does not occur, mediation should not be required.\textsuperscript{153} All participants in this multi-tiered screening process

\begin{footnotes}
\footnote{146. \textit{Id.}}
\footnote{147. \textit{Id.}}
\footnote{148. \textit{Id.}}
\footnote{149. \textit{Id.; see also Toronto Report, supra note 7, at 12 (stating that parties to mediation should be interviewed separately before the formal negotiation process).}}
\footnote{150. \textit{Id.}}
\footnote{151. \textit{Id.}}
\footnote{152. \textit{Maine Project, supra note 8, at i, x.}}
\footnote{153. \textit{Id.; see also Georgia Commission on Dispute Resolution, supra note 3, at 2. Pro-}}
require training in domestic abuse and the power imbalance created by such abuse. Each participant should receive information regarding domestic abuse, address those concerns, and then make a decision regarding whether mediation is appropriate.

V. THE ROLES OF THE PARTICIPANTS

Participants must screen for both past and present abuse. The type of screening mechanism varies, depending on which of the participants uses the tool. Screening devices include questionnaires and interviews. These may be written, by telephone, or in person. They must remain confidential to ensure the safety of the parties. The role of each participant differs slightly; therefore, each is discussed seriatim below.

A. The Lawyer

The first discussion regarding mediation of family matters occurs when a client meets with a lawyer. After informing the client of the mediation option, the lawyer helps the client determine whether mediation is appropriate. In the multi-tiered screening process, a lawyer posed guidelines would require all court programs to develop screening for domestic violence through intensive intake. Intake procedures would identify cases that should not be referred to mediation, such as criminal cases that involve domestic violence. If a court program identifies civil cases involving domestic violence that might still benefit from mediation, screeners could refer these cases to mediation. However, only mediators who have received special training could mediate such cases.

154. See Post, supra note 19, at 13 (stating that two-thirds of women in one study reported marital violence, and, if violence is chronic or occurs after separation, the results of mediation are worse for women).

155. See Fischer et al., supra note 79, at 2122.

156. Id. See Erickson & McKnight, supra note 16, at 377, 381. The authors give couples a questionnaire with a single item: “Was abuse present in the marriage relationship?” Id. If the answer is positive, they ask couples to check off the type(s) of abuse: 1) physical; 2) emotional; 3) chemical; or 4) other. Id. See Chandler, supra note 16, at 331, 336. In Hawaii, a screening interviewer asks: “Would you tell me if you have been physically abused by your spouse during your relationship?” Id. If the response is positive, the interviewer asks when the abuse last occurred, whether the person fears further assaults, and whether the person feels the abuse has limited his or her ability to communicate equally with the spouse. Id. See Girdner, supra note 129, at 366-72. Girdner assesses a couple’s decision-making patterns, manner of resolving conflict, and means of expressing anger. Id. A second section examines abuse behaviors. Id.

157. See, e.g., Fischer et al., supra note 79, at 2122.

158. MAINE PROJECT, supra note 8, at 31. Protection is essential; otherwise the abused party may assume the environment is safe and protected when actually it is not. Id. Proceeding as if there is no potential danger places the party at a greater risk.


160. Treuthart, supra note 14, at 745; see also Peter Salem & Ann Milne, Making Mediation
is in the best position initially to identify and deal with a client's circumstances. To determine whether the client participated in domestic abuse, either as victim or perpetrator, the lawyer may screen by use of a questionnaire or a personal interview.

The lawyer or client may believe that the lawyer's presence during a family mediation session will help to equalize the process. The lawyer and client should decide whether the lawyer will be present during mediation sessions.

Requirements vary among the states regarding an advocate's presence in mediation sessions. For example, Alaska provides for the presence of counsel in divorce mediation, but does not provide for the presence of counsel during custody mediation.

State bar associations should offer training on domestic violence to help family lawyers advise their clients regarding family mediation. Lawyers may be simply unaware of past domestic abuse that makes some cases inappropriate for mediation. In such a case, the presence of an uninformed lawyer at a mediation session provides insufficient client protection.

Once a client and lawyer decide whether to use mediation, the lawyer should state in the initial pleading whether mediation is appropriate. The lawyer should have an opportunity to petition the court to exempt any required mediation, if the lawyer believes the parties are

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Work in a Domestic Violence Case, Fam. Advoc., Jan. 1995, at 34, 38. Lawyers can help by: 1) helping the client obtain a protective order; 2) referring to counseling or a battered women program; 3) notifying the court of abuse; 4) explaining mediation by distinguishing it from counseling and custody evaluations; 5) helping the client articulate needs and interests to be presented in mediation; 6) evaluating the alternatives to mediation with the client; 7) allowing the client to make decisions; 8) explaining to the client mediation policies and procedures, including how and when to terminate mediation; 9) discussing screening procedures with the mediator and explaining these to the client; 10) advising the client about possible waivers from mediation or separate mediation sessions when domestic abuse exists. Id.


162. See Gerencser Study, supra note 137.

163. See Craig McEwen & Nancy H. Rogers, Bring the Lawyers into Divorce Mediation, 1 Disp. Resol. 8 (1994) (stating that, to preserve fairness, lawyers should be encouraged to attend mediation sessions).


166. Schafran, supra note 15, at 27.

167. See Bryan, supra note 13, at 193. Bryan argues that a high-risk client should avoid mediation, but her lawyer should attend if avoidance is impossible. Id. The lawyer's presence may provide insufficient client protection if the lawyer is not aware of certain pressures and temptations. Id. Such pressures and temptations include: belief that mediation is a "better way" of resolving disputes, rhetoric and lawyer self-interest, the preservation of relationships, and professional accountability. Id. at 210-14.
not equal in their bargaining positions.\textsuperscript{168} Finally, statutes must mandate a lawyer's presence at mediation when needed for the parties to bargain equally.\textsuperscript{169} If lawyers are not present during mediation, states should provide that no agreement will become final until it has been lawyer-approved.\textsuperscript{170}

\textbf{B. \textit{The Clerk of the Court}}

Because the clerk of the court is the first person to take the family matter into the court system, the clerk should have a protocol for determining whether mediation is appropriate. If a lawyer recommends mediation, the clerk should institute a screening procedure. Ideally, this procedure will include interviews with the parties. A lawyer may be unaware of the problems of domestic abuse or too biased to discern potential problems with mediation. Thus, a neutral clerk should make an independent finding as to whether mediation is appropriate.

The clerk should employ trained deputies, lawyers, or psychologists to interview the parties in each case filed with the family court.\textsuperscript{171} The initial interview may be by telephone, written questionnaire, or in person.\textsuperscript{172} If a telephone interview or questionnaire reveals a reason for concern, a follow-up personal interview should occur.\textsuperscript{173}

Many parties enter the courthouse unrepresented.\textsuperscript{174} In pro se cases, the parties may not have the knowledge or skill to make accurate

\begin{itemize}
\item \textsuperscript{168} \textit{See} Gerencser Study, \textit{supra} note 137.
\item \textsuperscript{169} \textit{See} Tubbs v. Tubbs, 648 So. 2d 817 (Fla. 4th DCA 1995) (holding a settlement agreement enforceable because wife was represented by counsel and accountant at time of agreement, even though agreement did appear to favor husband); \textit{see}, e.g., FLA. STAT. \textsection{} 44.1011(d) (Supp. 1994) (permits lawyers to attend). In Frederick v. Sturgis, the court held that lawyers may not be sanctioned for failing to appear at mediations. 598 So. 2d 94 (Fla. 5th DCA 1992).
\item \textsuperscript{170} McKinlay v. McKinlay, 648 So. 2d 806 (Fla. 1st DCA 1995) (wife's objection in form of letter to opposing counsel was sufficient to apprise opposing counsel of objection). Florida Rule of Civil Procedure 1.740(f)(1) provides that, if agreement is reached on any matter as a result of mediation, the agreement must be reduced to writing and signed by the parties. If the party's lawyer is not present when the agreement is reached, the lawyer has 10 days to submit a written objection to the agreement to the mediator, the parties, and opposing counsel. FLA. R. CIV. P. 1.740(f)(1). If the lawyer fails to object within 10 days, the agreement is presumed accepted. \textit{Id.}
\item \textsuperscript{171} Peter Salem, Lecture at Advanced Family Mediation Training, sponsored by University of South Florida Mediation Institute \& The Florida Association of Professional Family Mediation (Jan. 27, 1995) (discussing a program where partners attend separate group orientation sessions and then receive private interviews afterward); \textit{see}, e.g., \textit{Maine Project, supra} note 8, at 26. Economic strains may affect the ability of mediation programs to implement screening procedures. \textit{Id.} However, the participants unanimously agreed that there must be screening. \textit{Id.}
\item \textsuperscript{172} \textit{Maine Project, supra} note 8, at 27. Some project members stated that telephone screening was an efficient approach, because it reduced the parties' trips to the courthouse. \textit{Id.} This can be significant in cases where child care or time off from work are considerations. \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{See} Madeline B. Simborg \& Joan B. Kelly, \textit{Beware of Stereotypes in Mediation}, \textit{FAM. Adv.}, Summer 1994, at 64, 69 (stating that more than half of divorcing parties in California are unrepresented).\
\end{itemize}
representations regarding mediation. In these instances, the clerk’s interview will be the first opportunity to assess the merits of mediation. After the screening interview, the clerk should make a recommendation regarding mediation,175 refer the family matter to the proper division of the court and, when necessary, recommend the use of a guardian ad litem or other court services.176

C. The Judge

In many states, judges manage their own cases177 and possess broad discretion to order family mediation.178 In a multi-tiered screening process, a judge receives a case with the lawyers’ and clerk’s recommendations regarding mediation. After questioning the parties, the judge determines whether mediation is appropriate. Alternatively, the judge may develop a separate screening process. Some judges may rely on the representations of the lawyers or the recommendations of the clerk. A judge makes a specific finding on the appropriateness of mediation in an order requiring family mediation.

In order to make a determination about family mediation, judges need additional training in substantive family law, mediation techniques, and domestic violence.179 To help judges learn to screen for the unique problems of domestic violence, some states require training

175. See, e.g., MAINE PROJECT, supra note 8, at 28. The success of the screening process depends partly on the ability of the screener. Id. Domestic abuse training is necessary. Id. Some participants in the project were concerned that using mediators as screeners would create a pro-mediation bias, leading to improper referrals. Id. Another option is using victim advocates as screeners. Id.

176. Salem & Milne, supra note 160, at 34, 38. Services may include community resources and support services, such as victim advocates. Id. Referrals to anger-management courses, abuse shelters, or batterers' groups also could be included. Id. Many courts now require divorcing parties to attend courses emphasizing parenting skills. Id.

In Alachua County, Florida, a privately administered course, “Positive Divorce Resolution,” is required for all divorcing couples with children. Fla. Admin. Order No. 1.1120 (Fla. Aug. 17, 1993) (on file with Clerk, Fla. Sup. Ct.). The parties each must each pay for the four-hour course and may not attend at the same time. Id.

177. Donald B. King, Save the Court, Save the Family, CAL. LAW., Jan. 1992, at 43, 44. The author is a judge who proposes judicial intervention in family cases when the parties first come to court. Id. To create an expectation of settlement, the judge should encourage the parties and their lawyers to resolve issues by settlement to create an atmosphere in which settlement is expected. Id. Trials should be the last resort. Id. The judge should schedule and participate in settlement meetings with lawyers and parties. Id. at 45.

178. Fischer et al., supra note 79, at 2117; see also supra note 54 and accompanying text. For example, an Iowa judge may require custody mediation. IOWA CODE ANN. § 598.41 (West 1994). In Louisiana, the parties may be required to mediate custody and visitation differences. I.A. CIV. CODE ANN. art. 9:351-356 (West Supp. 1995).

179. King, supra note 177, at 45.
programs. Legislatures should require such training to help sensitize judges to the psychology of the battering relationship, and enable judges to determine whether mediation is appropriate.

D. The Family Mediator

In a multi-tiered screening process, a participant other than the mediator completes a screening. This participant can be a lawyer, clerk of the court, or the judge. If any of these participants recommends that mediation should not occur, the case should be exempt from mediation. However, if a multi-tiered process is not used, the mediator needs a designee, usually another mediator or colleague, to screen for domestic abuse. This reduces the likelihood of mediator bias toward one of the parties during the mediation. The alternate mediator or designee may use a questionnaire or separately interview each party. The person completing the screening determines whether mediation should occur.

Regardless of representations by parties or their lawyers, the mediator ultimately determines the fairness of the mediation process. Once the mediator or designee decides that mediation is appropriate, the mediator should employ safety measures to protect the participants during mediation. Such measures may include mediating in the presence of the parties’ lawyers or mediating with parties in separate rooms. If the mediator determines that the mediation is progressing inappropriately, the mediator should declare an impasse. For instance, a mediator in Kansas may terminate a session based on the belief that continuation would “harm” one or more of the parties.

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180. See, e.g., R.I. GEN. LAWS §§ 12-29-6 (C), (D) (1988) (requiring training for probation officers and all judicial personnel); W. VA. CODE § 48-2A-13 (1994) (authorizing judges and requiring magistrates to complete yearly training programs); see King, supra note 177, at 45.

181. See King, supra note 177, at 45.

182. See, e.g., Fischer et al., supra note 79, at 2133 ( recommending that the first question should be whether parties believe they can negotiate on an equal basis with their spouses, followed by questions about fear and abuse to determine whether a perceived lesser negotiating status is connected to fear of their partners or to past abuse); see also PAGELOW, supra note 114, at 356 (suggesting an interviewer’s checklist for identifying domestic violence cases).

183. See TORONTO REPORT, supra note 7, at 20. Safety issues and protocols should be in place before the initial client interview. Safety components include: 1) spacious conference rooms allowing for easy escape; 2) conference tables providing some barrier to immediate contact; 3) private meeting rooms; 4) clearly marked exits; 5) visible presence of a peace officer; 6) availability of other staff; 7) availability of third parties to escort clients; 8) separate and safe waiting areas. Id. Procedures also may include limited contact during the mediation process; written rules governing both parties during mediation; safe settings, such as a courthouse with a metal-detecting device; and collaboration with the parties’ lawyers. Id.

184. Id. at 23-24. The abused person should leave the mediation first, and the alleged abuser should depart later. Id.

Family mediators may possess a variety of professional credentials, including legal training, mental-health training, or accounting certification. No universal standards for family mediators and mediation trainers exist. Many jurisdictions maintain a list of mediators who have completed certification training. In the absence of uniform standards, states must train family mediators to have a master's degree or a doctorate in social work, mental health, behavioral or social sciences; or be a physician certified to practice adult or child psychiatry; or be a lawyer; or be a certified public accountant. FLA. R. CIV. P. 1.720(f)(3).

Utah requires a mediator to have a license in psychology, social work, marriage and family therapy, or law, in addition to 40 hours of training. Hendricks, supra note 41, at 502 (citing UTAH CODE ANN. § 30-2-17 (1992)); see also Susan C. Kuhn, Comment, Mandatory Mediation: California Civil Code § 4607, 33 EMORY L.J. 733, 738 (1984). In California, a mediator must have a master's degree in psychology, social work or other behavioral science, two years' experience in counseling or psychotherapy, and sufficient child custody research to enable the mediator to assess children's mental health requirements. Id.; see also N.C. GEN. STAT. § 7A-494 (Supp. 1994) (similar requirements).

Other jurisdictions may be less stringent and require only a degree in addition to mediation training. LA. CIV. CODE ANN. § 9:356 (West Supp. 1995) (requiring mediator to be a lawyer or have a master's degree in behavioral science); WIS. STAT. ANN. § 767.11(4) (West 1993 & Supp. 1994) (requiring three years of experience in dispute resolution and 25 hours of mediation training).

Hendricks, supra note 41, at 67. Eighty percent of all mediators hold graduate degrees. Id. Social workers comprise 43 percent of the mediators in the private sector and 72 percent of the mediation staff in the public sector. Id. Marriage and family therapists, psychologists, and psychiatrists comprise the next largest professional group, which is 35 percent of private sector mediators. Id. Lawyers/mediators comprise 15.4 percent of the mediators in the private sector and 1 percent of the public sector mediators. Id. Accountants, clergy, educators, financial planners, and guidance counselors account for 6.5 percent of the mediators in the private sector and 9 percent of the mediators in the public sector. Id.


See, e.g., FLA. STAT. § 44.102(5) (Supp. 1994).
about domestic abuse, including a component on domestic violence,\textsuperscript{191} to enable mediators to handle abuse cases.\textsuperscript{192} Presently, no state requires training in domestic abuse as part of its mandated mediation certification program.\textsuperscript{193}

VI. CONCLUSION

Many family matters can be successfully mediated if abuse has not created an unequal balance of power. The key is to distinguish chronic abuse cases, always inappropriate for mediation, from cases of limited abuse, where the parties can bargain equally. Unfortunately, no bright-line test exists. However, screening by each participant in the process helps exempt inappropriate cases from mediation.

Legislatures must amend existing mediation statutes to require screening by participants at every level and exemptions from mediation when participants discover evidence of domestic abuse. Legislatures also must require that all participants receive training in order to recognize signs of domestic violence and abuse.

Lawyers, in their initial pleadings and responses, must note evidence of domestic abuse and indicate whether mediation is appropriate. When family matters come before a clerk of the court, the clerk should be required to determine whether domestic abuse has occurred and, thus, whether family mediation should occur. In deciding whether to send cases to mediation, judges must make findings regarding domestic abuse and whether mediation is likely to succeed. Finally, family mediators or their designees must screen all cases for domestic abuse.

Ultimately, if any participant in the multi-tiered screening process determines that mediation is inappropriate, a mediation exemption must be available. A successful mediation requires equal power between the parties, and a battered person does not have equal power.

\textsuperscript{191} MAINE PROJECT, \textit{supra} note 8, at xi.

\textsuperscript{192} \textit{Id.} at 36. Training programs must cover assessment of danger, child abuse, reporting procedures, and liability for failure to disclose threats made to potential victims. \textit{Id.} Training for mediators must include: analysis of domestic abuse and child abuse laws; understanding of how therapists, lawyers, and advocates understand domestic abuse differently; study of key factors in the assessment of danger from family violence; understanding of post-separation adjustment of abused persons and abusers; evaluation of the parties' capacity to mediate and other screening issues; power-balancing, using special mediation techniques; and defusing potentially violent situations during mediation. \textit{Id.} at 37.

\textsuperscript{193} See Fischer et al., \textit{supra} note 79, at 2167-68. There are no universally accepted standards for family mediators and mediation trainers in domestic abuse. \textit{Id.} See also TORONTO REPORT, \textit{supra} note 7, at 4. Few, if any, professional mediation associations and court-connected programs have adopted or promoted adequate standards for mediating cases involving domestic abuse. \textit{Id.}