

# A MEDIATOR'S GUIDE TO DOMESTIC ABUSE

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National Center on Women and Family Law

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## A MEDIATOR'S GUIDE TO DOMESTIC ABUSE

by

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## A MEDIATOR'S GUIDE TO DOMESTIC ABUSE

### INTRODUCTION

"If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

State v. Oliver, 70 N.C. 60 (1874)

"There were times when he was very sorry and said it would never happen again, and it always did. I had black eyes, disconnected shoulders, bruises all over my body..."

Long condoned by society, domestic abuse is both widespread and severe. For over fifteen years advocates for battered woman have been working to stop domestic abuse. Towards that end they have sought to improve the response of the court and criminal justice systems to battery. Shelters and hotlines have been created. Abused women and their advocates have called national attention to the varied social costs of woman abuse: women's tangible physical, emotional and economic injuries; children's slowed social and intellectual development; and their emulation of their parents, repeating the pattern of domestic abuse in the next generation. As a result of their efforts, state legislatures have sought to address the harms of domestic abuse by strengthening their state laws, both civil and criminal, and providing improved remedies. Police have changed their arrest-avoidance policies. And victims receive more support in seeking criminal sanctions for the abuse. The harm to the children from domestic abuse has been

recognized and has become a factor in custody decisions in many states.

Recently, proponents of mediation and advocates for abused women have struggled with what role, if any, mediation can play in ending a dispute when one participant has abused the other.

Family mediation now occurs in most states, and covers a range of issues. Most frequently, it centers on child custody and visitation, allowing mediators to utilize the mental health expertise that many of them have. However, lawyers and professionals with specialized financial knowledge also mediate property and financial support issues arising between family members. And mediation has been proposed in some communities to resolve criminal charges filed between family members, including cases involving intimate partners.

Family mediation is conducted within a non-adversarial framework with particular assumptions and understandings about participants. Mediation is based on:

- \* Voluntary participation by the parties.
- \* A bargaining process in which the parties are presumed to be equal.
- \* A neutral third party or parties who have no decision-making authority, whose role is to facilitate an agreement.

However, none of these is present when one of the parties is a victim of domestic abuse. Moreover, mediation of cases involving abused women is both harmful to the interests of those women and physically and emotionally dangerous to themselves and their

children.

Many mediators recognize that where domestic abuse has occurred, use of mediation does not serve either their profession or the public. In 1984, responding to these concerns, the Conference of Concerned Mediators and Advocates on Mediation of Family Law issues was held in New York City. The attendees, who included mediators, attorneys and abused women's advocates, resolved that

there should be no mediation where past or present domestic violence is the presenting problem...Any legal rights (including property, custody) or protection of the victim should not be mediated if it is known at the outset or discovered during mediation that there is or has been domestic violence. Conference Minutes, November 10, 1984, at 13.

Building on the proposals from the 1984 Conference, this guide addresses why mediation of cases involving an abused partner is inappropriate, why it is harmful to the victim's interests, and why it is physically dangerous for the victim. This guide uses both studies on domestic abuse and the ethical codes of mediation to explore the implications of domestic abuse for mediation. This guide then addresses how to identify and screen out those cases in which one partner has abused the other.

## AN OVERVIEW OF DOMESTIC ABUSE

Domestic abuse is behavior between present or former sexual partners, as distinguished from other family or household disputants, such as siblings or roommates. The partners need not live or have lived together.

Domestic abuse consists of an act or acts by one partner that serve to intimidate or control the other. The behavior may range from criminal acts causing or threatening physical harm, to non-criminal acts that destroy her ability to act independently. The conduct may include:

- \* any acts causing physical pain or harm to the victim, such as: pushing, grabbing, pinching, shaking, slapping, wrestling, hair-pulling, kicking, punching, choking, rape, or use of weapons
- \* verbal threats to injure or kill the victim, sometimes coupled with threatening actions
- \* verbal criticism of the victim that impairs her self-esteem and makes her emotionally dependent on the abuser for approval, affection or companionship
- \* his unwanted presence at her home, workplace, or school, or his monitoring of her activities at these or other places (in person or by telephone)
- \* trespass or destruction to property in which she has an interest, even if he is an owner (for example, a car that he

owns but she drives)

- \* exercising control over property in which she has an interest (for example, control over her income)

- \* physical confinement of the victim, or forcible removal of her from the premises

- \* any threat with any weapon

- \* the use of any of the above threats or actions, or other actions, to control the victim's conduct, such as:

  - whether she works outside her home, and on what terms,
  - whether or where she attends school, and on what terms,
  - how she uses her money or property,

  - who she sees and under what circumstances she sees them

- \* attempts to commit any of the above acts

- \* any of the above acts committed against persons close to the victim, including her children.

Domestic abuse is not limited to violence that leaves the victim with bruises or injuries. A number of forms of abusive behavior may be just as coercive as more obvious violence in terms of their effects on the victim.

Even though physical abuse may not have occurred in several years, it may simply be that it has not been necessary to use violence because other behaviors, such as threats, isolation, degradation, or economic abuse were sufficient to maintain the control originally established through the use of violence. Although physical assault may be used only once or occasionally, it instills the threat of future violent attacks. All domestic

abuse is serious and can lead to more intimidation and violence.

Regardless of which forms of abuse occur, the incidents of abuse usually recur, often escalating in severity and frequency over time unless outside deterrent intervention takes place. Divorce or physical separation does not end abuse. In fact, abuse continues and typically escalates after the break-up of the relationship.

Domestic abuse is widespread. It is estimated to occur in 24-30% of marriages.

One cannot easily identify either the abuser or the victim. The abuser looks and acts normal, while the victim may look hysterical or act loving towards the abuser. Abusers come from all socioeconomic backgrounds, races, and religions. Abusers represent all different personalities, family and educational backgrounds.

Children suffer significantly from domestic abuse between their parents. They experience long term emotional disturbance and display significant stress-related physical symptoms (e.g., insomnia, anxiety, headaches, developmental problems, guilt).

Almost all the victims of domestic abuse are women. Violence by men is more frequent than by women and more injurious. Women are not usually the primary aggressor.

The occurrence of abuse changes the nature of the relationship. Domestic abuse intimidates the victim and reduces her ability to represent, or even identify, her own interests. The victim may not even recognize that she accedes to the abuser's wishes for fear of abuse, or that this pattern is detrimental to

her. It is important to understand that no amount of skill or training on the part of the mediator can make up for the control an abuser has over his victim.

Because the coercive effects of domestic violence tilt the power to influence decisions completely to the advantage of the abuser, neither participation in the mediation process, nor any agreements achieved through such a "mediation", can be considered voluntary.

Moreover, the mediation process places her in danger of further intimidation and/or abuse. Further, violence cannot be mediated. Mediation of the issue of violence is both inappropriate and dangerous.

Domestic abuse continues and escalates when it occurs "behind closed doors" and when it is not sanctioned. Battered women's advocates and criminal and civil justice officials have come to realize that battering can only be stopped when the batterer is held responsible for his actions through the sanctions of the legal system.

Mediation may actually perpetuate battery by protecting the batterer from civil or criminal sanctions. Mediation allows the batterer to continue to believe he is right to abuse his wife, and fails to send a message that he is responsible for his conduct and his conduct is wrong.

## DOMESTIC ABUSE: THE FACTS

### THE ACTORS

#### The abuser

\* No reliable psychological profile exists to allow identification of abusers.

--There is little conclusive research on abusers because they avoid counselors, making them elusive subjects to study or treat. Gondolf, "Fighting for Control: A Clinical Assessment of Men who Batter," -- Social Casework: J. of Contemp. Soc. Work 48, 49 (January 1985) (hereafter "Clinical Assessment").

--Gondolf, who has studied abusers extensively, suggests that "the pursuit of a unitary batterer profile may be in vain." He separates abusers into four types, based on the severity of the physical injury they inflict, but notes that research on abusers has focused on those who have inflicted the least amount of abuse. Gondolf, Who are Those Guys? A Typology of Batterers Based on Shelter Interviews (unpublished paper, July 1987) at 11.

\* Abusers often have rigid views about the roles of men and women in society.

--In a Missouri study of 200 abusers, researchers found that they were "oversocialized" into traditional views about the propriety of male control over families. Consequently, in addition

to being physically abusive, they exerted unilateral control over their victims' relationships and the partners' finances. "Clinical Assessment" at 52.

**\* Abusers are more likely than non-abusers to have been exposed to domestic abuse or have experienced physical abuse as children.**

--Of the 200 abusers in a Missouri counseling programs, the majority reported experiencing severe discipline or witnessed abuse involving their parents. "Clinical Assessment" at 51.

--In Lenore Walker's 18-month study of abused women, 63% of the abusers were reported to have witnessed physical violence by their fathers against their mothers. Only 27% of the non-abused women reported that their partners had the same experience. Walker, The Battered Woman Syndrome 19 (1984).

--One abusers' counselor reported that all 150 of the men that he had treated over a two-year period had either experienced physical abuse as children or had witnessed it between their parents. Pagelow, Woman Battering, Victims and their Experiences 106 (1981) (hereinafter Woman Battering).

--In Pagelow's study of 350 victims who had sought domestic abuse shelter services in California, 53% of the victims

said that their abusers had witnessed their mothers being beaten by fathers. 45% said their abusers had been physically abused themselves, as children. Id. at 168-171.

--In a study of men in a Washington state abusers' program, 63% had either experienced physical abuse, or had witnessed physical abuse involving their parents, when they were children. Ganley and Harris, Domestic Violence: Issues in Designing and Implementing Programs for Male Batterers (paper presented at the American Psychological Association, August 29, 1988) at 3.

--Interviews with 12 abusers in a Pittsburgh counseling program confirmed that 9 had either witnessed their fathers physically abusing their mothers, or had experienced physical abuse by their fathers. Gondolf and Hanneken, "The Gender Warrior: Reformed Batterers on Abuse, Treatment and Change," 2 J. of Fam. Viol. 177, 182 (1987) (hereafter "The Gender Warrior").

**\* Abusers often blame victims, rather than assuming responsibility for the abuse.**

--Abusers in the Pittsburgh interviews reported that they blamed their spouses for their behavior. "All those years, I thought I was the one being abused. I thought I was right...I never realized that I was the one creating the problems." Gender

Warrior" at 185.

**\* Abusers are highly likely to deny or minimize the harmful consequences of their actions.**

--Ganley and Harris found that even abusers who had sought out treatment alternated between full recognition of their behavior and denial that it was a problem. "Domestic Violence Issues" at 5.

--Another study found that abusers use elaborate justifications for their abuse: minimization, confusion, outright denial, intoxication, loss of control and projection of blame are all common. Adams and Penn, "Men in Groups: The Socialization and Resocialization of Men who Batter," (paper presented at the annual meeting of the American Orthopsychiatric Association, April 1981).

**\* Most abusers fail to utilize or complete counseling programs.**

--The Pittsburgh program Second Step reports that over five times as many abusers inquire about the program as enroll in it. About 30% of those who enter the 12-week program drop out before they complete it.

--A long-standing Denver program for abusers, AMEND,

reports a 75% dropout rate after the first one or two sessions. Generally, counseling programs for abusers have a one-third to one-half dropout rate. Gondolf, "Evaluating Programs for Men who Batter: Problems and Prospects," 2 J. of Fam. Viol. 95, 98.

**\* Many abusers resume their physically violent behavior during or after counseling.**

--A study of abusers who had partly or completely attended counseling in Minnesota shows that 40% of the abusers resumed physically abusive behavior within 4 1/2 months after participating in counseling. Id.

--In a study of three Texas abusers' programs, 39% of the victims reported continuing abuse from their partners during the counseling. 45% of the victims reported continued abuse after the counseling ended. Id.

--While the abuser may cease being physically violent during counseling, there is evidence that verbal and other forms of psychological abuse escalate. Id.

**\* Most abusers go on to abuse other partners.**

--In Pagelow's survey, of the victims whose partners had previous marriages, 57% said that the abusers had been violent with

their previous wives. Woman Battering at 62.

--A Los Angeles abusers' counselor confirmed to Pagelow that all of the 150 abusers he had treated acknowledged that they had abused other partners. Woman Battering at 106.

--Ganley found that of the 21 intimate relationships they reported, the men had used physical violence in all but 3. Ganley and Harris, Domestic Violence: Issues in Designing and Implementing Programs for Male Batterers (paper presented at the 1978 meeting of the American Psychological Association) at 6.

### The victim

\* No reliable psychological profile exists for identifying domestic abuse victims.

--Psychologist Lenore Walker conducted an 18-month study of abused women for the National Institutes of Mental Health. She found that different personality patterns emerge when women are measured across the life span, each occupying a different place in relation to the time of the abuse. Walker, The Battered Woman Syndrome 76 (1984) (hereinafter Syndrome).

--In a study of 100 abused women who took the Minnesota

Multiphasic Personality Inventory (MMPI), Rosewater found that while victims appeared to have elevated scores suggestive of mental disturbance, subscale analyses showed inconsistencies that separated the abused women from those who are mentally disturbed. Misdiagnoses of abused women are likely if their need to cope with abuse is not considered. Id.

**\* Domestic abuse victims are likely to have grown up in an environment that encouraged them to be passive about domestic abuse.**

--In Walker's study, victims perceived their fathers, like their abusers, as having more traditional views on women's roles. Syndrome at 78.

--Pagelow found that victims in her study broke down into two groups. Some came from loving homes, and lacked experience in coping with physical abuse. Others came from homes in which domestic abuse had occurred. In both groups, there was a parental emphasis on traditional sex-role socialization. Woman Battering at 61.

--44% of the victims in Walker's study reported witnessing their fathers physically abuse their mothers. Syndrome at 19.

\* Depending on which point they have reached in the relationship, victims differ in their perceptions of how the abuse affects them.

--Walker found that victims who have left the relationship acknowledge that "powerful others" may control their lives, a reference to the abuser. Victims still in the relationship do not, however, and Walker hypothesizes that these victims do not yet concede that they lack control over their abusers' behavior. Syndrome at 79.

\* Victims who believe that they have control over their abusers' behavior in fact must modify their own conduct to achieve that "control." Id.

--Walker found that 40% of the victims, including both those still in relationships and those who had left, believed they had some control over their abusers' behavior. However, most victims also admitted that this required them to modify their behavior in order to avoid abuse. Id. at 79.

--In a random nationwide survey of 3,520 American households, Gelles and Straus found that the vast majority of the abused women either avoided their spouses or avoided doing things to set off their spouses as their main tactic to prevent abuse. Gelles and Straus, Intimate Violence 150 (1988).

**\* Victims who seek assistance often find that they are held responsible for preventing domestic abuse.**

--In their study of emergency room treatment of abused women, Stark and Flitcraft found that "medicine disposes of battering by characterizing it as a psychiatric problem for the victim," with mental health referrals occurring 15% of the time, compared to only 4% of the time in other, non-abuse cases. Stark and Flitcraft, "Medicine and Patriarchal Violence: The Social Construction of a 'Private' Event," 9 Int'l J. of Health Svcs. (No. 3, 1979).

--Mental health professionals often adopt the view that the victim's behavior must change to stop the abuse. In one case the counselor focused on the victim's post-partum depression as a cause of the abuse. "Gender Warrior" at 187.

--Law enforcement officials often refuse to take action when domestic abuse incidents are reported. In Pagelow's survey, 60% of the victims who requested that their abusers be arrested were refused. Another 24% reported that their abusers were arrested and released shortly afterward. Woman Battering at 81.

**\* Most victims do not repeat a pattern of involvement in abusive relationships.**

--In Pagelow's study only 17% of the victims reported having been in other abusive relationships. Woman Battering at 59.

--Walker's study showed that few domestic abuse victims entered into new relationships at all. The abusers were 2 1/2 times more likely to have remarried than the victims. Syndrome at 15.

### The child

\* Children suffer emotional detriment from domestic abuse in their households.

--The majority of children are aware of domestic abuse in their homes. In Walker's study, 87% of the mothers acknowledged that their children knew about the physical violence. Syndrome at 59. In Pagelow's study, 76% of the mothers reported that the children were physically present during beatings, while others overheard them. Pagelow, "Children in Violent Families: Direct and Indirect Victims," in Hill and Barnes, eds., Young Children and their Families (New York: Lexington Books) 1981 at 55.

--These children have a variety of medical complaints. Social workers at an abused women's shelter in upstate New York report that infants have high rates of insomnia, diarrhea and other

illnesses. Alessi and Hearn, "Group Treatment of Children in Shelters for Battered Women," in Roberts, ed., Battered Women and their Families (New York: Springer Publishing) 1984 at 52.

Children of battered women who received medical treatment at a rural health clinic also displayed various symptoms, complaining of headaches, asthma, and insomnia. Hilberman and Munson, "Sixty Battered Women," 2 Victimology 460, 463 (1977).

--These children experience behavioral problems. Children, especially boys, are more physically aggressive than children from non-abusive homes. Girls are passive, clinging, and less able to separate from their mothers.

**\* The emotional detriment to children from domestic abuse is such that they are not emotionally benefited by frequent contact with both parents.**

--A study of 100 "high-conflict" families 2 1/2 years later found "consistent evidence that children who had more frequent access (to both parents) were more emotionally troubled and behaviorally disturbed." These children "were significantly more depressed, withdrawn and uncommunicative, had more somatic symptoms and tended to be more aggressive," according to both parents. Center for the Family in Transition, Ongoing Post-Divorce Conflict in Families Contesting Custody: Does Joint Custody and Frequent Access Help? (paper presented at the meeting of the

American Orthopsychiatric Association, 1988).

**\* Children in domestic abuse households model their behavior on the abuser parent's.**

--(See The Abuser, above).

**Disparate impact of domestic abuse**

**\* Overwhelmingly, women are the victims of physical violence inflicted for purposes of intimidation or control.**

--In their 1975 and 1985 surveys of couples living together, Straus and Gelles concluded that violence by men is more injurious and repeated about three times more often than violence by women. Self-defense was three times more likely to be the reason for a woman's violence. Straus, Gelles and Steinmetz, Behind Closed Doors: Violence in the American Family 43 (1980). Although women and men engage in violence in about the same numbers, women do not initiate violence, and their actions do not have the intimidating effects of men's violence. Violence by women is not likely to have the same purpose, or effect, of intimidation as is violence by men. Gelles and Straus, Intimate Violence 90 (1988) (hereinafter Intimate Violence).

--In Great Britain, a survey of about 900 criminal case

files found that 94% of the assailants were men; another study of 900 criminal cases in Minnesota showed that 95% of the assailants were men). See Frieze and Browne, "Violence in Marriage," in National Institute of Justice, Crime and Justice - An Annual Review of Research: Volume on Family Violence (Chicago: University of Chicago Press), 1988 at 24.

-- The U.S. Department of Justice reported that 95% of the victims of domestic violence are women (Bureau of Justice Statistics, Report to the Nation on Crime and Justice: The Data, Office of Justice Programs, U.S. Department of Justice, October 1983.)

--The fact of separation or divorce does not change the direction of physical violence. Among separated or divorced partners, the same pattern of primarily female victimization predominates: men are the assailants in 91% of domestic assaults. Department of Justice, Bureau of Justice Statistics, Special Report - Family Violence (1984), at 4.

**\* Women are the primary victims of psychological abuse and conduct that belittles or controls victims.**

--Among female victims in the 1985 Gelles-Straus survey, 69% of victims said they consciously sought to avoid their abusers or to avoid topics that would initiate violence. Intimate Violence

at 68.

--In a 1984 clinical study of over 400 abused women, with a matched control sample of non-abused women, Walker found that 94% of the women reported that their abusers kept track of their victims' whereabouts "frequently," while victims knew their abusers' whereabouts only about a quarter of the time. By contrast, the sample of non-abused women reported that they and their partners kept track of one another's whereabouts at the same rate, 71%. Walker, The Battered Woman Syndrome (New York: Springer Publishing Co.) 1984 at 26 (hereafter Syndrome) at 173-4.

--Walker also found that abused women rarely use their children to get things from their abusers; only 4% reported using this tactic. Id.

**\* Women are the primary victims of economic abuse, the manipulation of finances by the abuser that prevents the victim from leaving the relationship.**

--Walker has identified two significant forms of economic abuse. One way is to trap the woman in the relationship through her fear of becoming poor as a result of her departure.

--The second form of economic abuse is the use of "money

as a coercive weapon...It occurs across all socioeconomic levels and is as powerful a technique among the poor as it is among those who have higher standards of living." Walker, The Battered Woman (New York: Harper and Row) 1979, at 129 (hereafter The Battered Woman).

## **PHYSICAL ABUSE**

The most widely discussed form of domestic abuse is physical violence between present or former partners.

### **The scope of the problem**

Determining the extent of physical violence occurring in intimate relationships is difficult, because definitions of what acts comprise physical abuse have varied.

**\* In their 1975 and 1985 surveys, Straus and Gelles found that from 11% to 12% of American men were physically violent toward their female partners.**

--In the 1975 survey, the researchers classified violent acts into eight categories (Conflict Tactics Scale): 1) throwing things, 2) pushing or grabbing, 3) slapping, 4) kicking or biting or punching, 5) hitting or hitting with an object; 6) beating, 7) threats with a knife or gun, or 8) use of a knife or gun. In 1975, they found that 12% of the men were physically violent toward their female partners, 3.8% of the time using the more serious violence

in categories 5 through 8. Behind Closed Doors at 36, 50. There was a 35% refusal rate in the study. Id. at 25.

--The 1985 survey of 3,520 American households was conducted by phone rather than in person, and took a little over half the time per interviewee. Nonetheless, the survey overall showed that husbands had been physically violent at a rate of 113 in 1,000 wives (11.3%). 30 out of 1000 women (3%) had been victims of what the researchers classified as more serious violence, ranging from hitting to use of a weapon. Intimate Violence at 104, 250.

**\* The rate of physical abuse occurring in marriages that are terminated by divorce is higher, ranging from 21% to 36%.**

--A study of 600 couples who sought divorces through the court in Cuyahoga County, Ohio, showed that 36.8% of the wives, and 3.3% of the husbands, mentioned physical abuse in their court files. The 600 wives raised the issues 11 times more often than their husbands. Levinger, "Physical Abuse Among Applicants for Divorce," Straus and Steinmetz, eds. 86 (1978).

--A National Institutes of Mental Health study in San Francisco showed that 21% of the women who had been previously married had experienced physical violence from a partner. The researchers studied 644 women who had been married. They omitted

the grabbing or pushing category in the CTS, using the definitions of hitting, beating and slapping. Russell, Rape in Marriage 89 (1984).

--Sociologist Irene Frieze found a 34% rate of physical violence by men against their female partners among a random sample of women who had been intended to serve as a control group for a comparison study with abused women. Pagelow, Family Violence 43 (1984).

#### Patterns of physical abuse over time

##### \* Physical abuse is repeated.

--Straus and Gelles estimate from both their 1976 and 1985 studies that having happened once, physical violence normally occurs again, at least three times per year. Behind Closed Doors at 41 (47% of the men battered their partners more than 3 times) and Intimate Violence at 104.

--All of the women in Walker's study had experienced physical violence by their abusers more than once, with increasing severity of injuries on each occasion. The study produced detailed profiles on four incidents: the first, the second, the worst, and the last. The Battered Woman Syndrome at 24.

--Pagelow reported that in her study, 94% of the women

reported more than one attack, and 74% reported an increase in both severity and frequency. Woman Battering at 163.

--In a questionnaire survey of 4,000 women from Illinois who sought shelter services, the figures were somewhat higher. More than half reported that the abuse occurred at least once a week. Another 25% reported a once-per-month frequency.

**\* The victim's injuries become more serious over time.**

--Walker found that only one-fifth of the women needed medical attention after the first battering incident, but about half needed it after the worst incident, later on. The number of women hit with an object during the worst violence was double the number of women hit with an object during the first violence. The Battered Woman Syndrome at 25-6.

**\* Physical abuse may reoccur in a "cycle".**

Although violence itself generally occurs for no apparent or identifiable reason, Walker has identified a temporal "cycle" of events leading up to and following it. In her survey, about 65% of the victims reported a tension-building period and about 58% reported a degree of loving contrition from their abusers afterward. Syndrome at 95-7.

--The tension-building phase features what Walker called "minor battering incidents," such as throwing objects down. The

abuser comes to understand that the victim "accepts his abusiveness as legitimately directed toward her." The victim's response is usually to become "nurturing, compliant, and (to) anticipate his every whim; or she may stay out of his way." She blames herself for the outbursts, minimizes the abuser's individual acts, and rationalizes that external factors, such as work pressure, are causing his anger. As she anticipates an acute incident, she experiences anxiety, depression, sleep loss, and medical ailments such as high blood pressure or heart palpitations. Women may continue in this phase for long periods of time. Walker, The Battered Woman (Harper & Row: New York) 1979 at 56.

--The acute battering incident itself involves physical abuse inflicted by the man, and a complete awareness on the victim's part that she is unable to prevent it. This stage may last from two to twenty-four hours. Id. at 60.

--The "loving contrition" stage occurs almost immediately after the abuse. The abuser is "extremely loving, kind and contrite...He knows he has gone too far, and he tries to make it up to her." He usually promises to change, insists that he needs her, and both of them believe he means it. However, the balance of power has been affected. The abuser "believes he has taught her such a lesson that she will never again behave in such a manner, and so he will not be tempted" to be violent again. This period lasts for varying periods and is often followed quickly by the

start of the tension-building period again. Id. at 65.

**\* Women who escape from the cycle develop particular reactions to the abuse as they move toward ending the relationship.**

--In Pagelow's study, the women generally recognized that the relationship was harmful to them. Nearly a quarter of the women had left their abusers once before; over one-third had tried twice; another quarter had tried four to six times. Woman Battering at 72. Of those who had left and then returned to the abuser, 72.5% reported that they did so because they believed that their abusers would change. Id. at 74.

--In Walker's study, the women who left permanently did so when "the ratio between the tension-building and loving contrition phases sharply diverged." Syndrome at 102. In other words, women were more likely to break off the relationships as they came to realize that the promises to end the abuse, made during the contrition period, would not be realized. These women "become, over time, more angry, disgusted, and willing to seek intervention; less fearful, anxious, and depressed." Walker, Syndrome at 87.

**\* The danger of physical violence is greater at separation, and after it, rather than less acute.**

--There is substantial evidence that some men become violent only after their partners declare their intentions of severing the relationships. Family Violence at 43.

--Three-fourths of domestic assaults occur while victims are separated or divorced from their assailants. U.S. Department of Justice, Report to the Nation on Crime and Justice - The Data (1983) at 21.

--13% of the victims in the Illinois survey were divorced or separated from their mates. Illinois Annual Report at 2.

#### **PSYCHOLOGICAL ABUSE**

Psychological abuse has received less attention from researchers, but there is ample evidence that it occurs. Gelles and Straus believe that "the true extent may be many more times that of physical violence." Intimate Violence at 68.

#### **Scope of the problem**

Like physical violence, psychological abuse is difficult to measure because of the difficulty of definition. However, in her study of physically abused women Walker also identified and quantified the incidence of some acts constituting psychological abuse, adapted from Amnesty International's measures of the

experiences of prisoners of war. Pagelow's study also measured a few categories of acts.

**\* Social isolation of victims often occurs.**

--Only 26% of the victims in the study saw their neighbors frequently, while a comparable control group of non-abused women reported such contacts with neighbors 53% of the time. Syndrome at 28.

--Three-quarters of the victims in Walker's study reported not being allowed to go where they wanted, compared to one-quarter of the control sample. Id. at 173.

--22% of the victims had no access to an automobile and 30% had no access to public transportation, while only 13% of the sample group lacked access to a car and only about 22% had no access to public transportation. Id. at 172.

--The victims moved an average of 6.2 times with their abusers, compared to 2.2 for control subjects. Id.

**\* Monopolization of perception, including obsessiveness and possessiveness, is frequently reported.**

--94% of the victims in Walker's study reported their

abusers' being "frequently" jealous of the women for allegedly having affairs with other men, compared to just 58% of the non-abused control subjects. The Battered Woman Syndrome at 184.

**\* An abuser's threats to commit harm to the victim, himself or to others are common.**

--The victims in Walker's study reported that 57% of the abusers in Walker's study had threatened to "kill someone," and 50% had threatened suicide. When asked about their perception of danger to them, 86% of the women stated a belief that the men would or could kill them, either accidentally or intentionally, and 87% believed that if anyone were to die during a violent incident it would be them, rather than their abusers. The Battered Woman Syndrome at 177-8.

--26% of the women in Pagelow's study reported that they returned because their abusers found them and threatened more violence. Woman Battering at 74.

--Victims report destruction of their property, which in itself implies a threat of harm and may also operate as a form of degradation (see below). Gelles and Straus found frequent allusions to this behavior, and report on two adult women who recalled their fathers' destruction of their pets. Intimate

Violence at 68.

**\* Degradation of the victim, including name-calling and other forms of humiliation, is frequent.**

--Verbal belittling of the victim is common, and is often connected with physical violence. Walker, for example, found that verbal abuse accompanied physical abuse 80% of the time. Syndrome at 26.

--In one reported case, the abuser made the victim eat her food, including dog food, from a pet's dish on the floor. State v. Laws, --- S.E.2d ---- (N.C. 1988).

#### Patterns of psychological abuse over time

**\* Psychological abuse, like physical violence, escalates over time.**

--73% of the victims in Walker's study said that it increased, with 15% reporting that it remained the same and 5% reporting some other pattern. Syndrome at 180

**\* Psychological abuse, like physical abuse, may be accompanied by occasional breaks.**

--When these breaks occur at random and variable times,

they keep alive the victim's hope that the abuse will cease. Syndrome at 28.

### **ECONOMIC ABUSE**

All women in this country suffer from economic discrimination based on their sex. In 1985, women earned only 64 cents for every dollar that men earned. U.S. Department of Labor, Facts on U.S. Working Women, Fact Sheet No. 86-1 (1986) at 1. However, abusers' manipulation of the partners' finances can prevent victims from ending the relationship, or compound the financial difficulties the women face if they do.

#### **Scope of the problem**

**\* Like most women in this country, abused women employed outside the home earn less than their male partners, and have a lesser ability to assert their economic independence.**

--Only one-third of the women in Pagelow's study were employed at the time they responded to her survey. Women who were employed were clustered in the lower-paying domestic, unskilled-labor and clerical fields, comprising about 78.3% of the total. By comparison, 60.2% of the men were in the skilled labor, managerial, and professional fields, or were self-employed.

--Income comparisons reveal the same disparity. 78% of

the men in Pagelow's study earned over \$600 per month in take-home pay, compared to only 37% of the women. Woman Battering at 137.

**\* Even if sufficient resources exist, the abuser may exert control over her access to them, and prevent her from leaving the relationship.**

--27% of the abused women in Walker's sample reported having no access to cash with their abusers, as compared to only 8% of the control group. Yet many of these victims were well-educated and held jobs of their own.

--34% of the abused women in Walker's study had no access to a checking account, as compared to 26% of the control group.

#### Patterns of economic abuse over time

**\* Economic abuse, like other forms of domestic abuse, worsens over time.**

--Economic abuse traps victims in abusive relationships. Victims must justify their need for money beyond the amount allotted them, and are unable to obtain what is needed for them to leave. In Pagelow's study, 29% of the women who returned to their abusers said they did so because they had no money, nowhere to stay, or no resources with which to live independently. Woman Battering at 74.

--The partners' property and income are dissipated by the abuser. Women have less information on these transactions and their effect on the partners' finances. Without women being aware of it, abusers could overextend credit or mismanage their income, leading to the loss of homes, cars or other possessions. The Battered Woman at 131.

#### SOCIAL COSTS OF DOMESTIC ABUSE

##### \* Victims receive physical injuries.

--A clinical study of over 400 battered women for the National Institutes of Mental Health found that over half the time, batterers punched and threw their victims bodily. One-third of the women were choked or strangled. Walker, The Battered Woman Syndrome (New York: Springer Publishing Co. 1984) at 26 (hereafter The Battered Woman).

--Pagelow reported that 24% of the victims in her study were injured by weapons ranging from knives and guns to chairs and lamps. Woman Battering, Victims and their Experiences at 95.

--Illinois domestic abuse programs, in a 15-month survey of 14,600 women seeking assistance, report that more than 60% of the victims were hit with a fist or object, 40% were kicked and choked, and one-fourth were threatened with a gun or knife. Two-thirds suffered more than one such attack.

**\* Victims may suffer long-term medical consequences from the injuries.**

--Physicians have found that 53% of the subjects in a study of female chronic pain sufferers were physically abused by their partners before the onset of the chronic pain condition. See Haber and Roos, Advances in Pain Research and Therapy (New York: Raven Press, 1985).

**\* Physical abuse increases medical costs.**

--A 1977 study reported, not surprisingly, that the mean number of injuries per patient is higher for abused women than for non-abused women. Flitcraft, Battered Women: An Emergency Room Epidemiology with a Description of a Clinical Syndrome and Critique of Present Therapeutics (unpublished thesis) at 16.

--Some private employers have become concerned about the "millions of dollars" in lost sick time and increased use of medical benefits. They have begun special programs aimed at both abuser and victim employees. Freudenheim, "Employers Act to Stop Family Violence," New York Times, August 23, 1988 at 1.

#### **EFFECTIVE INTERVENTION**

**\*Battering can only be stopped by use of sanctions which hold the batterer solely responsible for his abuse. Failure to**

**employ sanctions results in continued and escalating abuse.**

--The Police Foundation found that arrest is the most effective method of police intervention, more effective than attempting to counsel both parties or sending the assailant away from the home for a few hours. Sherman and Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault" American Sociological Review No. 49 (1984) PP. 261-272, Police Foundation Report #1, "The Minneapolis Domestic Violence Experiment," (April 1984).

--A study by the U.S. Department of Justice found that calling the police following an act of battery significantly reduces the risk of a husband attacking his wife again. Langan and Innes, "Preventing Domestic Violence Against Women", August 1986, NLJ 102037

--The U.S. Commission on Civil Rights found that mediation programs are inappropriate for cases of domestic abuse. U.S. Commission on Civil Rights, Under the Rule of Thumb (pp 61-76).

--The most recent guidelines from the National Institute of Justice reject the use of mediation in cases involving battered women:

Mediation appears to be an excellent forum for resolving many types of disputes; however, it does not appear to be an appropriate forum for handling domestic violence cases. This is true for a variety of reasons, both

philosophical and practical. Most fundamentally, when used as a substitute for criminal proceedings, mediation implies that spouse abuse does not constitute serious criminal behavior deserving of criminal penalties. Violation of a mediation agreement results in no criminal sanctions. Beyond the failure to hold abusers accountable, the mediation process can imply that battered women share responsibility for the criminal conduct, and may even require them to promise that they will change their own behavior in exchange for the batterer's promise not to commit further crimes.

Furthermore, while mediation presumably requires that both parties be placed on "equal footing" in order to negotiate a mutually acceptable agreement, the balance of power in victim-abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable. Mediation, by nature, relies to some extent on the mutual goodwill and fairness of both parties. In some kinds of cases, trained mediators may be effective in equalizing the bargaining power of the parties, but they cannot compensate for a long-term pattern in which one party has consistently controlled and manipulated the other. Indeed, the victim may even be afraid to speak up or register disagreement during a mediation session for fear of retaliation. This imbalance of power would continue after the mediation session as well, since the parties' relationship would not be altered.

The complexity of spouse abuse cases and the fact that battering represents a pattern of behavior, rather than a single isolated event, also mean that mediation will be less successful with these cases. National Institute of Justice, Confronting Domestic Violence: A Guide for Criminal Justice Agencies, pp.6-2

--A recent study found a significantly lesser amount of post-separation violence when victims used an adversarial divorce process instead of a conciliatory process. Ellis and Wight-Peasley, Wife Abuse Among Separated Women: The Impact of Lawyering Styles, paper presented at the Annual Meeting of the International Society for the Study of Aggression.

## IMPLICATIONS OF DOMESTIC ABUSE FOR MEDIATION

Domestic abuse intimidates the victim and reduces her ability to represent, or even identify, her own interests. The victim may not even recognize that she accedes to the abuser's wishes for fear of abuse, or that this pattern is detrimental to her.

The key elements of mediation are:

- 1) voluntary participation
- 2) equality of bargaining power
- 3) neutrality at the mediation, and
- 4) confidentiality

When one partner abuses another, the various assumptions and understandings needed for fair or successful mediation are absent.

\* The victim may not voluntarily choose mediation. She may agree to it because of fear of the abuser or inability to act on her own interests. Her abuser may have threatened her or convinced her that the legal system will be more sympathetic to him (e.g., that she will lose her children or financial support).

\* The abuse in all cases renders the victim either unable to act in her own interests, or less able to do so than the abuser can do for himself, upsetting the principle of equality of bargaining power needed to make mediation objectively fair.

\* Even if equal bargaining power can be maintained, the desirability of a "win-win" result is impaired by overriding public policy considerations requiring that the agreement hold the abuser alone accountable for any wrongful behavior.

\* Whether or not the mediator supports a result that holds the abuser solely responsible for his behavior, the principle of neutrality is affected. The mediator will have taken sides with one participant or the other.

Not only is mediation dangerous for abused women, but mediation of cases involving abused women has severe implications for mediation's fairness. There can not be effective mediation of battered women's cases. Effective mediation requires that there be an equality of power between the parties and an ability and willingness to mediate and mediator neutrality. None of this is present in cases involving abused women.

Mediation is a unique dispute resolution alternative because it relies on the participants, not a court, to achieve justice in any given case. For mediators, then, domestic abuse consists of deliberate abuser behavior that intimidates the victim, reducing her ability to identify and represent her interests as well as the abuser can do for himself. It is important to remember that the victim may not even recognize that she accedes to the abuser's wishes for fear of abuse, or that this pattern is detrimental to her.

#### A. Implications for Mediation's Fairness

##### 1. No equality of bargaining power

Domestic abuse destroys the equality of bargaining power between the participants. As the National Institute of Justice concluded:

"while mediation presumably requires that both parties be placed on "equal footing" in order to negotiate a mutually acceptable agreement" the abused woman may make concessions to protect herself from further abuse. (The) balance of power in victim-abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable. Mediation, by nature, relies to some extent on the mutual goodwill and fairness of both parties. In some kinds of cases, trained mediators may be effective in equalizing the bargaining power of the parties, but they cannot compensate for a long-term pattern in which one party has consistently controlled and manipulated the other. Indeed, the victim may even be afraid to speak up or register disagreement during a mediation session for fear of retaliation. This imbalance of power would continue after the mediation session as well, since the parties' relationship would not be altered. National Institute of Justice, Confronting Domestic Violence: A Guide for Criminal Justice Agencies, p. 62

The abused woman often lacks a sense of self-worth as a result of the abuse, blaming herself when it happens. She may also believe the abuser is right in making other negative claims about her--for example, her reliability as a witness in a criminal case, or her fitness as a parent in a custody case. (Pressure from the abuser or his agents outside mediation can exacerbate this). The abused woman may, while traveling the cycle of abuse, believe her abuser's promises to change his behavior, and at the time of mediation he may in fact have made some temporary changes. Believing in his good faith, she is often less able to identify interests of her own, and may be susceptible to his settlement ideas despite the harm they do to her interests.

In Lenore Walker's study 73% of the victims reported that the abuser "always" or "usually" prevailed in major disagreements, as compared to just 16% of the control sample of non-abused women.

Even a woman who is out of the cycle of abuse, and can identify her own interests, may be affected by abuse. She may fear physical harm. A woman under these circumstances may make concessions to ensure her physical safety or that of her children. Her economic dependence on the abuser may leave her unable to use other alternatives such as a lawyer, and she may give in because she does not believe she has any other choice.

These same dynamics give the abuser an advantage whether he actually coerces the woman during the session or not. He may specifically seek mediation to exploit this advantage. Such patterns of interaction are likely to create difficulties for abused women in mediation. No amount of Mediator skill or training can make up for the control that an abuser exerts over his victim.

In addition, some abused women may have added difficulty maintaining equal bargaining power as a result of cultural, medical, or educational factors. As a result, the following factors make mediation ever more problematic:

- language barriers that prevent the abused woman from communicating with the mediator as effectively as her partner;

- mental deficiencies, particularly those with an acute effect on the abused woman's learning abilities or comprehension;

- complex issues, requiring specialized knowledge or expertise.

In a domestic abuse case, these may include, but are not limited to, the following:

- \* the amount of money damages owed her for injuries and

income lost as a result of the abuse;

- \* the paternity of a child;
- \* child custody or visitation;
- \* the classification of a piece of property as "marital," "community," or "separately" owned by one partner;
- \* the value of a piece of property;
- \* the tax implications of property transfers or particular custody arrangements;
- \* the tax implications of child support verses alimony;
- \* the public assistance implications of support verses property division;
- \* the allocation of debt obligations, particularly in light of concurrent bankruptcy proceeding;
- \* the appropriate level, frequency or duration of child or spousal support payments, particularly if one partner is on public assistance;
- \* the fairness of a given property division.

These conditions--language barriers, mental deficiency, complexity of issues--exacerbate the imbalances between the parties when there is domestic abuse present.

## 2. Loss of mediator neutrality

Neutrality is a problem in every case involving domestic abuse. If the mediator condemns the abuse, the abuser will not believe he/she is neutral. If the mediator does not act against the abuse, the victim will not believe he/she is neutral. And of course

condoning the abuse has severe implications for the continuation of the violence.

Similarly if the mediator sees or does not see the implications of the abuse in the issues to be mediated (e.g., custody) the mediators will be viewed as sympathetic to one or the other party.

### 3. Lack of voluntariness

Domestic abuse reduces the abused woman's freedom to make many choices for herself, including her freedom to choose mediation. A domestic abuse victim may agree to mediate because the abuser has threatened her or because he has convinced her that the legal system will be more favorable to him (e.g., she will lose her children or financial support). A recent study of domestic abuse victims showed that the most often used technique for dealing with the abuser was avoiding conflict with him. A victim who chooses this option may not want to mediate because she fears abuse, but may agree to placate him. This same tendency may operate against her as she negotiates, causing her to accede to his proposals whether she believes them to be appropriate or not.

Other studies have demonstrated that domestic abuse victims suffer economically from the abuse. And women typically earn less than men. As a result, at least some domestic abuse victims may have "chosen" mediation because their economic dependence on the abuser has made them unable to take other action by hiring counsel. Again, this imbalance makes it less likely that her agreement to proposals is completely voluntary.

Under these circumstances, it is inappropriate to talk about mediation as a device for facilitating a victim's self-determination. More often, her concern is simple self-preservation.

#### 4. Limited confidentiality

Domestic abuse presents difficulties with respect to confidentiality as well. If a participant makes a threat in either a joint or individual session the mediator probably has a duty to warn and protect the victim under that state's law. Thus there cannot be totally confidential mediation in cases involving domestic abuse.

Nor should the mediator keep such a communication confidential. Battery is perpetuated when it is kept behind closed doors.

### Implications for Substantive Results

#### 1. No deterrence of future abuse

Researchers have found that to make the abuser change his behavior, he alone must be held accountable for it, in a public setting that emphasizes the social disapproval of his conduct. Instead, mediation occurs in private. The process focuses on the relationship between the parties without assessing blame for inappropriate, anti-social or criminal behavior. The batterer is not required to admit responsibility for the abuse. Further, there is no mechanism to hold the abuser accountable for his actions. And there are no mechanisms to ensure the victim's safety.

(Some settlement terms can aggravate this problem. Sometimes the victim is asked to share responsibility for preventing further abuse, or guarding the children from emotional harm that may have resulted from the abuse. In criminal cases, mediated agreements may require her to agree not to mention or do things that will "antagonize" the abuser. In civil custody cases, the participants often both agree "not to argue in front of the children," instead of pinpointing the abuser's violent behavior as the inappropriate conduct that is harmful.)

The abuser is not given the message that is mostly likely to deter future abuse--that his conduct is wrong and must be changed. This sends out a message to the participants that violent behavior is condoned and that the victim may be partially responsible for its occurrence.

## 2. No redress for past harm caused

Mediation is generally a functional, future-oriented approach that disregards the past harm from the domestic abuse, in favor of emphasizing the participants' willingness to cooperate and reach a desirable future result. Domestic abuse injuries--emotional or physical--are typically not compensated in mediation. Mediated criminal cases usually result in the dropping of charges and no punitive sanctions against the abuser. Mediated custody agreements more often monitor both parents' conduct for "cooperation," rather than addressing the detrimental effects of domestic abuse on the children and seeking to limit the abuser's access to them. In

neither case is the harm the abuser causes acknowledged or corrected.

## ETHICAL DUTIES OF MEDIATORS

### Introduction

One spouse...called...demanding assurance that she would be permitted to enter the mediation office before her former husband arrived so that she would not have to be together with him in the parking lot, since, she said, he was 'violent and assaultive' and she feared for her life. Then she arrived for the first session in a car driven by her ex-husband, held hands with him in the parking lot before the session, and spent a good part of the session...praising him for his kindness. They reached an amicable settlement in the next session.

D. Saposnek, Mediating Child Custody Disputes 30 (1983).

Several organizations have issued ethical guidelines for alternative dispute resolution processes. The American Bar Association, the Association of Family and Conciliation Courts, the Society for Professionals in Dispute Resolution, and the Center for Dispute Resolution have promulgated ethical standards for use by family mediators. These guidelines vary in specificity on particular points but are in general agreement on the importance of several factors including the responsibility of the mediator: 1) to conduct an orientation session; 2) to obtain informed consent; 3) to ensure the voluntary participation of the parties; 4) to equalize bargaining power between disputants; 5) to remain neutral and impartial; 6) to discuss the issue of confidentiality with the participants.

Domestic abuse perpetrated by one disputant on the other has

a significant impact on each element of the mediation process. The cumulative effect of the negative implications for battered women impugns the integrity of the mediation process and leads inescapably to the conclusion that the use of mediation in domestic abuse cases is unethical.

## **DOMESTIC ABUSE AND PRELIMINARY MEDIATION PROCEDURES**

### **Domestic Abuse and the Duty to Conduct an Orientation**

**\* Domestic abuse increases the need for mediators to provide meaningful orientation information to mediation participants.**

--The Association of Family and Conciliation Courts Model Standards of Practice for Family and Divorce Mediation (hereinafter "AFCC Standards") requires mediators to "define mediation and describe the differences and similarities between mediation and other procedures for dispute resolution." AFCC Std. Sec. I.A.

--The American Bar Association Standards of Practice for Lawyer Mediators in Family Disputes (hereinafter "ABA Standards") require "an orientation session to give an overview of the process" to participants. ABA Std. Sec. I.

--The Ethical Standards of Professional Responsibility for the Society for Professionals in Dispute Resolution (hereinafter "SPIDR Standards") impose on mediators the "obligation to assure that all parties understand the nature of the process, the

procedures, the particular role of the neutral, and the parties' relationship to the neutral." SPIDR Standard-Responsibilities to the Parties - Informed Consent.

The Code of Professional Conduct of the Center for Dispute Resolution (hereinafter "CDR Code") obligates mediators "to educate participants as to their procedural options and to help them choose wisely the most appropriate procedures, CDR Code Sec. 2 - "Appropriateness of Mediation."

In many communities, mediators have no control over who enters mediation initially. Mediators in court-connected programs take wholesale case referrals from courts. Even private practitioners cannot determine who seeks them out and why. A federally-funded study on a mandatory custody mediation program in California and voluntary mediation programs in Minnesota and Connecticut found that 20% to 39% of all participants had "profound misconceptions about the goals of mediation" after undergoing the process. They confused mediation with marriage counseling or, because many believed the mediator would make the custody decision, with binding arbitration. Pearson and Theonnes, Divorce Mediation: An Overview of Research Results, 19 Colum. J. of Law & Soc. Prob. 451, 466 (1985).

Because one can expect that a significant percentage of women mediation participants are, have been, or will be abused by the partners with whom they are expected to mediate, the ethical obligation to hold an orientation session is especially essential

for family mediators.

Domestic Abuse and the Duty to Obtain Informed Consent

**\* Mediators are ethically obligated to screen cases to ensure that all participants give an informed consent before mediation proceeds.**

--The AFCC Standards require the mediator to "help the participants evaluate (its) benefits, risks and costs...and alternatives available" to them. AFCC Std. Sec. I.A.

--The ABA Standards require mediators to "assess the appropriateness of mediation for the participants." ABA Std. Sec. I.

--The SPIDR Standards require the mediator to obtain informed consent from the participants before beginning mediation. SPIDR Std. - Responsibilities to the Parties - Informed Consent.

--The CDR Code acknowledges "mediation is not a panacea for all types of conflicts," Sec 2 "Appropriateness of Mediation." The mediator "is obliged to educate the parties and to involve them in the mediation process." Sec. 2 "The Mediation Process."

A mediator has an affirmative obligation to screen a case for domestic abuse, or other factors that affect informed consent,

before proceeding with mediation.<sup>1</sup>

## DOMESTIC ABUSE AND THE MEDIATION PROCESS

### The Impact of Domestic Abuse on Victim Voluntariness

**\* Mediators are ethically obligated to avoid mediating if the victim is unwilling or unable to voluntarily choose mediation.**

--ABA Std. Sec. 5.A. and AFCC Std. Sec. IX.B.A. both provide that "If the mediator believes that the participants are unable or unwilling to meaningfully participate in the process or that reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help."

--The SPIDR Std. on "Responsibilities to the Parties - The Settlement and its Consequences" provides that the mediator has "a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties

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<sup>1</sup> Some participants, men or women, will often demonstrate other characteristics that impair either their willingness or their ability to mediate:

(1) language barriers that prevent one partner from communicating with the mediator as effectively as the other partner;

(2) mental deficiencies, particularly those that affect a partner's learning ability or comprehension; or

(3) One or both partners may lack the specialized knowledge or expertise that is required by complex issues.

dictate, the neutral must inform the parties of that concern."

The CDR Code Sec. 2 emphasizes that "pressures that jeopardize voluntary action and agreement by the parties should not be a part of mediation."

If there has been or is domestic abuse between the parties, the mediator should not proceed with mediation. Whether the victim is willing to mediate, or the victim is unwilling to mediate at all, the case should be treated as inappropriate for mediation for the reasons discussed below.

**\* A victim may be too intimidated to give an informed voluntary consent to mediation.**

Domestic abuse reduces the abused woman's freedom to make many choices for herself, including her freedom to choose mediation. The majority of domestic abuse victims attempt to placate their abusers in order to avoid conflict with them and abuse by them. A victim who "chooses" mediation may not want to mediate; perhaps she fears abuse, but may agree in order to placate her abuser. Under these circumstances it is inappropriate to view mediation as a voluntary dispute resolution alternative that can reinforce the victim's sense of self-determination. More often, her concern is simple self-preservation.

In the Saposnek excerpt, the mediator proceeded with a joint session, despite information from the woman that indicated a

history of domestic abuse, and the victim and abuser reached an "amicable" agreement. It is highly unlikely that the agreement reflected the true wishes or interests of the victim.

Alternatively, it is possible that the couple in the Saposnek example was in the "loving contrition" phase of the cycle of violence. The abuser, who may have been experiencing remorse over a violent episode, may have been particularly conciliatory. Under these circumstances, the most reasonable course of action from the woman's perspective, may have been to react in an ostensibly loving way toward her partner. Both research results and previous experience might have warned the mediator, if not the victim, that once the "tension-building" phase began again, the agreement was likely to break down. Such a result would certainly harm the children, and might well lead to further violence against the victim.

**\* Once fully informed about the drawbacks of mediation when domestic abuse has occurred and alternative resources for victims of domestic battery, the victim may be unwilling to mediate.**

A victim of domestic abuse who agrees to participate in mediation may not have considered the long-term consequences of her choice.

In separate caucuses, the mediator could provide information and review a variety of options with the victim, depending on the type of case involved. Written orientation materials and

discussions should be used so that participants receive sufficient information. **Mediation and You**, a sample booklet for domestic abuse victims which is part of this packet, provides a suggested format for presenting this information.

For example, in custody cases, the usual benefits of frequent contact for children with both parents is outweighed by the harm of exposure to continuing abuse. In financial disputes, it would be essential for the mediator to refer the victim to legal counsel to review whether she might have a legal claim for damages for the assault, and whether that would affect her choice of mediation. If mediation involved the abuser's criminal liability for the assault itself, the mediator should provide research results to the victim which show the high potential for repeated violence, even after mediated agreements are made.

**\* A domestic abuse victim who has left the relationship may be angry with her abuser and may be unwilling to mediate.**

In another potential scenario, the victim may have broken out of the cycle of violence. Like many women she may have remained adamant about not wanting to meet with her abuser, or she may have rejected the notion of mediation at all. Lenore Walker's research on abused women demonstrates that anger is an appropriate and necessary emotion for victims who have decided to leave their abusers.

As a natural consequence, it is likely that the victim will

wish to see the abuser held accountable for his actions in court, rather than to discuss other issues in mediation. Her perspective will differentiate her from the typical mediation participant, who in Pearson and Theonnes' study was likely to appreciate mediation because it was more "private." Divorce Mediation at 464. For the abused woman at this stage, however, domestic abuse is not a "private matter," brought on by her failure to be "a good wife," but is wrongful behavior for which the abuser, not she, is responsible. It is essential to recognize that, at this stage, the victim's objections to mediation are likely to be substantial, and justifiable.

#### The Impact of Domestic Abuse on Bargaining Power

\* The ethical obligation not to participate in a negotiation that would impugn the integrity of the process requires that mediation be terminated if equal bargaining power cannot be achieved and maintained.

--AFCC Standards Sec. VIII imposes on the mediator the obligation to prevent the use of manipulative or intimidating tactics.

--ABA Standards Sec. V obligates the mediator to suspend or terminate mediation if balanced bargaining cannot be maintained.

--The CDR Code Sec. 2 "Empowerment" requires the mediator to refer disputants to resources for additional information or

assistance "in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached which is fair equitable, and has the capacity to hold over time." Sec. 2 "Empowerment." The CDR Code Sec. 2 "The Settlement" also requires the mediator to take appropriate action to prevent finalizing an agreement which the mediator feels is "grossly inequitable to one or more parties."

**\* Women in general experience a greater sense of coercion in mediation than men.**

In the Pearson-Theonnes study, 23% of the California women participants, 20% of the Minnesota of women participants, and 12% of the Connecticut women participants, reported feeling coerced by their mediators into agreements. Divorce Mediation at 456.

**\* Women perceive themselves as having achieved less satisfactory results in mediation than men, and studies demonstrate that their concern has a basis in fact.**

Despite the higher levels of coercion reported by women in the Pearson and Theonnes study, the researchers found that women generally had favorable attitudes toward mediation. Since their 1981 study, however, more recent data have confirmed the gap they identified between how men and women perceive mediation.

For example, a recent Virginia study of attorney-represented

participants in voluntary custody and financial mediation confirmed that "most of the increased satisfaction created by mediation was experienced by the fathers...". Men were more satisfied, and women were less satisfied, than counterparts who had litigated. Emery and Wyer, Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents, 55 J. of Consult. and Clin. Psychol. 179, 183 (1987).

Finally, some researchers are demonstrating a substantive difference in mediated and court-or attorney-facilitated agreements. A study of voluntary mediation results in the state of New York, dealing with both custody and financial issues, compared comparable mediated results with those negotiated by attorneys and those achieved in judge-supervised settlement conferences. Mediated agreements resulted more frequently in joint custody, in lower or no child support payments, and lower or no alimony payments. M. Ray, Divorce Settlements: Comparing Outcomes of Three Different Processes for the Resolution of Disputes (June 1988) (unpublished manuscript available through National Center on Women and Family Law).

**\* Abused women may experience coercion in mediation to a greater extent than other women.**

Women who have experienced domestic abuse are more likely than other women to have established a pattern of deferring to their abusers in disagreements. 73% of the victims in Walker's study

reported that the abuser "always" or "usually" prevailed in major disagreements, compared to just 16% of the control sample of non-abused women. Only 9% of the victims said that they prevailed in major disputes about half the time, compared to 59% of the non-abused women. Syndrome at 174.

The victim still in the cycle of abuse may continue to believe that she can have an impact on her abuser's behavior, even as she defers to his wishes in order to maintain peace. Under these circumstances, she may not even be aware that her established pattern of concession and deference suggests an imbalance in bargaining power.

However, for the victim who understands the inequality, and who has left the relationship, the perception that the abuser will prevail in disputes remains even after the relationship ends. Walker found that victims who had left the relationship scored significantly higher than normal on tests designed to measure their awareness of "Powerful Others" or the influence of outsiders on their decisions. For domestic abuse victims, then, the risk of unequal bargaining power is substantial.

### The Impact of Domestic Abuse on Mediator Neutrality and Impartiality

The neutrality and impartiality of the mediator is acknowledged as essential in order to maintain the integrity of the

mediation process. ABA Standards Sec. III, AFCC Standards Sec. II, and the CDR Code Sec. 2 "Neutrality" and "Impartiality," focus on these integral components of mediation, and these sets of standards require mediators to disclose conflicts of interest and withdraw if a concern over bias is raised.

**\* Domestic abuse exacerbates an existing neutrality and impartiality problem.**

Some cases turn on whether domestic abuse has occurred such as cases in which the victim requests an order to restrict the abuser's access to her or cases in which civil damages are sought for domestic abuse injuries or death. The mediator cannot remain "neutral" in these cases because whether domestic abuse has occurred is the issue.

As noted previously, some mediators may view the abuse as implicating mental health issues that can be resolved through changes in both participants' behavior. The acceptance or negation of the victim's claim, as facilitated by the mediator, is necessary to resolve the case. A victim who believes her claim is valid is not likely to view as neutral a mediator who suggests that she, the victim, accept responsibility for the abuse. Nor is an abuser who believes that he did nothing inappropriate likely to view as neutral a mediator who suggests that he accept civil or criminal liability for his conduct.

The mediator appears to be placed in a "catch 22" situation when dealing with domestic violence issues. It may be difficult for the mediator to ensure that bargaining power is equalized without compromising neutrality. At the same time, the mediator's assuming a "neutral" stance toward the violence may be interpreted as the mediator's condoning the violence. These tendencies can have a crucial effect on the mediator's ability to maintain equality of bargaining power between the participants.

\* Both factual issues about the occurrence of domestic abuse, and what it should mean to the case's outcome, must be addressed in some cases.

These dual concerns often arise in custody disputes. Some mediators may focus on domestic violence in a relationship by viewing the issue as one to be resolved by changes in both participants' behavior. Alternatively, some may believe that "neutrality" means not accepting domestic abuse evidence as relevant to custody decisions.

The view that a change in victim behavior is the preferred solution to domestic abuse, or that the abuse is irrelevant, is incorrect from a mental health point of view. See **Domestic Abuse The Facts**, above. Also, in many jurisdictions the legislature or courts have decided that there is a "necessary or direct connection" between domestic abuse and parenting ability. See Sun and Thomas, "Custody Litigation on Behalf of Battered Women,"

21 Clearinghouse Review 562, 564-566 (November 1987), and 1988-89 Supplement at 3 (available from the National Center on Women and Family Law).

Certainly, to the abused woman, a mediator who persists in refusing to treat domestic abuse issues as relevant, given this evidence, would hardly appear neutral. On the other hand, the abuser is likely to view as unfair the mediator's insistence on believing that domestic abuse occurred. He is unlikely to be able to accept that its impact on the children justifies limiting his access to them. In short, it is unlikely that both participants can view the mediator as neutral by the time the process is at an end.

**\* The behavior of a Battered Woman may make it more difficult for mediators to maintain their neutrality and impartiality..**

Abused women often appear to lead comparatively more chaotic lives, to be more "emotional" and less articulate than their abusers. The abused woman may simply come off as the more "unfit" or "uncooperative" parent, or simply the more "unlikable" partner. These characteristics can affect the mediator's treatment of the participants.

### **The Impact of Domestic Abuse on Issues of Confidentiality**

**\* Confidentiality is a critical element of the mediation process.**

ABA Standards Sec.II. A and C, AFCC Standards Sec.IV. A, SPIDR Standard - Responsibility to Parties Sec. 3, and the CDR Code Sec. 2 "Confidentiality", focus on the need for confidentiality in order to encourage full and open disclosure during mediation. At the same time, the relevant standards recognize that applicable law may compel the mediator to subsequently reveal information under particular circumstances.

-- ABA Standard Sec. II.C acknowledges that the mediator is unable to bind third parties, such as the participants' lawyers, not to disclose information.

-- AFCC Standards IV A.3 instructs the mediator to discuss with the participants the potential consequences of their disclosure of facts to each other.

-- The CDR Code Sec. 2 "Use of Information" differs from the other standards in neglecting to warn disputants that, despite the mediator's efforts to resist disclosure of confidential information, complete protection is not available. At the same time, the CDR Code carves out a clear confidentiality exception (see discussion, infra).

Absent clear statutory language in a particular jurisdiction, the protection afforded to evidentiary uses of statements made during mediation and to the disclosure of documents may be limited at best.

**\* Confidentiality issues may arise in various ways:**

- 1) the mediator may be compelled to make a recommendation to the court on one or more issues if a resolution is not reached;
- 2) the statements made by participants during mediation sessions may be used as evidence in a future legal proceeding;
- 3) the program records may be open to public inspection and available to subsequent litigants;
- 4) the mediator may have to act to protect a readily identifiable and foreseeable victim of danger when a specific threat of violence has been made by a participant.

**\* Battered women may be disadvantaged by an inability to compel mediator testimony or by lack of access to mediation program records.**

A battered woman may need access to vital information to prevent psychological, physical, or financial injury. Battered women may need to use the courts to obtain orders for protection from violence or to enforce existing orders. Although mediators may resist disclosure of confidential information, it may be essential for victims of domestic abuse to secure necessary documentation.

A battered woman who is already hampered from an evidentiary perspective in attempting to prove domestic violence which occurred

in the home without witnesses will be further disadvantaged by her inability to use any admissions about violence made by her batterer during mediation. Although the fact that mediation takes place "behind closed doors" is attractive to some disputants, battered women may be further victimized by the continued privatization of the violence perpetrated against them.

One approach which avoids broad disclosure of information discussed during mediation but, at the same time, provides the victim with a record of the abuse is the inclusion of a statement describing the violence in a preface to the mediation agreement. The victim can use the agreement if needed in subsequent proceedings to show a pattern of violence. Lerman, Mediating Wife Abuse, 7 Harv. Wom. L.J. 57, 106-107 (1984).

**\* Mediators have a duty to protect victims of domestic violence.**

-- Only the CDR Code requires mediators to report actions to appropriate agencies "[i]n the event of child abuse by one or more disputants or in a case in which a mediator discovers that a probable crime will be committed that may result in serious psychological or physical harm to another person..." Sec. 2 "Confidentiality". Although the inclusion of this exception to confidentiality in the mediation context may protect victims of domestic abuse, the "probable crime will be committed" language should be broadly construed by mediators to ensure victim safety.

Professionals, including attorneys and psychotherapists, may be compelled to breach confidentiality and to contact law enforcement officials or to warn identifiable victims when threats of violence are made. A series of California decisions established the therapists' affirmative duty to intervene when violence by a client is in issue. In Tarasoff v. The Regents of the University of California, 551 P.2d 334 (Cal.1976), the court held that a therapist has a duty to protect a readily identifiable and foreseeable victim of danger when a specific threat of violence is made by a patient. The "duty to warn" concept developed in Tarasoff currently serves as a model for legislation enacted in several jurisdictions and serves as a guideline to psychotherapists in states without specific statutory provisions.

The common interpretation of Tarasoff is that the therapist has an affirmative duty to warn the victim, notify law enforcement, or both. The Ethical Principles of Psychologists provides that patient information should not be revealed without consent of the patient or the patient's legal representatives "except in those unusual circumstances in which not to do so would result in clear danger to the person or to others." The A.B.A. Model Rule of Professional Conduct 1.6 also permits attorneys to reveal confidential information if imminent serious bodily harm or death would result.

Although clinical prediction of dangerous behavior is uncertain, threats of violence made by batterers usually do result in assaultive acts. As Lenore Walker's research indicates,

domestic violence usually escalates in its severity and frequency and physical abuse is often preceded by verbal threats. When a disputant makes a threat in the presence of the mediator in a joint session or individual caucus, the mediator has a similar duty to warn and protect the victim. The mediator should clearly state at the beginning of the mediation process that threats of violence will result in waiver of confidentiality and termination of mediation.

### The Implications of Domestic Abuse for a "Win-Win" Result

--AFCC Standard IX.B.2. and ABA Standard V.A. permit the mediator to suspend or terminate mediation if "a reasonable agreement is unlikely," and instead to refer the participants to appropriate resources for assistance.

--The SPIDR Standard "Responsibilities to the Parties - The Settlement and Its Consequences" provides that the mediator must "be satisfied that agreements in which he or she has participated will not impugn the integrity of the process."

--The CDR Code provides specific alternatives including termination and withdrawal when an agreement is reached which "a mediator feels (1) is illegal, (2) is grossly inequitable to one or more parties, (3) is the result of false information, (4) is the result of bargaining in bad faith, (5) is impossible to enforce, or (6) may not hold over time.

**\* Most mediators seek to facilitate "win-win" results.**

"In developing a win-win outcome, the mediator prevents victories for one partner by making sure that for each concession, or 'win,' enjoyed by one, there is an equal concession, or 'win,' for the other. Ideally, the 'win' for each party is contained within the same issue."

J. Haynes, Divorce Mediation 5-6 (1982)

The "win-win" approach is not mentioned in any of the ethical codes, but it represents a basic premise of family and divorce mediation. In reality, it may be possible to protect the interests of one spouse only by disfavoring the interests of the other spouse.

**\* A win-win result in a case in which domestic abuse has occurred is unethical because it increases the potential for further abuse.**

Domestic abuse, particularly physical violence, is often identified by mediators as a stumbling block to a settlement. In the no-fault framework of mediation, it is addressed with "equal" blame-placing, "emphasizing that 'it takes two to fight' but only one to 'unlock.'" Campbell and Johnston, Impasse-Directed Mediation with High-conflict Families in Custody Disputes, 4 Beh. Sci. and the Law 217, 232 (Spring 1986).

The underlying assumption is that the victim can change the abusive dynamic just as easily as the abuser. However, Walker's study demonstrated that victims could not, by changing their

behavior, prevent either physical violence or psychological abuse. While they could sometimes defer it by avoiding conflict with their abusers, victims could never prevent it. Id.

A mediator may attempt to "unlock" a victim by trying to help her formulate an agreement that will "prevent" domestic abuse. In a custody case, for example, an abuser may blame his behavior on the victim's refusal to provide him with unlimited, informal, equally shared access to the children. However, arrangements that call for the victim to change her behavior in response to these claims will not end the abuse. In custody cases, there is an added drawback of detriment to children. Such agreements would be affirmatively harmful and, if approved by the mediator, would impugn the integrity of the process.

**\* A win-win result is more likely to fail when domestic abuse has occurred because, by definition, it allows the abuser to avoid accountability for his actions.**

Mediation is a functional, "future-oriented" process. It focuses on formulating a workable result that will carry the participants into the future. However, a non-blaming mediated agreement that ignores domestic abuse in the parties' relationship is neither workable nor likely to be long-lasting. Abusers themselves note that the first step toward a change in behavior involves an admission of wrongdoing, which is not required in a mediated agreement.

--A study of high-conflict families, many of whom mediated their agreements, demonstrated continued conflict between the parents, with corresponding harm to the children, two and a half years after agreements were finalized. Center for the Family in Transition, Ongoing Post-Divorce Conflict in Families Contesting Custody: Does Joint Custody and Frequent Access Help? (unpublished paper presented at the 65th annual meeting of the American Orthopsychiatric Association, 1988).

--A study of criminal mediation agreements in Brooklyn found that domestic abuse cases were four times more likely than other types of criminal cases to result in repeated offenses. Cook, Neighborhood Justice Centers: What Types of Disputes are Appropriate? 12 (paper delivered at the annual meeting of the Law and Society Association and the Research Committee on Sociology of Law, Madison, Wisconsin, 1980).

Mediated agreements that do not hold the abuser solely responsible for the abuse are more likely to fail, and it would be unethical for a mediator to promote such a result.

### Conclusion

Domestic abuse inflicted by one participant upon the other has a direct, integral, and negative impact on the integrity of the mediation process. When one disputant has abused another disputant, it is virtually impossible for the mediator to: 1)

determine the victim's voluntary participation in the mediation process; 2) achieve and maintain equality of bargaining power; 3) remain neutral and impartial; 4) maintain confidentiality and protect the victim; and 5) achieve a "win-win" result while still making the abuser accountable for his actions.

Mediation should be restricted to situations involving disputants with equal bargaining power who, after obtaining full knowledge of available alternatives, have freely chosen to participate in the process. In order to protect against the dangers inherent in the misuse of mediation, the neutral facilitator must not initiate mediation when the process cannot be conducted in compliance with existing mediation guidelines.

## RECOMMENDATIONS

1) The issue of abuse should never be mediated under any circumstances.

2) Family law cases involving parties between whom there was or is domestic abuse should not be mediated - no matter how seemingly long ago or how seemingly slight the abuse might appear.

3) Cases involving domestic abuse should be exempt from any mandatory civil or criminal mediation program.

4) Court personnel, mediators and advocates should join together to request an exemption for battered women.

## DOMESTIC ABUSE SCREENING

### INTRODUCTION

This is a screening guide for use in separate orientation caucuses with parties who have been ordered or referred to mediation. It should be used whether or not previous screening efforts have been made by attorneys or judges with whom the participants may have come into contact.

The woman should be interviewed first. If abuse is disclosed, the mediator and victim can plan for her safety while the abuser's meeting is still pending. The mediator should not disclose to either participant anything said by the other during the separate screening process.

### GOALS OF SCREENING

Mediators should NOT screen with the goal of possibly mediating cases involving "infrequent" or "minor" abuse. Any level of abuse by one partner against the other must be viewed as inappropriate by the legal system of which the mediator is a part. (See "An Overview of Domestic Abuse" and "Domestic Abuse: The Facts".) Instead, screening should seek to:

**IDENTIFY** domestic abuse in the relationship, whether the victim uses that term to describe the parties' interaction or not; and

**ASSURE** that the consequences of domestic abuse for family members--for the victim and any children--are addressed by a court.

Few participants will make this task easy. Abusers are not likely to readily admit misconduct. Nor will all victims present the image of a bruised and passive wife, allowing the mediator to immediately identify them as domestic abuse victims.

### **SCREENING FOR DOMESTIC ABUSE**

These screening guidelines have two components, first a document review and second, in-person screening. These can be incorporated into a routine that many mediators already follow. These guidelines assume that mediators will take the necessary time to orient the participants to the mediation process, as discussed.

#### **Document Screening**

**INFORM** all participants about the mediation process, making clear that they may register written objections to mediation or provide documentary support for an objection to mediation. Mediators may adapt for their own use "**A User's Guide to Mediation.**" (Located in the Appendix, p. A-4)

**REVIEW** any personal information forms or questionnaires that the participants may submit. If the mediator desires, a self-exclusion check-off may be incorporated into the personal information form. (See "**Screening Guide for Domestic Abuse,**" Form

1). However, the fact that neither party self-excludes using the check-off should not halt the screening process.

**EXAMINE** legal documents in the case. The mediator may obtain these from the participants as addenda to personal information forms, or from the attorneys. Legal files may often be reviewed at the court clerk's office. Look for:

--sworn statements from the victim or family members about domestic abuse;

--copies of police reports or medical records;

--references to police, criminal court or medical records;

--references to other legal proceedings, past and present, including proceedings for restraining orders or orders of protection. In some communities, petitions for such orders are denoted with a specific number or letter. Screening in these cases may merely be a matter of learning the case number.

The legal documents may also disclose other conditions requiring attention, such as the participant's need for an interpreter or other special advocacy.

**TERMINATE** the process after document screening if a written or verbal allegation of domestic abuse is identified at this stage. Follow the steps in **TERMINATING MEDIATION**, below. If no information as to domestic abuse appears, continue with the second stage of screening.

## In-Person Screening

The procedure outlined below should be followed if document review has not previously disclosed domestic abuse.

**SCHEDULE** separate orientation meetings with each participant. No appointment times except their own should be disclosed to participants, and they should be advised to arrive and leave separately.

**CONDUCT** face-to-face screening with each participant, using "**Screening Guide for Domestic Abuse.**" Questioning should be open-ended at first, and narrowed only later, if clarifying answers are needed.

**EXPLORE** victim concerns. If the victim has immediate safety concerns, the mediator should help her prepare a safety plan: calling on law enforcement, a friend or an advocate, or arranging for her to be accompanied to a meeting place with them. The mediator should give the victim a copy of "**Mediation and You**" (sample copies are available from the National Center on Women and Family Law) and refer her to the resources in it for further advocacy. The victim should be advised of when termination notices will be sent out so that she can plan for her safety, if necessary. (See "**Screening Guide for Domestic Abuse**").

**ADVISE** the abuser that he will be informed in writing, at a later date, as to whether mediation is appropriate. DO NOT confront him with allegations of domestic abuse. If he does acknowledge his responsibility for domestic abuse, recommend that he seek assistance

through existing community resources for abusers.

**REJECT MEDIATION** if domestic abuse is identified as having occurred. Terminate the process, using the steps as in **TERMINATING MEDIATION**, below.

## SCREENING GUIDE FOR DOMESTIC ABUSE

### ABUSER-VICTIM Demeanor

The abuser may be more articulate and better-prepared for the session. He may appear more believable because he is more articulate than the woman, and more reasonable because he is willing to compromise on matters at issue. For example, in a custody case, the abuser may be interested in joint custody, which is a far more favorable result for him than a custody arrangement that restricts his access to the children because his conduct is harmful to them and dangerous to the victim. He may express strong feelings for the children, but may not be willing to address issues such as the effects on them from his abusive behavior toward their mother.

The victim, by contrast, may be far less prepared to discuss matters in a businesslike way, or to immediately move toward compromise. She may appear less articulate or intelligent because her answers may be vague; she may be passive to the point of silence. Or, she may seem less reasonable because she is highly emotional, particularly if she has begun to talk about the domestic abuse. In a criminal case, this may translate into a preference for prosecution; in a custody case, this may translate into opposition to shared care for the children, or even to visitation.

A mediator's natural response to these demeanors may be to feel some irritation with the "less cooperative" participant. However, the mediation experience often represents an important contact with the judicial system for both parties. The mediator

must demonstrate concern about domestic abuse, and not appear to condone it by supporting the abuser's efforts to shift responsibility for his conduct.

For a more comprehensive discussion of domestic abuse and its effects on individual family members, see **"The Mediator's Guide to Domestic Abuse."**

## CONDUCTING THE INTERVIEW

### 1. Discussion of the mediation process

If the mediation program calls for voluntary participation, the mediator can begin by evaluating the participants' decision-making patterns, using their decision to mediate as an example. Even if mediation is mandatory, the mediator can still use questions 1(d) and 1(e), following up with questions on whether the woman has avoided the man since being ordered to mediate and why; or whether the man has tried to exert any influence over the woman, and how the woman responded.

a. How did the parties hear about mediation?

b. How was the decision to try it arrived at? Have they talked about mediation with one another? What did they decide, if anything? How did they decide it?

c. Before seeing the information sheet, how did each envision the process as working?

d. Review with each participant the general information sheet, **"What You Should Know About Mediation."** Having done so, does either

think mediation is not "right" for them? If not, why not?

Responses to listen for:

From the woman:

In addition to identifying language or mental competence barriers, the mediator should be alert to any of the following responses. They may indicate domestic abuse, and warrant closer screening:

--he said they should try it; she was uncertain about what mediation was until she saw the information sheet

--she did not talk to him about being ordered into mediation, because he gets angry at her when they try to talk

--having reviewed the information sheet on mediation, she has doubts about whether to go on (follow-up: why?)

--they talked after they got the sheet, and the man "got upset" when she expressed doubts; or he contacted her and tried to influence her views on going forward with mediation

--he abused her when she raised doubts about it

--she says she wanted mediation but does not know anything about it; or she agreed mediation to avoid trouble (what trouble?)

--she has no attorney, and this was why she chose mediation; or,

--she has an attorney who advises against mediation.

From the man:

Again, the mediator should screen for language or mental competency difficulties. In addition, while the man may not become violent, the mediator should watch for the following as possibly indicating the presence of domestic abuse:

--the man appears for the woman's meeting as well as his, either with her, or without her knowing he would be there. (The mediator should not confront him on this, but should screen both with this in mind)

--his account of the decision-making process diverges greatly from hers, particularly if he perceives it to have been a joint decision, while she feels "talked into it"

--he is more sure about wanting mediation than she was

--he wants to know what she told the mediator, and questions her veracity without even being told what she said

--he becomes angry if the mediator will not tell him what she said

--he brings up incidents he thinks she mentioned, and tries to minimize any harm that occurred

2. Discussion of the participants' relationship in general

Regardless of whether the previous inquiry has suggested domestic abuse, follow up with a discussion of how the two have resolved arguments in the past. The less egalitarian the decision making process has been, the greater the possibility that one

partner, more likely the man, has dominated the relationship and been abusive. The victim may talk openly about the abuse, but it is also possible that the mediator may suspect it (for example, if her answers are evasive and the man is waiting outside).

It is not likely that the man will openly acknowledge domestic abuse, so the mediator should not expect an admission. If the abuser becomes angry at the direction of the discussion, the mediator may wish to terminate the screening. Confrontation is not recommended.

- a. How are the two of them getting along now?
- b. What was their most recent argument about?
- c. How did they resolve it?
- d. What kinds of arguments did they used to have? What happened during the worst ones?
- e. What happens when one got angry with the other?
- f. What happened when one did not get his or her way because of something the other did?
- g. Did they get physical with each other when angry?

Responses to listen for:

From the woman:

--vague hints about discord ("we just couldn't get along," he "was always getting mad at me," which should be followed up)

--if arguments "got bad," she left (may have gone to an abused women's shelter or gotten a restraining order)

--if she did not do something to his satisfaction (have dinner ready, or clean the house right) he withheld "rewards" from her, like refusing to let her eat or sleep, or preventing her from seeing friends

--if he disliked her friends or family, he always made a big scene when she saw them; or else she stopped seeing them in order to avoid a big scene

--if he did not like her having a particular job, she either quit or lost it because of his behavior to her or her co-workers, or because of his constantly contacting her there (variation: similar pressure on her to drop out of school or go stop engaging in other activities, such as hobbies)

--if they disagreed about how to handle money, it wound up with him having control over it, her getting an allowance from him, and her request for a separate account denied

--if they disagreed about his having weapons in the house, he continued to have them there

--if, once they've separated, he has come to her separate residence when she did not want him there

--if she didn't want to have sex, he forced her to, and she felt uncomfortable about it

--specific incidents of domestic abuse, including acts that were the basis of previous criminal charges or restraining orders. (It would be typical for her to have forgotten the specific

dates of arguments, to tell the story in a way that suggests she was "just as responsible" for what happened as he was, and to lack "evidence," such as medical records or a police report. However, often domestic abuse incidents occur during holidays or special events, such as family gatherings, and mentioning these may assist her in remembering).

From the man:

--highly divergent answers about the same issues: either he believed all decisions were made jointly and absolutely without coercion; or that no incidents ever occurred; or that she bullied him into the decision to mediate

--if abuse is acknowledged, it is minimized, with an emphasis on "mitigating" circumstances: how long ago it occurred, a subsequent reconciliation that suggests that "it wasn't that bad," or provocative conduct by the woman, such as her drinking, flirting with other men or leaving the children (or him) alone;

--alternative explanations for her injuries, such as accident or another assailant;

--great concern with what the woman told the mediator, to the extent that he is non-responsive to screening questions

--criticism of the woman, expressing doubts about her veracity, mental stability, morality, intellectual capacity, or parenting ability

--anger or amusement with the mediator for asking the questions, coupled with refusal to answer the questions at all

--self-defense claims or claims that the woman has been abusing him (the mediator should not confront him directly, but should note height and weight differences; either partner's specialized fighting training; evidence of comparative injuries; whether the man has lost a job, dropped out of school, or given up other activities due to her conduct; whether he has been isolated from seeing his own family or his own friends due to her conduct; whether he has been without shelter or money)

### 3. Checklist of questions on domestic abuse

If domestic abuse is disclosed or the mediator suspects it, it is essential to explore with the victim her concerns about the potential for imminent or severe harm to her or the children. This will allow the mediator to plan termination of the process in a way that will not exacerbate the danger to family members. The following checklist of questions should be covered:

a. Has he ever hurt her physically or tried to? How? (pushing, grabbing, pinching, shaking, hair-pulling, arm-twisting, throwing things at or near her, slapping, hitting, burning, smothering, punching, choking, kicking, beating, threats or injury with a weapon, rape, or attempts to do any of these)

b. Has he ever done any of these things to the children?

c. Has he ever tried to stop her from leaving? What has he done to stop her? Has he ever tried to throw her out of the house? How did he do that?

d. Has he ever taken the children and refused to let her see them? For how long? Where were they taken? What reason did he give?

e. Has he broken things? Her things? The children's things? How has he done it? What reason did he give?

f. What was the first instance of his hurting her (and/or the children) physically?

g. What happened during the worst incident?

h. What happened during the most recent?

i. If it happened more than once, how frequently did it happen?

j. Does he have access to weapons? What kind of weapons?

k. What has happened when he has wanted to have sex and she has not?

l. Did they ever engage in forms of sex that she felt uncomfortable about, or that she objected to?

m. Does he ever try to frighten her deliberately, knowing she doesn't like this? What has he done?

n. Has he ever destroyed things that she or the children specifically care about? (Her pets? Her clothes? The children's toys?)

o. Does he ever try to convince her that she is mentally ill?

p. Does he call her frequently to check up on her, or does he accuse her of having affairs with other men when she is not?

q. Has she wanted to change her routine in any way--get a job

outside the home; go to, or back to school; learn to drive? What has his reaction been?

r. Has she ever wanted her own bank account? If so, does she have one? If not, why not? What does he think of the idea?

s. Does she have friends of her own, or family members of her own, that she sees regularly? How does he behave around them?

t. Have any of her family members or friends expressed concern for her or the children's safety?

u. Has she ever been to an abused women's shelter?

v. Has she ever asked for a restraining order or order of protection?

w. Has she, or anyone else, ever called the police about her abuser? What happened if they did?

x. How is her health? Has she had any emergency room visits? What for?

#### CONCLUDING THE INTERVIEW

After meeting with both participants the mediator may be certain about whether domestic abuse has or has not occurred. However, some cases will present uncertainties. Because of the important issues of abuser accountability, victim safety, and the significance of the legal rights involved, all doubts should be resolved against mediating. The following guidelines should be used in concluding the interview.

--ADVISE the woman that mediation will be terminated and give her the booklet, "Mediation and You."

--HELP THE WOMAN PLAN PLAN her next step. Ask her the following:

\* Is she concerned about her immediate safety when she leaves the building, or later, when he finds out that mediation has been terminated? Discuss alternatives to giving the abuser notice on the spot. Urge her to obtain legal advice if she has questions about the children.

\* Does she feel physically safe in her living situation? Has she consulted an abused women's program about her alternatives?

\* Is she represented by an attorney? If not, does she anticipate getting one? When? Emphasize the legal referrals available to her.

--MEET with the man. During this meeting:

\* If the abuser also indicates an unwillingness to mediate, the mediator may wish to terminate mediation on the spot, and give him the general termination notice and referrals.

\* If the abuser still wishes to mediate, the mediator should indicate that a decision about further sessions has not been made, and that the man will be contacted in writing about whether mediation will proceed further. He should be notified of termination by mail, using of the general notice and referrals.

## TERMINATING MEDIATION

**NOTIFY BOTH PARTIES.** Send a written notice to both parties, separately, advising each that the case can not be mediated (See Form #2, Appendix).

**CONTACT WITH COUNSEL.** The mediator should always communicate with the participants' counsel to inform them that mediation will be terminated. Unless the case involves an emergency and the victim cannot be consulted, the mediator should discuss with her the timing and nature of the communication. An immediate telephonic or verbal notice should always be followed up with a written communication.

**CONTACT WITH THE COURT.** If the case was referred for mediation by the court, it is also essential for the mediator to notify the court that mediation is being terminated. Unless a formal system of notification is in place, the mediator should consult with the victim and her attorney on the timing and nature of the notice.

**TRACK** the case with an indication on the file, particularly if the mediator is in a program with a large caseload. A flagging system should permit the case to be processed more quickly if mediation is suggested again.

**Where There Is A First-Time Disclosure**  
**of Domestic Abuse During Mediation**

Despite the most careful screening, mediators may nonetheless unwittingly become involved in custody mediation when domestic abuse has occurred between the participants. Regardless of how the abuse is disclosed, or the nature of the abuse, the mediator should not mediate the case further.

Instead, when domestic abuse is disclosed to the mediator for the first time, a number of options are possible. There is no single correct response; it will depend on the circumstances of the disclosure. However, at minimum, the mediator should consider the following:

**SEPARATE CONSULTATION CAUCUSES.** If domestic abuse is mentioned during a joint mediation session, the mediator should NOT confront either participant about the incident directly. Instead, the session should be ended as soon as is safely possible and caucus with each participant in a private meeting. At this point, the mediator can consult with the victim about the propriety of other steps that she may wish to take.

**REPORT TO THE POLICE.** If domestic abuse occurs in the mediator's presence, or if it is reported to the mediator during a joint session, the victim should make the choice on whether to call the police. However, in emergencies, the mediator should call the police and report the domestic abuse. Many local police departments have special policies for handling domestic abuse cases, available through police public information offices or local domestic abuse

prevention programs. The mediator should become familiar with these policies and the individuals who staff any special police programs.

**REFERRAL TO THE DOMESTIC ABUSE PREVENTION PROGRAM.** In every case, the mediator should either refer the victim to a domestic abuse prevention program in the community, or assist her in making telephone contact for immediate assistance. The mediator should not attempt to provide one-on-one counseling for the victim. Community programs will be the most familiar with shelter options, emergency medical care availability, day care options and counseling programs that the victim may require. A summary of available agencies is listed in "Mediation and You."

**NOTIFY BOTH PARTIES.** Send written notice to both parties separately that explains that the case can not be mediated. (See Form #2, Appendix).

**CONTACT WITH COUNSEL.** The mediator should always communicate with the participants' counsel to inform them that mediation will be terminated. Unless the case involves an emergency and the victim cannot be consulted, the mediator should discuss with her the timing and nature of the communication. An immediate telephonic or verbal notice should always be followed up with a written communication.

**CONTACT WITH THE COURT.** If the case was referred for mediation by the court, it is also essential for the mediator to notify the court that mediation is being terminated. Unless a formal system of notification is in place, the mediator should consult with the victim and her attorney on the timing and nature of the notice.

**TRACK** the case with an indication on the file, particularly

if the mediator is in a program with a large caseload. A flagging system should permit the case to be processed more quickly if mediation is suggested again.

APPENDIX

**FORM 1: SELF-EXCLUSION PROVISION**

\_\_\_\_ I have looked at the booklet "**Mediation and You.**" I do not want to use mediation to settle my case.

\_\_\_\_ I do not want to mediate unless I have a translator who can speak \_\_\_\_\_ (fill in language).

I would like \_\_\_\_\_ (fill in name) to be my translator.

**FORM 2: TERMINATION NOTICE**

NOTICE OF TERMINATION FROM MEDIATION

TO: (insert participant names)  
FROM: (insert name of mediation program)  
RE: (insert case number)

We have reviewed your case carefully. As we have told you, mediation is not the best way for everyone to settle their disputes. In our judgment, your case would be better resolved some other way. (OPT FOR MANDATORY MEDIATION: The court has been notified of this, so you do not have to tell the judge yourself.)

You should talk with your lawyer, if you have one, on what to do next. If you do not have a lawyer, attached is a list of community resources that may help you as you plan what to do next. If either of you has any other questions, please contact (insert supervisor name and phone number).

## COMMUNITY RESOURCE SHEET

### Legal Help

--legal services or legal aid office

--bar association pro bono or private lawyer referral service (including bar associations serving specialized communities such as people of color, women, gay, lesbian, single-parent, mentally disabled people, or youth)

--district attorney's office/public defender's office

--state child support collection agency

--lay special-interest groups for parents

--victim advocacy groups

### Financial Help/ Housing

--public or nonprofit shelter

--state, county or city public assistance or housing agency

--low-income housing advocacy groups

### Counseling

--abused women's shelter, counseling services, or hotlines

## A USER'S GUIDE TO MEDIATION

### INTRODUCTION

You have been referred here to try to settle your legal dispute through mediation. This booklet talks about what mediation is and isn't. While mediation is a good idea for some people, it isn't for everyone. Before you read this booklet, you should contact one of the "Legal Help" resources listed at the end to make an appointment to help you decide whether or not to mediate. Then read the booklet, and think carefully about whether mediation will help your situation.

You should feel free to let the mediator know if you have doubts about mediation, at any time, either by phone or in writing. In addition, each of you will have a separate, **private** meeting with the mediator to talk about whether mediation is right for you. The meeting is a good time to bring up your doubts and questions about mediation.

You will not start mediation until after the meeting, and even then only if the mediator and both of you agree. Then, after that, if you do not want to continue mediating, you can stop. In mediation, YOU make all of the important decisions.

## WHAT MEDIATION IS

**MEDIATION IS A WAY OF SETTLING DISPUTES.** It is different from having the judge or your lawyers do it, though. In mediation, you and your partner try to settle your differences through a neutral third person or persons. The neutral person is called a mediator. The mediator isn't as involved in your case as you are, and will try not to take sides. He or she will encourage each of you to pay attention to each other's concerns. He or she can help you decide where you agree and disagree, help you settle the disagreements, and write up any agreements you make.

If you two do work out an agreement, you will each take it to your own attorneys. They will talk with you about the agreement, to make sure you understand and are willing to follow it. If the agreement is all right with you, the attorneys will turn it into a legal document, and do what is necessary to make it a court order. The court order will be binding on both of you. (In some places, if your lawyers agree, the mediator may take the agreement to the judge, who signs it and makes it a court order. Even if the mediator can take papers directly to the judge, he or she will remind you that you still need to go over your agreement with a lawyer.)

## WHAT MEDIATION IS NOT

**MEDIATION IS NOT LEGAL ADVICE OR REPRESENTATION.** Your mediator may be a lawyer, but IS NOT YOUR lawyer. Your mediator will take no one's side. He or she will try to help you reach an agreement, and that's all. If you want to talk with someone who will look at things with only your interests in mind, you must see a lawyer of your own in addition to the mediator.

**MEDIATION IS NOT MARRIAGE OR COUPLES COUNSELING.** Mediation is for people who know they aren't going to be together any more, and who have to talk about the practical, legal part of breaking up. If you both want to talk about a reconciliation, you can go to a marriage or couples counselor.

**MEDIATION IS NOT THERAPY.** Mediation is a way to settle your legal dispute--that's all. Your mediator may be a mental health professional, like a psychologist, or a social worker. You may feel that one of you has a mental health problem that needs treatment. However, you SHOULD NOT EXPECT mediation to provide mental health treatment for such problems. If you've been upset about the legal dispute, you certainly may feel in a better frame of mind after mediation, simply because things are resolved. However, that's NOT the primary goal of mediation.

**MEDIATION IS NOT ALWAYS CONFIDENTIAL.** In some places, a mediator is legally prohibited from telling about mediation discussions, or releasing files on you, without your permission. In other places, the mediator must answer court subpoenas. You

should ask your attorney about the law in your community.

Whatever the answer is about the law, you should realize that in mediation you usually **cannot** keep information private from **your partner**. In other words, if you tell the mediator something, you must assume that the information will also be given to your partner. Sometimes this does not matter, but if the case goes back to court, your partner might try to use the information.

**MEDIATION IS NOT FOR EVERYONE.** Mediation is a better way to resolve disputes for some people, but it doesn't work for everyone. If you feel you cannot talk to or trust your partner, for whatever reason, mediation may not be for you right now. If you are trying mediation because you believe it would be better or cheaper than having a lawyer, you should keep in mind that seeing a lawyer separately is important for each of you.

Your mediator is:

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You will be meeting your mediator on:

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**A REMINDER:**

Since this meeting is meant to be a chance for you to talk privately with the mediator, please don't come with your partner. There will be plenty of time for you to communicate with each other later, if you do mediate.

## Mediation in Known Domestic Abuse Cases

### **Required Conditions**

If the mediator knows that domestic abuse has occurred, he or she should reject mediation unless the following, specific pre-conditions are first met in order to insure equality of power, knowing consent, voluntary consent and protection of the victim:

\* **Concurrent independent legal representation** for each participant.

\* **Victim has consulted with a battered woman's advocate** at a local battered women's shelter or counseling program.

\* **Written consent of all parties and counsel** agreeing to mediation

\* **Entry of an order of protection or restraining order** in which the abuser agrees not to harm the victim. NO mutual order to this effect should be substituted. A mutual order wrongly implies that the victim is as responsible for stopping the abuse as the abuser, and gives him an additional weapon against her (the threat of arrest).

\* **Safety planning** for the victim, including at minimum:

--**Shuttle sessions.** Always have the parties meet with the mediator separately. Schedule each participant's mediation sessions for different days, encourage participants to keep appointment times and dates confidential, and ensure each that participant arrives and leaves separately.

--**Precautionary emergency measures.** These may include a signal for summoning emergency assistance, possibly

through a buzzer or other way of signaling the reception desk, switchboard or building security; or having supervisory monitoring or security patrols during mediation.

\* **Third-party emotional support** for each participant. The abused woman, in particular, should be encouraged to bring an advocate or friend with her to her sessions.

\* **No confidentiality** as to threats or acts of harm that occur during mediation. Instead, the mediator should warn the parties that such actions WILL BE REPORTED to law enforcement authorities immediately.

#### **Substantive Conditions**

Mediators should not recommend or sanction any agreement that creates a safety risk to the victim, or that risks making the children continuing witnesses to domestic abuse. These substantive guidelines will help the mediator to formulate recommendations if the parties request them, and to evaluate agreements the parties make.

\* **Reject paternity mediation** if either party disputes the issue. The legal rights and obligations that result for parents, and the potential emotional damage to the child if an erroneous paternity agreement is made, involve significant interests for all of the parties. These should be decided through the legal system, according to state law.

\* **Advise against joint custody in any form** in domestic abuse cases. There was an initial assumption among many mental health and legal professionals that a child always benefits from an ongoing

relationship with both parents, and that joint custody is to be preferred for this reason. However, more recent research indicates that where there is continuing conflict between the parents, including domestic abuse, joint custody is acutely harmful to children. The financial stress of maintaining two households also adds to the burden of low-income families. Since the best interest of the child remains the standard for custody determinations in every state, even laws that "favor" joint custody would not mandate it in domestic abuse cases. Also joint custody can be harmful to the battered woman because it permits the abuser to use joint decisionmaking concerning the children to pressure the victim.

**\* Explore supervised visitation options.** It may be important for a third party to be present during the abuser's visits, to deter a child snatch or to avoid other harm to the child and/or the abused woman. If no agency is available for this purpose, a mutually agreeable family member or other adult with whom the child feels at home (a neighbor or day-care provider, for example) are possibilities to explore.

**\* Limit parent-to-parent contact,** recommending that the parties utilize third parties for pick-up and drop-off of children. As a practical matter, these arrangements can be useful in preventing a reoccurrence of abuse, and may also reinforce the notion that the abuser's future relationship is with the children, not with the victim.

**\* Urge specificity** in the times, dates and places for visitation pick-up and drop-off, if any. These will prevent manipulation of the victim and minimize disruption for the children.

\* **Avoid language** that requires both parents to facilitate parent-child contact, or that imposes any punitive sanction on either for failing to do so. It is not possible to mandate "friendly parent" behavior between parents whose interaction has involved the infliction of physical harm on one by the other.

#### **Grounds for Termination of Mediation**

Terminate the process if:

- \* either participant no longer has counsel;
- \* either participant comes to the other participant's session, or sends someone to it;
- \* either participant commits or threatens a criminal act during mediation, including possession of a weapon, harassment or attempts to injure the victim, the mediator or any other person
- \* either participant is arrested for any reason;
- \* either participant requests that mediation stop; OR
- \* the mediator believes termination is appropriate.