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Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators

Alexandria Zylstra

Of all marriages referred to court-based divorce and custody/visitation mediation programs, fifty to eighty percent involve domestic violence.1

I. INTRODUCTION

As the popularity of court-ordered mediation for custody disputes increases, the need for an effective way to address cases involving domestic violence becomes more critical. The ongoing debate over whether cases involving domestic violence should be mediated, while relevant, amounts to an exercise in futility. Courts across the country are permitting, and even mandating, such cases be mediated, often unaware that domestic violence is even present. Further, this debate begs the question of how mediators and mediation program administrators should handle such cases that will inevitably come through their doors. To address the special issues that may arise in such cases, courts and mediation programs implement various screening mechanisms to determine appropriateness and style of mediation.

As more and more jurisdictions implement mediation alternatives for family cases, the need for effective screening methods becomes a critical linchpin to ensure the process and potential outcome are fair, voluntary, and do not further endanger victims of domestic violence, the children involved, or the mediator.2 Nonetheless, the present state of screening nationwide paints a dismal picture. The most recent study of mediation programs found that while eighty percent of mediation programs utilized by family courts do some form of screening for domestic violence, usually in the form of written or oral questions, the mean number of questions relating to domestic violence is only 3.5.3 While quantity of questions seems small, the quality

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3. The term screening is used generally in this article to refer to statutory and court rules, as well as, mechanisms used by individual mediators and mediation program administrators to assess the appropriateness of mediation. The National Council of Juvenile and Family Court Judges’ Model Code on Domestic and Family Violence and the Academy of Family Mediators’ Policy (attached as Appendix A) both impose an affirmative duty upon mediators to screen for domestic violence. Surprisingly, however, the ABA’s Standards (attached as Appendix B) only require a mediator to “make a reasonable effort” to screen cases for domestic violence. See infra app. B at Standard 11(c).

of the questions is even more critical. As explored later in this article, such a shortfall in screening represents "a serious shortcoming and raises questions about the comprehensiveness and adequacy of screening in general." Add to this dismal picture of screening practices the fact that very little is written about the practical aspects of screening for domestic violence. Although many books and journal articles, specifically devoted to family mediation, tout the importance of screening for domestic violence, few offer guides as to how to conduct the screening or evaluate the results of the screening.

Presented with such a dearth of standard practices and literature, family mediators have little guidance in whether and how to address cases involving domestic violence. Thus, this article sets forth a mediation screening framework that mediators and mediation program administrators can use to evaluate whether cases are appropriate for regular mediation (joint session without special safety measures), some modified form of mediation, or should be excluded from mediation. Such a method will better ensure a safe and fair mediation experience.

Part II briefly examines the controversy surrounding the mediation of cases involving domestic violence, concluding that the arguments against mediating such cases suffer from serious flaws. Part III examines the present state of screening methods across the country, both at the state and local levels. Although not a complete state-by-state comparison, this section gives samples of the different methods currently in place via state laws or court rules, and local court rules. After concluding that mediation screening for domestic violence is, at best, extremely piecemeal and varies greatly in effectiveness and scope, and that screening procedures are the “cornerstone of safe mediation,” Part IV proposes a model screening protocol for family mediators and mediator program administrators to use in assessing cases before the mediation process begins.

4. Id.


7. This article does not attempt to describe how to mediate cases involving domestic violence, only how best to screen cases and what precautions need to be taken to increase the likelihood of a safe and fair process.
II. THE CONTROVERSY OVER MEDIATING CASES INVOLVING DOMESTIC VIOLENCE

The controversy surrounding mediation of cases involving domestic abuse has existed since mediation entered the family law arena. Soon after the 1976 Pound Conference, the concept of family dispute mediation began appearing throughout the country. At the Pound Conference, attorneys discussed the potential benefits of family dispute mediation - a process where a neutral party would assist the parents in resolving their custody and visitation issues as an alternative to litigation. The trend became so popular, while usage rates remained low, that California became the first state to enact mandatory mediation statutes for contested custody cases in 1980. Mediation advocates began touting mediation’s ability to increase the participant’s self-determination, promote the best interests of the children through higher quality parenting plans, and potentially reduce the economic and emotional costs involved in resolving family disputes. Mediation critics, particularly domestic violence victim advocates, challenged this process.

A. The Dynamics of Domestic Abuse

Domestic abuse is defined as the use of force or other means to intimidate or control an intimate partner. Domestic abuse is not about conflict, but about a need to control and dominate. Violence in a relationship creates more than physical effects. Abuse can cause post-traumatic stress disorder in which the primary manifestations are psychological hyper-arousal, re-experiencing, and avoidance. When the abuser is a person the victim trusts, often professing love, comfort, or reassurance, the result is a dissociated coercion. To make sense of this dichotomy, the victims may psychologically minimize the violence, or believe they

11. Abuse can include a range of non-physical, as well as, physical actions such as: “relentless criticism, controlling behavior, imposed isolation, withdrawal, jealousy, humiliation, intimidation, name-calling, mind games, shouting, [destroying property], servitude, threats, guilt-tripping, slapping, unwanted touching, pushing, punching, restraint, rape, mutilation, strangulation, and death.” Kathleen O’Connell Corcoran & James C. Melamed, From Coercion to Empowerment: Spousal Abuse and Mediation, 7 Mediation Q. 303, 305 (1990). The generally accepted classifications of abuse include: physical, sexual, emotional, financial/economic, and property abuse. Karla Fischer, Neil Vidmar & Rene Ellis, The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 S.M.U. L. Rev. 2117, 2121 (1993). While physical abuse is most commonly identified with domestic abuse, other forms, only recently, have gained acceptance within the violence rubric. Id. Emotional, financial (controlling access to money or job), and property abuse (including harming pets) are all techniques abusers use to gain control and dominance over the victim. Id. at 2121-22.
12. Fischer, Vidmar & Ellis, supra n. 11, at 2158. “To structure mediation as if the cause of abuse is conflict is to artificially frame the issue of battering.” Id.
14. Id. at 342.
are to blame for the violence, thus making it very difficult for an untrained mediator to recognize the existence of a violent relationship. Additionally, domestic abuse may be such that the control and dominance renders victims unable to bargain in their own self-interest or in the interest of the children.

**B. Criticisms of Mediating Cases Involving Domestic Violence**

Given these dynamics of an abusive relationship, critics argue that mediation of these cases is inappropriate and may be harmful. The primary criticisms, most closely related to the screening issue, include: a lack of trained mediators able to recognize the symptoms of domestic violence; a fear that the mediator may mediate the occurrences of abuse thus implying the victim holds some responsibility and, thereby, negotiating authority for the battering; a process concern that the grossly unequal bargaining power inherent in violent relationships renders one party unable to meaningfully participate in the process; and a safety concern that mediators are failing to adequately protect victims throughout the mediation process or punish the abuser. Even assuming these concerns can be allayed, critics continue to assert a societal concern that mediation is far too brief an encounter to adequately address and counteract the effects of long-term abuse and the socially sanctioned domination of men over women which results in submission, placating, obliging, and accommodating behavior on the woman's part.

1. Unequal Bargaining Power

Mediation is generally defined as a process in which an impartial third party assists disputants in resolving a controversy, but that third party lacks authority to impose a solution. Such a definition assumes each party will participate equally to arrive at a mutually beneficial result. In an abusive relationship, however, mutual participation may be very difficult for a victim because the abuser may have consistently silenced him/her throughout the relationship and the victim may fear retribution if true needs are expressed. If one party fears the other, it is unlikely that party can mediate on equal bargaining ground. Critics argue that, in relationships in which the imbalance of power is great or unrecognized, such as in

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15. *Id.* at 343.
16. *Id.*
18. Corcoran, *supra* n. 17.
20. Fischer, Vidmar & Ellis, *supra* n. 11, at 2161.
21. *Id.*
cases involving domestic violence, equality of participation and fairness are not only compromised, but the process may, in fact, present a danger of physical harm to the victim.23

Victim advocates argue that a fundamental inequity in power, control and decision-making exists in relationships involving domestic abuse.24 Author Linda Girdner notes, "[s]pouse abuse is an insidious form of power imbalance that strongly jeopardizes the ability of one or both parties to be able to participate meaningfully in mediation."25 Authors Douglas Knowlton and Tara Muhlhauser argue that even one incident of violence forever changes the "equation of intimacy," and that bargaining on an equal basis becomes impossible.26 Once the balance of power is so greatly altered, critics argue that victims' fears of violent retribution may prevent them from asserting their own interests, thus removing an important element of mediation.27 Finally, critics caution that merely implementing safety precautions does not remove the "psychological terrorism" that may be perpetuated with a look, movement or word during the mediation.28

2. Process Flaws

a. Lack of appropriate mediator training

Another criticism focuses on the present lack of widespread domestic violence training available to mediators. Such a flaw potentially renders mediation of such cases either futile or actually dangerous. For example, because mediation is designed to assist the parties to resolve conflict, an untrained mediator may attribute the abuse to conflict. However, in cases involving a history of domestic violence, the conflict is only the pretext for abuse, which really stems from a need to dominate and control.29 Thus, an untrained mediator attempting to resolve the conflict may, in fact, ignore the real problem. Or, critics fear that mediators may be

28. Knowlton & Muhlhauser, supra n. 26, at 267-68. Such control creates a "culture of battering." Fischer, Vidmar & Ellis, supra n. 11, at 2117.
29. Fischer, Vidmar & Ellis, supra n. 11, at 2158.
cornered into a position of mediating the occurrence of abuse, which inappropriately assigns responsibility to both the victim and the abuser.

b. Failure to protect victims and hold abusers accountable

Finally, writers such as Karla Fischer, Neil Vidmar and Rene Ellis argue there is a false assumption among mediators that mediation can protect a battered woman from future abuse, when such protection is highly unlikely.30 Further, some argue that mediation cannot overcome the long-standing effects of an abusive relationship within the context of such a brief encounter. Regardless of the power-balancing techniques the mediator uses, critics argue that believing such techniques will actually reduce the power imbalance and ensure a safe and fair settlement is absurd because it presumes that mediators, in a brief amount of time, are able to accomplish what takes trained psychologists years to accomplish working with violent offenders, and with abuse victims.31 Not only is this transformation unlikely, critics argue that such false assumptions may, in fact, greatly increase the risk of danger to the victim with this type of intervention by an untrained mediator.32

In a related argument, not only does mediation fail to stop the violence, but the future focus of standard mediation styles, rather than a focus on past behavior, actually absolves the abuser of accepting responsibility for past behavior.33 The perpetrator may be excused for his actions under this model and further, critics argue, this may be perceived by the victim as the mediator condoning the behavior, thus jeopardizing mediator neutrality.34

C. Flaws of the Criticisms

Two vital flaws in the critics’ arguments flow from a misunderstanding of the theory of mediation, and an inaccurate comparison to an idealistic litigation model.

1. Misunderstanding the Goals of Mediation

An example of the first flaw can be found in Fischer, Vidmar and Ellis’ article, The Culture of Battering and the Role of Mediation in Domestic Violence Cases, which compares the ideologies of mediation, as they perceive them, with the

30. Id. at 2164-65. Despite these criticisms, studies suggest that mediators today are more sensitive to the effects of family violence on the mediation process and most now see techniques such as separate mediation and private screening as essential tools in handling these cases. Pearson, supra n. 6, at 324-25.
31. Maxwell, supra n. 1, at 344. These critics appear to have the support of the American Psychological Association, which, in 1996, advised against the use of mediation when family violence is an issue, citing lack of psychological training on the parts of mediators, judges and lawyers. Id. at 349-50.
32. Id. at 344; Mary Pat Treuthart, In Harms Way? Family Mediation and the Role of the Attorney Advocate, 23 Golden Gate U. L. Rev. 717, 722 (1993) (focusing on reaching agreement and avoidance of blame fails to stop the violent behavior or protect the victim).
34. Treuthart, supra n. 32, at 726.
culture of an abusive relationship to illustrate the incompatibility of the two. However, of the eight comparisons, three of them are based on practices not taught in standard mediation training programs, such as the concept that batterers need to be coerced into mediation and a belief that a written agreement will end the present violence or end future violence.  

Three of the other problems discussed would be overcome by basic mediator training: an inaccurate view that abuse arises out of conflict, a false assumption that each party automatically participates equally in the process, and a false belief that private caucusing will necessarily encourage victims to reveal their real needs.

Their final two criticisms address mediation's future focus and, thus, its failure to punish the abuser, and mediation's avoidance of blame and fact-finding. Both of these arguments also suffer from the same flaw of failure to understand the goals and purpose of mediation. Most family mediation programs do not purport to be able to end the violence in an abusive relationship nor do they set about attributing blame to either party. Mediation is not advertised as a panacea for deep-rooted psychological, chemical, or other problems. Rather, mediation is designed as an alternative to present conflict resolution models, specifically litigation, which leads to the second flaw in the critics' arguments.

2. Incompatible Comparisons

The second mistake critics make is comparing the best possible litigation scenario (where truth is found and justice served) to the worst possible mediation scenario for cases involving domestic violence (joint sessions with an untrained mediator). When compared to a more realistic picture of family law litigation, however, mediation compares well to litigation, which truly fails battered spouses. First, the idealistic view of litigation ignores the reality that the judicial system continually neglects victims by failing to provide legal representation. It is, for example, unrealistic to compare mediation to an attorney-represented litigation since litigants lack representation in forty to ninety percent of divorce cases. Secondly, women in the litigation setting can be seriously disadvantaged by evidence of frequent moves (to escape the violence), perceived abandonment of the children, or an apparently uncooperative attitude. The adversarial process also fails to protect children from violent homes, particularly where the abuser has not physically harmed the children.

Litigation also tends to increase hostility, threats, blaming and fear, while doing nothing to improve parties' communication skills or otherwise empower the

35. The authors cite the following three ideologies of mediation: “6. IDEOLOGY OF MEDIATION: Batterers need to be coerced into mediation... 7. IDEOLOGY OF MEDIATION: The novelty of a written agreement detailing the rules of the relationship will end the violence... 8. IDEOLOGY OF MEDIATION: The process of mediation can protect battered women from future violence.” Fischer, Vidmar, & Ellis, supra n. 11, at 2163-65.
36. Id. at 2158-63.
37. Pearson, supra n. 6, at 321, (evaluating a national project from 1993 to 1995, sponsored by the Center for Policy Research, to determine how mediation programs have responded to criticisms that cases involving domestic violence should not be litigated).
38. Corcoran & Melamed, supra n. 11, at 308.
39. “The judicial mind has not accepted that domestic violence is, in fact, child abuse.” Id.
parties.\footnote{Corcoran, supra n. 17.} Despite arguments that mediation may make the victim feel guilty or unacknowledged, the courtroom often creates an even greater risk of victim humiliation, discredit and loss of control.\footnote{Knowlton & Muhlhauser, supra n. 26, at 266.} Finally, while many critics argue mediation’s future focus excuses the batterer’s actions, litigation in fact encourages the abuser to deny past behavior.\footnote{Stephen K. Erickson & Marilyn S. McKnight, Mediating Spousal Abuse Divorces, 7 Mediation Q. 377, 385 (1990).}

Mediation, on the other hand, offers several advantages not available in the litigation context. For example, a long divorce proceeding may not meet the needs of parties in a violent relationship, and mediation may offer quicker results and may also address any immediate or unexpected needs.\footnote{Joanne Fuller & Rose Mary Lyons, Mediation Guidelines, 33 Willamette L. Rev. 905, 906 (1997).} Additionally, criticisms leveled against mediating cases involving domestic violence ignore the reality that parents will inevitably have future contact over parenting issues, since the likelihood of termination of parental rights in abuse cases is extremely rare.\footnote{Erickson & McKnight, supra n. 42, at 377.} The adversarial litigation model, with a focus on attributing blame and a win-lose outcome, does little to foster conciliatory relations between the parents.

Further, while litigation is rigid in its structure and rules, mediation programs vary widely and can be structured to address the issues that arise in the separation of relationships involving domestic violence.\footnote{Dalton & Schneider, supra n. 5, at 425; Corcoran & Melamed, supra n. 11, at 312.} In fact, one of the earliest advantages of mediation included its dynamic potential to be shaped to meet the needs of the clients.\footnote{Irving & Benjamin, supra n. 5, at 451.} As a final note, although scholars may be greatly concerned with the mediation model, at least one study indicated process satisfaction rates among domestic violence victims are higher with mediation than with attorney-negotiated settlements.\footnote{King, supra n. 8, at 444.}

\textit{D. Conclusions}

While critics may argue that mediation is never appropriate for cases involving domestic violence, the more common approach is to assess power issues on a case-by-case basis paying particular attention to: duration, severity, frequency,
onset, abuse of alcohol or drugs, psychiatric disorder, and other family dysfunction. Research in 1990 by mediators Stephen Erickson and Marilyn McKnight concluded, based on more than 1400 cases, half of which involved emotional or physical abuse, that mediation can be successful in such cases if special precautions are taken, including the use of a highly experienced mediator. However, even Erickson and McKnight acknowledge certain cases are inappropriate for mediation. Those include cases in which: the abuser discounts the other party and refuses to acknowledge the other’s worth; abuse is ongoing during the mediation period; where either party insists upon carrying weapons or abusing substances; or either party violates the ground rules the mediator implements to ensure safety and power balance. Additionally, the existence or occurrence of abuse should never be mediated, as violence and coercion are not negotiable - a process whereby each party assumes responsibility and agrees to make concessions.

Given the flaws in the current criticisms regarding mediation of cases involving domestic violence, and after comparing mediation to the present litigation model, it is clear that, at least in some cases, mediation of such cases may be a more fair process with a greater likelihood of a desirable outcome. This leads to the question of which cases are appropriate for mediation and, if appropriate, how should those cases be handled. The following section examines the present state of statutory and court rules across the country and what predominant screening methods are used.

III. PRESENT STATE OF SCREENING METHODS

A variety of methods and rule sources are currently used to determine which cases have a history of domestic violence that makes them inappropriate for mediation. These include statutory exemptions, judicial exemptions, screening limited to whether prior criminal or civil orders of protection exist, and more extensive screening, either oral or written, directed toward the mediation client and/or client’s attorney. Additionally, the identity of the gatekeeper varies greatly. Under some screening models, the court (judge or court clerk) is the primary gatekeeper. In others, the burden rests with the attorney to raise the issue of domestic violence before a mediation order is entered. Still other jurisdictions impose the burden of screening upon the mediator or the mediation program administrator, either by specific statute or rules, or by a lack of any regulations covering cases involving domestic violence. Finally, vast differences also exist among the states regarding what, if any, safety measures should be implemented...

48. Irving & Benjamin, supra n. 5, at 217; Corcoran & Melamed, supra n. 11, at 310 (arguing such cases can be mediated by appropriately trained mediators, and the critics merely lack an understanding of mediation theory and practice). For arguments against mediating any case involving domestic violence, see Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991). While Grillo takes the extreme position of advocating exemption of all cases where any domestic violence is suspected, other writers advocate mediation in cases where instances of abuse was infrequent or isolated, and where the parties are able to mediate on equal footing. Gerencser, supra n. 22, at 59.
49. Erickson & McKnight, supra n. 42, at 388.
50. Id. at 387.
51. See Maxwell, supra n. 1, at 345.
before mediating such cases. Examples of each of these methods are discussed below.  

Also note that, although the following analysis appears to portray extensive state and local involvement in domestic violence screening, the examples listed are more the exception than the rule, representing only a handful of states. In fact, at least ten states have no statutes or court rules addressing any issues of domestic violence within the mediation context. Further, even in those states with some form of gatekeeping, the processes suffer from several flaws, to be discussed in section D.

A. Obligations of the Court

Several statutes and court rules impose an obligation upon the trial judge to screen cases for domestic violence. Once a case enters the judicial process, the following guidelines impose an affirmative duty upon the judges to ensure cases referred to mediation are appropriate. Such screening would have to occur either through independent judicial review of the cases, upon a motion made by one party alleging domestic violence, or perhaps by a court clerk’s indication in the court file that a party has alleged domestic violence (although none of the following rules require such screening by clerks).

1. Exclusion from Mediation of Cases Involving Domestic Violence
   
a. Exclusion when an order of protection is in effect

   Alaska, New Jersey, Alabama, Hawaii, and Michigan all provide for exemption from mediation when an order of protection is in effect.

   b. Exclusion based on a finding of a history of domestic violence

   Pennsylvania permits courts to mandate parties to attend mediation orientation sessions and, should both parties consent to mediation, the court may then enter an order of mediation. However, state statute prohibits courts from mandating even the orientation session if either party or a child has been a victim of domestic violence or child abuse within twenty-four months prior to the filing of the action. Florida, Michigan, Nevada, Alabama, Louisiana, and Virginia also provide

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52. While this section will examine the most prevalent forms of screening, a 1993 nationwide study indicated that ten percent of responding mediation programs use other screening methods not discussed here, including gathering data from: court files, criminal records, the prosecutor’s office, victim advocacy services, and batterer treatment providers. Thoennes & Salem, supra n. 3.

53. A search of state statutes and court rules revealed the following states lack written requirements for any screening mechanisms: Arizona, Arkansas, Connecticut, Indiana, Mississippi, Rhode Island, South Dakota, Utah, Wisconsin and Wyoming.


exclusion from mediation based on findings of a history of domestic violence. Additionally, local court rules in Illinois, Missouri, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, and Washington permit exclusion of cases from mediation where domestic violence has occurred.

2. Mediation with Special Rules

Rather than provide a specific exemption from mediation, other jurisdictions permit mediation of family cases involving domestic violence or child abuse provided certain requirements are met.

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58. See Ill. 18th Jud. Cir. R. 15.18 (2001) (prohibiting mediation when the court determines an impediment to mediation exists, such as domestic violence); Ill. 19th Jud. Cir. R. 18.03 (2001) (stating mediation is not required if the court determines an impairment to mediation exists, such as prior or existing domestic violence proceedings, prior adjudication of guilt or responsibility from criminal or civil proceeding based on domestic or family violence, or pending criminal or civil proceedings based on domestic or family violence); Mo. 6th Jud. Cir. R. 68.8.6 (2001) (permitting court to waive mediation for good cause shown by either party or by a screening determination that mediation is inappropriate); Mo. 13th Jud. Cir. Ct. R. 68.16B(2) (2001) (permitting waiver of mediation for good cause shown, including issues of child abuse, neglect or domestic violence); Neb. 4th Jud. Dist. Ct. R. 4-3 (2000) (noting domestic violence issues “may, upon consideration by the trial court, disqualify the parties from mediation”); Nev. 2d Jud. Dist. Ct. R. 53 (2001) (permitting exemption from mandatory mediation for substantial allegations of child abuse or neglect); Nev. 8th Jud. Dist. Ct. R. 5.70 (2001) (permitting the trial judge to waive mandatory family mediation for good cause shown, although not specifically referring to domestic violence); Nev. 9th Jud. Dist. R. 26 (2001) (permitting exemption from mandatory mediation if party files a motion that mediation is inappropriate, including substantial allegations of child abuse or neglect, or an order of protection is in effect); N.D. S.C. Dist. Ct. R. 2 (2001) (exempting from mediation cases where an issue of domestic violence is raised by either party and prohibiting the court from mandating mediation in cases which may involve physical or sexual abuse of a party or child of a party); Pa. York Cty. R. Civ. P. 6300 (2000) (prohibiting family mediation where either party is or has been a subject of domestic violence or child abuse during the pendency of the action or in the preceding twenty-four months); and Wash. Whatcom Cty. Super. Ct. R. 94.08(g)(2000) (exempting from mediation cases where a domestic violence restraining order or protection order has been entered in the prior twelve months, where a domestic violence no contact order exists, or where the court finds domestic violence has occurred and “such abuse would interfere with arms length mediation”). Ohio’s Cuyahoga and Montgomery Courts of Common Pleas exempt cases from mediation assessment when chronic or severe domestic violence is alleged or either party has been convicted or plead guilty to or where either party is “genuinely in fear of the other.” Ohio Cuyahoga Ct. Common Pleas Dom. Rel. Div. R. 32(H) (2001); Ohio Montgomery Ct. Common Pleas Dom. Rel. Div. R. 4.44 (2001). However, both counties do permit mediation referral where the domestic violence is not chronic or “appears to be tied to the divorce.” Ohio Cuyahoga Ct. Common Pleas Dom. Rel. Div. R. 32(H); Ohio Montgomery Ct. Common Pleas Dom. Rel. Div. R. 4.44. The rule prohibits mediation referral where one of the parties has been adjudicated abusing a child, unless the court determines mediation is in the parties best interest and makes specific findings of fact. Ohio Cuyahoga Ct. Common Pleas Dom. Rel. Div. R. 32(H); Ohio Montgomery Ct. Common Pleas Dom. Rel. Div. R. 4.44. “Mere allegations of neglect or abuse” will not preclude referral. Ohio Cuyahoga Ct. Common Pleas Dom. Rel. Div. R. 32(H); Ohio Montgomery Ct. Common Pleas Dom. Rel. Div. R. 4.44.
a. Victim consents to mediation\textsuperscript{59}

Delaware requires domestic violence cases be excluded from mediation unless the victim, who is represented by counsel, requests mediation.\textsuperscript{60} Other states, including Alabama, Hawaii, and Tennessee, require that, in addition to the victim’s consent, the mediator must be specially trained. Alabama and Hawaii also permit the victim to be accompanied by a support person.\textsuperscript{61} Kentucky and Tennessee require a judge to make specific findings before a domestic violence victim’s consent to mediation can be given effect.\textsuperscript{62}

b. Prevention of face-to-face mediation

In Texas, if a party requests exclusion from mediation based on an allegation of domestic violence, but a judge determines the allegation is not supported by a preponderance of the evidence, the judge may refer the case to mediation but must include in the order that the parties not be required to have face-to-face contact.\textsuperscript{63} West Virginia permits orders prohibiting face-to-face mediation in such cases, but leaves the decision to the discretion of a special master.\textsuperscript{64}

c. Multi-tiered evaluation

Alaska presents one of the most detailed set of rules for mediation of cases involving domestic violence. Either party may request a court order for mediation. The court is prohibited from ordering mediation when an order of protection is in effect.\textsuperscript{65} If domestic violence has occurred between the parties, but no order of protection is in place, custody mediation is only permitted if the victim agrees to the mediation and both parties are advised they have the right not to agree to mediation and such decision will not bias other decisions of the court.\textsuperscript{66} Finally, if a party requests mediation of a case not covered by the divorce or custody statutes, and no order of protection is in place but domestic violence has occurred, the court must determine whether mediation may result in an equitable settlement.\textsuperscript{67} In making this

\textsuperscript{59} The Model Code on Domestic and Family Violence permits mediation in cases involving domestic violence only where: there is no order of protection, the victim requests the mediation, the mediator is trained in domestic and family violence, and the victim is permitted to bring a support person. Advisory Committee, National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence §§ 311, 407-08(a) (Natl. Council of Juv. and Fam. Ct. J.J. 1994).
\textsuperscript{61} Ala. Code § 6-6-20(f) (2001); Haw. Rev. Stat. § 580-41.5 (2000) (in addition to victim’s consent, mediation can only proceed where the mediator is specially trained in domestic violence and the victim is allowed to bring a support person to the mediation). Tenn. Code Ann. § 36-4-131 (2000).
\textsuperscript{62} Ky. Rev. Stat. Ann. § 403.036 (Baldwin 2000) (court must make finding that the victim’s request voluntary and not the result of coercion, and “mediation is a realistic and viable alternative to or adjunct to the issuance of an order sought by the victim of the alleged domestic violence and abuse”); and Tenn. Code Ann. § 36-4-131, 36-6-107, 36-6-305.
\textsuperscript{63} Tex. Fam Code Ann. § 6.602(d) (West 2001).
\textsuperscript{65} Alaska R.C.P. 100 (2001).
\textsuperscript{67} Alaska R.C.P. 100.
determination, the court must consider whether there is a history of domestic violence which "could be expected to affect the fairness of the mediation process or the physical safety of the domestic violence victim."?

3. Judicial Training

The last method codified in state or local rules to assist judges in the screening process involves judicial training. For example, California state law requires judicial training programs in domestic violence for current judges and commissioners who deal with domestic violence matters. It also provides domestic violence orientation programs for new judges and annual training sessions.

B. Obligations of the Mediator

1. Mediator Training

Several states impose training requirements on mediators who are referred cases from the family court. California, Alabama, Alaska, Hawaii, Idaho, Kansas, Maryland, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Carolina, and Tennessee all require that family mediators be trained in domestic violence, which includes either screening protocols, mediation session precautions, or both.

2. Mediator’s Duty to Screen for Domestic Violence

A small, but growing, number of states have implemented statutory requirements that mediators screen family cases for domestic violence prior to the

68. Id.
70. Id.
mediation session. In Alaska, if both parties consent to mediation, the mediator must evaluate whether domestic violence has occurred between the parties.\textsuperscript{72} If the mediator discovers that either party has committed a crime involving domestic violence, the mediator may not engage in the mediation unless the victim consents to the mediation and the mediator is properly trained.\textsuperscript{73}

Alabama, Hawaii, Nebraska, and Oregon require mediators and/or mediation program administrators who are referred custody and visitation cases to screen for domestic violence.\textsuperscript{74} Several counties in California, Missouri, and Pennsylvania also require that mediators screen for domestic violence.\textsuperscript{75}

3. Special Rules Regarding the Structure of Mediation

In order to ensure the safety and fairness of the mediation process, some jurisdictions developed variations to the traditional structure of mediation.

a. Separate intake sessions

California mandates separate intake sessions with a mediator when requested by a party who alleges domestic violence.\textsuperscript{76}

b. Inclusion of a support person

Alabama, Alaska, Hawaii, Tennessee, and many local courts in California permit victims of domestic violence to bring a support person to the mediation.\textsuperscript{77}

\textsuperscript{72} Alaska Stat. §§ 25.20.060, 25.20.080.
\textsuperscript{73} Id.
\textsuperscript{75} See Cal. Ventura Super Ct. R. 9.33 (2001) (requiring the mediator to screen cases involving allegations of domestic violence with current restraining order to determine the necessity of separate waiting areas or separate mediation); Mo. 6th Cir. Ct. R. 68.8 (requiring mediators to screen parties prior to mediation to determine whether mediation may be inappropriate because of child abuse, neglect, or domestic violence and to report to the Court a finding only whether mediation is inappropriate); Mo. 23rd Cir. Ct. R. 68.14(e) (2001) (requiring mediators to pre-screen for domestic violence and report to the court if mediation is deemed inappropriate); Pa. York Cty. Ct. R. Civ. P. 6303 (2000) (requiring mediators to pre-screen all family law cases using the Tolman Screening Model and determine whether mediation is not appropriate due to domestic violence).
\textsuperscript{76} Cal. Fam. Code § 3181 (West 2000).
Note, however, that California state law grants the mediator discretion to exclude the domestic violence support person from mediation sessions. 78

c. Implementation of safety protocols

Oregon and Texas require mediators to implement safety procedures to minimize risks of intimidation or violence. 79

d. Separate or shuttle mediation

In Texas, if the court does not find evidence of abuse by a preponderance of the evidence, it may refer the case to mediation but must include in the order that the parties be placed in separate rooms during mediation (in addition to the order prohibiting face-to-face contact). 80 Several California counties have a unique mediation structure for family cases involving domestic violence. The process, called separate mediation, is structured so the mediator meets with each party and conducts the mediation on separate days and times. 81 Other California counties require that family cases involving domestic violence be conducted as “shuttle” mediations. In this process, the parties are separated in different rooms and the mediator may only conduct a joint session if he/she determines such a structure would be safe for the victim. 82

e. Early termination of mediation

Pennsylvania requires mediators to terminate mediation upon a finding that mediation is “inappropriate” or the case is “unsuitable” for mediation. 83 Pennsylvania’s requirements specify that the mediator’s duty to screen for abuse throughout the mediation process is a “continuing ethical obligation.” 84 Note that Pennsylvania is the only state with an ongoing screening responsibility.

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81. See Cal. Contra Costa Super. Ct. R. 13 (permitting parties to request separate mediation sessions where a domestic violence restraining order is in effect); Cal. Humboldt Super. Ct. App. R. 9.5(a) (permitting request for separate mediation by the parent alleging domestic violence); Cal. Monterey Super. & Mun. Cts. R. 10.06 (requiring separate mediations for cases involving a history of domestic violence or where a domestic violence restraining order has been issued, and mandating non-disclosure of the time and date of mediation to the opposing party).
82. See Cal. Yuba Super. Ct. R. 5.5(K) (requiring separate mediation interviews in cases with domestic violence allegations and permitting joint session only if it is determined safe; if domestic violence is disclosed or becomes apparent during a joint mediation session without prior indication, the mediator may separate the parties and then conduct interviews); Cal. Imperial Super. Ct. App. R. B2 (2001) (“permitting separate rooms for mediation where domestic violence is alleged). Orange County, California, takes a unique approach in requiring separate interviews to screen for domestic violence and then mandating assignment of a male/female mediation team if mediation is conducted in these cases. Cal. Orange Super. Ct. R. 703. Fresno County, California, requires that the party alleged to be the abuser may only receive mediation information that does not include the alleged victim’s residential address. Cal. Fresno Super. Ct. R. 31.2 (2001).
83. Pa. R. Civ. P. 1940.6a(4); 1940.3.
84. Pa. R. Civ. P. 1940.3.
f. Piercing mediator confidentiality

West Virginia permits, but does not require, the mediator to report to the court "credible" information received concerning domestic violence or child abuse. Additionally, Yuba and Orange counties in California permit mediators to report known or suspected child abuse or threats of harm to an intended victim or their property.

C. Obligations of the Mediation Program Administrators

Finally, at least one state, Oregon, imposes specific screening and process responsibilities upon mediation program administrators. Oregon mandates that program administrators: recognize that "mediation is not an appropriate process for all cases and that agreement is not necessarily the appropriate outcome of all mediation; demand that neither the existence of nor provisions in a restraining order may be mediated; and implement screening and ongoing evaluation processes for domestic violence in all domestic relations cases." Counties in both Missouri and Nevada also require mediation program administrators both to implement screening protocols and to determine whether mediation is appropriate.

D. Deficiencies of Screening Mechanisms

As seen in this sampling, domestic abuse screening rules vary greatly in gatekeeping, methodology, and degree. Also, as stated earlier, although the above description appears to paint a picture of widespread screening, the examples only represent a small number of states. In those states that do have screening mechanisms, the processes often suffer from serious flaws. First, the training and screening requirements imposed upon judges is based on an unlikely pattern of assumptions: that judges will review the case file before the case is referred to mediation, that the battered party will come forward with allegations of abuse, and that the judge will then conduct an evidentiary hearing. This process is extremely unlikely in most courts, where cases are often sent to mediation before any judicial intervention occurs.

A second flaw of many of the screening mechanisms is that they require one of the parties to come forward before mediation and make an allegation of domestic violence. As discussed earlier, many victims may not consider their relationship abusive, may minimize the abuse, or may fear retribution if they come forward.

86. Cal. Yuba Super Ct. R. 5.5(j); Cal. Orange Super. Ct. R. 703 (permitting exemption from mediator confidentiality to report known or suspected child abuse, or threats of injury or harm to an intended victim and/or their property).
88. See Mo. 6th Cir. Ct. R. 68.8.5, 68.8.6 (requiring confidential screening by both the program administrators and the mediator); Nev. 2d Jud. Dis. Ct. R. 53 (2000) (permitting the mediation program administrators, in cases found to include domestic violence, to either make a determination that mediation is inappropriate or to require special protocols to protect the victim).
89. Dalton & Schneider, supra n. 5, at 431.
Further, the likelihood is even more remote that the abuser will make an affirmative motion to the court that violence is present. Therefore, placing the burden on the parties is both ineffective and unrealistic. Finally, none of the states impose a comprehensive structure of screening that encompasses all the necessary elements for effective and safe mediation of cases involving domestic violence, as will be discussed in the Part IV.

Thus the responsibility for addressing these matters falls squarely on the shoulders of the mediator, and the mediation program administrators. The following recommendations for an effective screening and evaluation protocol by mediators and mediation administrators stem from extensive research into present screening methods, professional writings, studies of mediation programs, and protocols developed by collaborations between mediators and victims' advocates. The proposed model includes: mediator training; separate orientation/interview sessions; safety protocols to protect against unfair power imbalances, intimidation, and violence upon arrival, during sessions, and upon departure; and a policy permitting either party or the mediator to terminate the process when it becomes coercive, unfair, or inappropriate.90

IV. A MODEL SCREENING METHOD FOR MEDIATORS

The foregoing discussion clearly indicates that relatively few states have detailed rules regarding the appropriate screening of potential mediation cases. Given this lack of guidance, it is imperative that the family mediator not only accept responsibility for being a key factor in the process, but also implement a protocol that becomes part of the preparation for every family mediation. While no screening or safety protocol can be perfect, training and experience can increase the likelihood that the mediation process is beneficial, voluntary, and safe.

A. Mediator Training

Given the high percentage of divorce cases involving issues of domestic violence, and the growing trend toward routing an increasing number of cases through mediation, it is inevitable that such cases will come through the family mediator's door. Thus, it is critical that mediators are properly trained before handling any family mediations, even the screening process. Empirical research clearly indicates that training will heighten awareness of the need to consider specialized forms of mediation in dealing with cases involving domestic violence.91 Additionally, domestic violence training assists the mediator in recognizing cues of a violent relationship. For example, a seemingly "uncooperative" or "emotional"

90. Similar recommendations can be found in the Academy of Family Mediators Mediation of Disputes Involving Domestic Violence (attached as Appendix A).

91. Thoennes & Salem, supra n. 3. In programs without domestic violence training, seventeen percent of the respondents reported that they "always mediate as usual" (without adapting mediation style for cases involving domestic violence). In programs with domestic violence training, only three percent of respondents reported they "always mediate as usual." Id.
party may in fact be a victim.\textsuperscript{92} Despite this, in Pearson's study spanning three years, thirty percent of responding mediation program administrators indicated their mediation staff received \textit{no} training in domestic violence.\textsuperscript{93}

Mediators can obtain the basic training through continuing legal education, domestic violence education programs, or shadowing/mentoring programs with practicing family mediators. Ongoing, continued training even for experienced mediators is also critical, as domestic violence protocols and legal practices are ever changing.\textsuperscript{94} Whatever type of training is sought, the content of the training should include an awareness of the central dynamics of a domestic violence relationship including the nature of dissociated coercion, coercive control, and the physiological and psychological dimensions of domestic violence, as discussed in Part II.\textsuperscript{95} Further, training should include information regarding the effects of abuse on family members (including children), different screening methods (including the possibility that parties will deny the existence of abuse), recognition of domestic abuse cues, appropriateness of a mediator's involvement in minimizing power imbalances, referral to appropriate community resources, and special precautions needed to conduct such mediations. Finally, mediator sensitivity to the impact of cultural, racial, and ethnic differences as they relate to domestic violence is an essential part of mediator training.\textsuperscript{96}

The training, particularly in screening mechanisms, will assist the mediator in determining which cases are appropriate for mediation and which ones are not. Of course, training alone will not completely prepare the mediator, as training cannot replace experience. Therefore, co-mediating in the early stages of one's mediation career may be particularly helpful not just in handling cases involving domestic violence, but also in assisting mediators develop their own styles of mediation.

Once the mediator develops a system for determining which cases are appropriate for mediation, those cases must be further separated into cases that will benefit from standard mediation and those that will benefit from specialized or adapted forms of mediation (such as shuttle mediation), or the implementation of safeguards, and an experienced and trained mediator.\textsuperscript{97} The following sections lay a foundation for assessing potential mediation cases.

\textbf{B. The Initial Interview}

\begin{itemize}
\item \textsuperscript{93} Pearson, \textit{supra} n. 6, at 332. The ABA Family Law Section Task Force and the Model Code on Domestic and Family Violence both demand that no mediator undertake any case involving domestic violence without adequate training. American Bar Association Family Law Section Task Force, Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation Standard XI (1997) (attached as Appendix B); and Model Code on Domestic and Family Violence, \textit{supra} n. 37, at § 407.
\item \textsuperscript{94} Oregon Domestic Violence Council, \textit{supra} n. 23, at 19.
\item \textsuperscript{95} Maxwell, \textit{supra} n. 1, at 343.
\item \textsuperscript{96} Fuller & Lyons, \textit{supra} n. 43, at 927.
\item \textsuperscript{97} Corcoran, \textit{supra} n. 17.
\end{itemize}
Studies of mediation programs across the country demonstrate a range of screening methods, including background checks, clinical observations, written questionnaires, and in-person interviews. Of these methods, the in-person, separate interview is most informative, as it allows a reluctant victim to potentially disclose abuse, even if not directly. Additionally, an in-person interview can assist the mediator in building a rapport with the parties and allows the mediator to evaluate non-verbal cues. Because the victim may minimize the abuse, or may fear retribution by disclosing abuse, the interview questions should include explicit questions about specific instances of physical, psychological, sexual, and other forms of abuse. The mediator, or other interviewer, should be looking for behavioral and nonverbal cues of violence or victimization in addition to the oral responses to the questions, such as a dismissive attitude toward evidence of abuse.

The structure of the questioning can be as important as the questions themselves. Since the victim may minimize the existence of abuse, questions should first address the effects of abuse that may affect the mediation process. For example, asking first whether the parties feel they can negotiate on an equal basis with the other party permits a more open response because it precludes them from associating the question with whether the relationship is abusive because no such questions have yet been asked.

1. Tolman Screening Model

One questionnaire designed to address the above concerns, the Tolman Screening Model (attached as Appendix C), is based on the research of Richard M. Tolman, Ph.D. in Social Work. The Tolman Model includes questions to be asked

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98. Pearson, supra n. 6, at 325.
99. Id. (citing a three-year study that revealed in-person screening is the favored approach because it allows mediators to observe the client which assists in determining fear and ability to mediate, as well as substance abuse and conflict issues). Nonetheless, of the eighty percent of programs that do screen for domestic violence, less than half use separate, in-person interviews. Id. If in-person, oral interviews are impossible, use a written form, but never mail the questionnaire to the parties' homes, as this may endanger an abuse victim.
101. See Maxwell, supra n. 1, at 345; Pearson, supra n. 6, at 325.
102. Maxwell, supra n. 1, at 345; Pearson, supra n. 6, at 325. Note that some writers suggest that the interview portion should be conducted by a colleague rather than the mediator in cases where the mediator has not received any information indicating prior domestic violence, so as not to bias the mediator toward one of the parties. Gerencser, supra n. 22, at 67. A 1992 national survey indicated that twenty-six percent of mediation programs responding to the survey use specialized intake workers to conduct the screening interview. Thoennes & Salem, supra n. 3. Regardless of who conducts the interview, it is imperative that it be done in person and orally, so as to include those who are unable to read and so that the interviewer can observe behavior and nonverbal cues.
103. Fischer, Vidmar & Ellis, supra n. 11, at 2170.
104. For additional examples of standardized models used to assess power imbalance, Irving & Benjamin, supra n. 5., cite the following (although this author has not reviewed them): Conflict Tactics Scale - M.A. Straus, Measuring Intrafamilial Conflict and Violence: The Conflict Tactics (CT) Scale, 41 J. Marriage & Fam. 75-88 (1979); Evaluation of Screening Results & Feminist Family Therapy Behavioral Checklist - S.E. Chaney & F.P. Piercy, A Feminist Family Therapy Behavior Checklist, 16
(orally) in the initial, separate session with each party, and an explanation of the significance of each question. The guidelines for evaluating the results are discussed in Section C. Note that the questions begin with open-ended ones regarding negotiation in the presence of the spouse, then move to issues of fear and conclude with specific questions regarding abuse. Such an approach permits the mediator to more fully assess the fears of the participant even if the respondent does not believe the relationship is abusive.

If the responses indicate a need for further screening, the mediator may need to clarify the types of abuse, frequency, duration, severity, and onset.\textsuperscript{105} For clarification of specific physical abuse, consider asking the respondent whether any of the following events have occurred in the relationship: pushing, slapping, restraining, hitting, punching, yelling, throwing of objects or destruction of property or pets, threatening, put-downs, following (stalking) or forced sexual relations.\textsuperscript{106} Additional questions regarding suspicions of mental health problems, drug or alcohol abuse may also assist the mediator in assessing the appropriateness of mediation.\textsuperscript{107}

To clarify potential emotional or psychological abuse, including financial abuse, the mediator may turn to psychological inventories for assistance. For example, Dr. Tolman developed the Psychological Maltreatment of Women Inventory (attached as Appendix D), which asks the respondent about the occurrence and frequency of events within a relationship for the prior six months.\textsuperscript{108} Dr. Tolman created both a female questionnaire and a male questionnaire. These questionnaires, like the initial questionnaire, are best administered in-person, and orally so as to allow the mediator to view body language and non-verbal cues, while also allowing for the possibility that the respondent cannot read.

2. Conflict Assessment Protocol

A second effective screening approach was developed by Dr. Linda Girdner, director of research at the American Bar Association’s Center on Children and the Law, and designed to identify spousal abuse in divorce-related cases and assess the appropriateness of mediation (attached as Appendix E). It differs from the Tolman model in that it involves a lengthier initial interview with follow-up questions occurring as soon as a particular response necessitates it. However, it is also similar in its structure by including the more open-ended, non-violence oriented, questions first so the mediator may assess decision-making routines and other control issues prior to specific questions regarding abuse. Both models can be effectively used to assist the mediator in determining which cases will be appropriate for mediation.

\textsuperscript{105} Irving & Benjamin, supra n. 5, at 216.
\textsuperscript{106} Adapted from Corcoran, supra n. 17.
\textsuperscript{107} Id.
3. Conclusions

One final question that may be appropriate to ask that is excluded from both of the above questionnaires is how does the respondent feel the other party will react to decisions made in mediation and whether they fear that reaction.109 As both of the above protocols address concerns about negotiating ability, fear, and abuse in an order best designed to elicit the information necessary to make an evaluation, either model can be an effective screening tool. If time is a limiting factor, the Tolman Model obviously involves a shorter initial interview, but may involve a lengthier follow-up should further inquiry be necessary.

C. Evaluation of Screening Results

Once the initial interviews are completed, the mediator must assess whether the parties are appropriate for mediation. As every case consists of different people with different personal and family dynamics, no fool-proof test exists to predict with absolute certainty which cases involving domestic violence are appropriate for mediation and which are not.110 However, Tolman and Girdner offer guidelines that allow mediators to most effectively categorize and evaluate such cases. Following are Tolman and Girdner's assessment approaches for the interviews described above, followed by a third approach developed from the Therapeutic Family Mediation model. All of these assessments are helpful guides for assessment of the appropriateness of mediation, and differences between the models are described in each section.

It is important to note that evaluation of the questionnaire responses does not imply that the mediator's job is to make a finding of whether domestic violence has occurred, only to evaluate the parties' ability to benefit from mediation if one or both parties has alleged such violence.111

1. Tolman Results

Tolman indicates that the responses to his screening model are useful for indicating next steps.112 That is, if no abuse or fear is indicated, and equal communication seems likely, the case can be referred for regular joint-session mediation.113 If the responses indicate past abuse, but the respondent feels able to communicate and is not presently fearful, Tolman advocates face-to-face mediation after additional screening confirms the responses, or possible specialized mediation if the mediator does not believe face-to-face mediation would be beneficial.114 Finally, if the respondent indicates past abuse and fear of the other party, and/or does not feel able to advocate in his/her best interest, mediation is not appropriate.115

109. Girdner, supra n. 100, at 15.
110. Gerencser, supra n. 22, at 58.
111. Girdner, supra n. 100, at 16.
112. Richard M. Tolman, Ph.D., Tolman Screening Model (see Appendix D).
113. Id.
114. Id.
115. Id.
2. Conflict Assessment Protocol

After the assessment questionnaire is administered separately to each party, Girdner divides the cases into three categories: those likely to benefit from standard mediation, those likely to be harmed by mediation and should therefore be excluded, and those likely to benefit from specialized mediation.116 In the first category, Girdner places cases with no control or abuse indicators, minimal emotional abuse like name-calling or put-downs that are not associated with a pattern of control, and cases with one or two isolated incidents of “physical confrontation” that did not create a controlling pattern.117

Girdner would exclude from mediation cases in which: one or both parties are unable to negotiate; there are indicators of potential serious injury or death to one party; the abuser continues to have a need to control the abused spouse; the abuser accepts no responsibility for the violence; the abuser has recently or plans to obtain a weapon or has been convicted of a violent crime; or the abuser has suicidal or violent fantasies.118 Girdner would also exclude cases in which the victim does not want disclosure of the abuse revealed to the other side.119

Finally, Girdner would place cases in the category of specialized mediation those cases not excluded from mediation by the second category so long as the parties agree to commit to a specially designed mediation process and the mediator is extensively trained and skilled in handling these cases.120

3. Therapeutic Family Mediation

A final alternative approach to assessing mediation questionnaire responses was developed in the mid-1980's by mediator Howard Irving and sociologist Michael Benjamin. Irving and Benjamin created and refined a mediation model called Therapeutic Family Mediation (TFM).121 The model was developed in response to two difficulties the creators saw in most couples mediations: underlying patterns of couple interaction that remain effectively charged despite separation or divorce and the maintenance or development of dysfunctional patterns in light of new or ongoing involvement of extrasystemic others.122 The model involves a four-phase process of assessment, pre-mediation, negotiation, and follow-up.123 The assessment portion is similar to the Tolman and Girdner models of categorization of the cases, but places more focus on temporal issues, such as the frequency and dates of past abuse, a factor missing from the Tolman and Girdner models but one that may be of significant importance in determining the appropriateness of mediation.

116. Girdner, supra n. 25, at 372.
117. Id. at 372-73.
118. Id. at 374-75.
119. Id.
120. Id. at 373.
121. Irving & Benjamin, supra n. 5, at 148.
122. Id.
123. Id. at 151.
As it relates to the issue of domestic abuse in mediation, Irving and Benjamin support a three-step decision-making process:\textsuperscript{124} First, it requires expanded assessment including inquiry in caucus about recent and regular occurrence of violent or inappropriate acts.

Second, in cases with a history of violence, additional inquiry is required to determine if violence is current and ongoing or was previously terminated. If current and ongoing or a lengthy history is indicated, mediation should be deemed inappropriate.

Finally, in cases judged appropriate for mediation, the mediator must decide which (if any) special precautions are needed "for the process to be fair and hold out the reasonable likelihood of an equitable and workable agreement." These might include: presence of a lawyer or advocate during mediation; process precautions such as caucusing rather than joint sessions and timing of arrival/departure; structured mediation rules such as ground rules (i.e. yelling, blaming, contact during shuttle mediation); and availability of other legal protections (restraining orders, confidentiality rules, availability of court ordered treatment programs).

D. Continued Screening Throughout the Mediation Process

If no indicators of abuse are discovered, or the mediator determines specialized mediation may be beneficial to the parties, the mediator's obligation to screen continues throughout the mediation process. Even in cases in which there are no indicators of domestic abuse, mediators must diligently continue the screening process throughout the mediation. As many factors may account for the parties' failure to disclose such private information in the early stages of the process, mediators must be observant to potential control mechanisms. These may include situations in which:

- one party always waits for the other to speak first (perhaps an indicator of control or fear);
- one party glances at the other each time he/she speaks to check for the other's reaction (an indicator of intimidation or fear of later retribution);
- one party excuses every conflict discussed (can be an indicator that either the abuser or the victim is minimizing the abuse);
- one party speaks more than seventy-five percent of the time (an indicator of control);
- one party sends the other behavioral or facial cues during the mediation (often difficult for an outsider to notice but may be part of a culture of battering); or
- one party gives a list of complaints about the other party, who offers no defense (an indicator of reduced self-esteem or minimization).\textsuperscript{125}

\textsuperscript{124} Id. at 220-21.
\textsuperscript{125} Haynes, supra n. 5, at 57.
Here are some examples:

1. The husband complains the wife never has enough baby food, diapers and other supplies on hand, and therefore the wife is not the best parent for the child.
2. The husband tells the mediator that he gave his wife the house so that the children would have a home.

[Both of these situations may be innocent remarks, or they may be indicators of financial abuse, where one party assumes total control over finances and puts the other party on a strict allowance that is too small to purchase even the necessities.] 126

3. One spouse appears very angry, speaks mostly about the other spouse, often saying little about himself/herself thus giving the impression the other spouse is the problem. 127 [Such behavior may be an indicator of control or minimization.]

4. One spouse speaks in low and measured tones, has difficulty expressing his/her needs, or displays body language indicating fear, tension, or inability to make direct eye contact with the other spouse. 128

It is important for the mediator to understand that any of the above indicators and examples may be completely innocent indicators, not of an abusive relationship, but of other dynamics such as: reticence about the mediation process or about litigation generally, fear about the uncertain future, differences in cultural norms, or some other reason. However, if the mediator observes one or more of the above situations or other indicators, or evidence of domestic violence is revealed during the session, it is best to err on the side of caution and convene a caucus in order to separate the parties until further inquiry can be accomplished. 129 The caucus gives the mediator an opportunity to confirm or deny suspicions regarding abuse, assess the need for crisis intervention, assess whether the abuse will interfere with that party’s ability to mediate in his/her own self-interest, and determine which, if any, special precautions must be implemented if the abused party wishes to continue with mediation. 130 That is, the caucus performed during the mediation serves the same functions as the pre-mediation separate interviews.

If the mediator determines mediation is inappropriate, care should be taken regarding how the session is terminated, so as not to place the victim in further danger. 131 Accepting full responsibility for making the decision to terminate the mediation session may deflect blame from the victim and may avoid the possibility of retribution against the victim. 132

E. Safety Measures and Specialized Process Protocols

Domestic violence is a common reason for divorce, and research suggests violence tends to escalate during attempted separation. Thus, implementation of protocols to protect both the process and the participants is a critical component of

127. Erickson & McKnight, supra n. 42, at 380.
128. Id.
129. Sun & Woods, supra n. 27, at 89.
130. Haynes, supra n. 5, at 60-62.
132. Id.
any screening protocol. Research and mediator experience indicate that mediation has been effective in cases involving domestic violence, particularly when appropriately tailored. Such tailoring includes safety measures to protect the participants and the mediator such as: caucus or shuttle mediation, non-disclosure of participant addresses and phone numbers, access to legal protections such as restraining orders, or requirements that one or both parties undergo counseling. Additionally, tailoring may also include measures to protect the goals of the mediation such as permitting an advocate to be present with the victim, or insistence upon termination of the process should one of the parties or the mediator feel that the parties are no longer able to negotiate in his/her best interest.

1. Safety Measures

Deciding which safety precautions to use and how to implement them can significantly affect the decision of which cases can be safely mediated. First, any safety measures implemented must protect each party upon arrival to mediation, during the mediation, and exiting from mediation. In addition to the separate, initial interviews discussed above, having the parties arrive and leave at different times, and escorting the parties to their cars after the session, will reduce the potential that one party will follow or stalk the other party. Providing separate waiting areas prior to the mediation will ensure limited contact, and perhaps reduce the potential for intimidation at the mediation session. Encouraging the parties to bring a friend or advocate to the session may assist the victim emotionally and may also offer a deterrent to the abuser if the victim is not alone.

During the mediation session, safety measures may involve positioning the victim near the door and the mediator in between the two parties both as a psychological barrier and for protection of the victim and implementation of a safety plan for the mediator in the event violence or a threat of violence occurs during the mediation session. Finally, ensuring the confidentiality of party addresses and phone

133. Corcoran & Melamed, supra n. 11, at 311.
134. Id. at 312-14.
135. Id.
136. Note that at least one mediator, John Haynes, insists that parties agree to strict conditions before he will agree to mediate a case involving domestic violence. The abused spouse must obtain an order of protection; the abuser must leave the family home and agree not to return during the mediation process; exchange of children must occur in a neutral location; and failure to comply with these conditions will terminate mediation. Haynes, supra n. 5, at 57. Erickson and McKnight also instruct mediators to strongly urge victims to obtain an order of protection. Erickson & McKnight, supra n. 42, at 383. Such conditions seem to obviate the voluntariness of mediation. Further, the conditions may be unreasonable in many circumstances, since the likelihood of obtaining an order of protection is not guaranteed merely because domestic violence has occurred. As with any court proceeding, judicial bias, lack of evidence, and witness credibility all play significant factors in the abused party’s ability to obtain an order of protection. Placing such a condition on the abused party further victimizes that party by imposing additional burdens merely because of his/her status as victim, and also fails to acknowledge that abuse falls on a continuum and each case should be assessed on its own merits.
137. Corcoran, supra n. 17.
138. Id.
139. Id.
numbers will protect the victim from the abuser finding out personal information if she has fled the relationship and is presently in hiding.  

2. Process Protection Measures

As stated earlier, abusive relationships can create an imbalance of power that makes it difficult for the victim to negotiate in his/her best interests, or in the best interest of the children. If a mediator chooses to accept such cases for mediation, steps should be taken to assist in creating a fair negotiation process. Permitting the victim to be accompanied by an attorney or an advocate during the mediation session can assist in reducing the victim’s feelings of intimidation and control. Note, however, that inclusion of an advocate can be problematic. For example, if domestic violence is undocumented, the mediator may have to divulge that the victim made allegations of domestic violence in order to explain the presence of the advocate. This can seriously jeopardize the mediator’s neutrality, as the abuser may believe that the mediator believes the allegations.

Another process protection is the use of shuttle mediation, where each party is present but in separate rooms during the session and the mediator moves between the two rooms. The California separate mediation is yet another option, where the parties are not even present on the same days. These alternatives will allow a reluctant party to more easily express his/her needs and concerns and allow the mediator to act as a filter for information exchange. Additionally, co-mediation, or co-mediation with a male-female team, may assist in balancing the appearance of an imbalance of power.

The use of ground rules regarding behavior during the mediation session can lay the foundation for the mediator’s expectations of how the parties should conduct themselves and what is and is not appropriate behavior in the mediation session. These may include prohibiting yelling or offensive language, or prohibiting parties from interrupting the other party while speaking.

140. Id. Referrals to appropriate counseling and shelter services may also be appropriate safety precautions. Pearson, supra n. 6, at 326.
141. Maxwell, supra n. 1, at 346. The role of the advocate may greatly alter his/her importance. For example, if the advocate is merely present but not actively involved in the negotiations, he/she may be more of an emotional support to the victim but may not be assisting in the balancing of power. The advocate’s role should be carefully considered before inclusion into the mediation process.
142. Id.
143. Id.
144. Corcoran, supra n. 17. Despite the apparent benefits of shuttle mediation or frequent caucusing in cases involving domestic violence, some mediators find such processes harmful to the mediation process, as parties will force the mediator to become a co-conspirator in the secrets they do not want the other party to discover and creates an appearance that the mediator is in control. Haynes, supra n. 5, at 63-64. In fact, Erickson and McKnight argue that face-to-face mediation of cases involving domestic violence “increase the likelihood of positive post-divorce interaction because the couple begins to use a method of cooperation, rather than the pain of adversarial, competitive conflict resolution.” Erickson & McKnight, supra n. 42, at 378. Such an idealistic view of mediation ignores the relatively brief period of time the mediator spends with a couple and presumes an ability that psychologists spend years trying to accomplish when counseling abusers.
Additionally, in cases involving domestic violence, mediators can de-emphasize the written settlement agreement as the desired goal of the mediation.\textsuperscript{146} This may release the pressure an abused party feels to reach an agreement so as to avoid litigation. If the parties do reach an agreement, the mediator should strongly encourage both parties to have an attorney review the document.\textsuperscript{147} This creates another level of protection to ensure that any agreement is the result of the parties truly bargaining in their best interests, and in the best interests of the children.

Finally, and most critically, mediators must withdraw from any mediation in which they believe the parties can no longer bargain in their best interests or in the best interests of the children, or a threat of harm is present. This may occur when: a party has committed or is threatening to commit acts of violence; a party is unable to participate further due to drug, alcohol, physical or mental disability\textsuperscript{148} the parties are entering into an agreement the mediator believes to be unconscionable; or a party is using mediation to further illegal conduct.\textsuperscript{148} The parties must also be informed that they, too, have the authority to end the mediation session if either party believes the process has become coercive. Mediation should never be a coercive process and if the mediator suspects coercion or an inability to negotiate, termination of the process is vital. As mentioned in the prior section, care should be taken when terminating a mediation session so as not to put a party in further danger.

V. CONCLUSION

Given mediation resolution rates between fifty and seventy percent,\textsuperscript{149} the increasing popularity of court-ordered family mediation, and ever-growing court dockets, it is vital that mediators and mediation program administrators arm themselves with training and screening protocols to ensure the process does not further harm the parties, children, or the mediator. Note that this Article does not intend to imply that creating screening protocols and safety measures will eliminate the domestic violence. However, screening protocols can assist mediators and program administrators to: effectively distinguish between those parties who can mediate on relatively equal terms and those with a culture of battering; assess the parties’ abilities to express their needs and negotiate in their own interest; and evaluate the parties’ level of fear or other safety concerns. Additionally, the imposition of effective safeguards, such as private, individual screening, mediator training in process alternatives such as shuttle or caucus mediation, and close involvement of attorneys in arranging the mediation and in reviewing all mediated agreements, offer the potential for even mandatory mediation to be a more effective resolution for custody issues.

Note, also, that the intent of this Article is not to place sole screening responsibility upon the mediator. Gatekeepers at each stage of the process should

\textsuperscript{146} Pearson, supra n. 6, at 326.
\textsuperscript{147} Pagelow, supra n. 93, at 358.
\textsuperscript{148} ABA Proposed Standards of Practice for Lawyers who Conduct Divorce and Family mediation, supra n. 94, standard 12. The ABA standards also advocate termination when the mediator believes the parties are not participating in good faith. Such a standard is so vague and arbitrary that it is not included in this list.
\textsuperscript{149} Thoennes & Salem, supra n. 3.
carry the responsibility for ensuring that cases involving domestic violence are appropriate for mediation, and that the mediator assigned to such cases is appropriately trained in this area. Lawyers are often the first to meet the client and may be in the best position to assess whether domestic violence exists, determine if mediation is appropriate, and whether certain safeguards, such as being present at the mediation session, are necessary. If the jurisdiction does not permit attorney attendance at the mediation, the attorney must carefully review, with the client, any mediated agreement before submitting it to the court. This will help ensure the terms are fair and the agreement was entered into voluntarily. Court clerks should be trained to identify signs of domestic violence and should conduct an initial interview with all domestic relations parties. Finally, the judge must ultimately decide whether the parties and the case is appropriate for mediation. If so, the judge must ensure that the appointed mediator is appropriately trained and that any mediated agreement clearly reflects voluntariness and relatively equal bargaining power, and protects the best interests of the children.

Barring effective gatekeeping at all levels, however, the mediator, and the program administrators, hold the responsibility for ensuring that the practice of mediation neither harms parties nor evolves into a coercive process. It is the imposition of appropriate screening and safety protocols that can best achieve these goals.
Appendix A

The following is a draft of the AFM Policy Statement on Mediation in Cases of Domestic Violence. It has not been approved and is provided for information about how some mediators approach in some contexts, assuming an affirmative duty to evaluate and monitor family violence.

Mediation Of Disputes Involving Domestic Violence

Drafted by the AFM Task Force on Spouse and Child Abuse

DRAFT (02/22/94)

PREAMBLE

Is mediation appropriate in family mediation when domestic violence is an issue? Clearly, there are more questions than answers to this controversial and emotionally-charged topic.

Family violence, which is mostly perpetrated against women, and its impact on children continue to pose serious questions for dispute resolution professionals and the practice of mediation. Women's advocates, mediators, mental health workers, lawyers and the judiciary are increasingly working together to better understand the complex consequences of family violence. Collaboration is increasing among mediators and advocates from victim's networks. We are working cooperatively and constructively to address the benefits and risks associated with mediation and the unique needs of abused women, men, and children.

Some critics consider divorce mediation to be inappropriate in cases where domestic violence is an issue because of the fear of retribution, the absence of trust, and the imbalance of power between the parties. Others argue that mediation may not protect parties from coerced settlements and from subsequent intimidation and violence; they believe litigation is preferable to mediation in these cases.

For cases in which there is abuse, a question often asked is whether the legal process - including protective orders, arrest, and litigation — is adequate to restructure a post-separation parenting relationship which will work in the best interests of all involved. This subject continues to be a topic of much debate.

This statement addresses some of the issues involved in determining which cases may be appropriate for mediation and makes recommendations regarding ways to safeguard the physical safety and legal rights of both parties.

1. Reprinted with the permission of the Association for Conflict Resolution, a merged organization of AFM, CREnet, and SPIDR.
ISSUES FOR MEDIATORS

Family mediation cases in which there is or has been domestic violence are complicated and can be dangerous to the participants and the mediator. Therefore, beginning mediators and mediators not trained or experienced in domestic violence should not accept referrals of these cases but rather should refer them to an experienced mediator or to another appropriate resource. Another choice would be for an inexperienced mediator to co-mediate with someone who has considerable professional experience dealing with domestic violence.

If the abuse history or potential for violence is sufficient to jeopardize a party's ability to negotiate without fear or duress, the case should not be mediated. There should be no mediation concerning the violence itself. For instance, an offer to stop hitting in exchange for something else should not be tolerated.

When safety is an issue, the mediators obligation is to provide a safe environment for cooperative problem-solving or, when this does not seem workable, to help the clients consider more appropriate alternatives.

Above all, the mediator must promote the safety of all participants in the mediation process.

AFM STANDARDS FOR ASSESSING WHETHER MEDIATION MAY BE APPROPRIATE

A. Prior to commencing mediation, screen all clients for a history of abuse to determine which cases are inappropriate for mediation, which require additional safeguards, in addition to or instead of mediation, and which should be referred to other resources.

1. Conduct initial screening separately with the parties. This could be done a variety of ways. For example, screening could take place within a brief telephone or face-to-face interview or with a written questionnaire. Using a structured questionnaire, basic information can be gathered which includes details about any history of abuse. If screening is not done separately, a victim may be unwilling to reveal the presence of violence and/or may be placed at risk for revealing the violence.

2. Screening should continue throughout the mediation process.

B. The issue of voluntariness is critical when it comes to creating a safe place for couples to meet and negotiate. However, there are some states, court districts, provinces, and territories within which courts require mediation prior to permitting a couple to go to trial.

1. AFM recommends that mediation be voluntary on the part of the participants. If however, this is not the case in a particular jurisdiction, it is acceptable to mandate couples to orientation sessions at separate times during which inquiries about domestic violence should be pursued. After these separate orientation sessions, clients could be offered mediation as one of several options.
2. Courts and court-connected mediation programs must assure that a party's request to waive the mediation requirement because of domestic violence is not seen as evidence of a lack of cooperation. Furthermore, in terminating the case, the mediator must take positive steps to protect the safety of the parties. This should include a thoughtful approach to termination in which safety is a priority.

C. Clients should be strongly encouraged to consult with attorneys prior to mediation and certainly before an agreement is finalized.

D. Mediators must be knowledgeable about domestic violence. Training for mediators should include the following:
   1. Issues related to physical and psychological abuse and as effect on family members;
   2. The impact that family violence (including witnessing violence) has on children;
   3. Effective techniques for screening, implementing safety measures and safe termination;
   4. Referral to appropriate resources, in addition to, or instead of mediation; and
   5. Sensitivity to cultural, racial and ethnic differences that may be relevant to domestic violence.

E. Where a decision is made that mediation may proceed, mediators need to meet standards of safety, voluntariness, and fairness. When mediators have concerns, they should inform their clients that they are not neutral about safety. Procedural guidelines include the following:
   1. Obtain training in domestic violence and become familiar with the literature.
   2. Never mediate the fact of the violence.
   3. Never support a couple's trading non-violent behavior for obedience.
   4. Set ground rules to optimize the victim's protection.
   5. When appropriate and possible, arrange separate waiting areas and separate arrival and leaving times, permitting the victim to arrive last and leave first with a reasonable lag in time for safety purposes.
   6. Use separate meetings throughout the mediation process when appropriate, necessary, and/or helpful.
   7. Consider co-mediation with a male/female mediation team, as an option.
   8. Maintain a balance of power between the couple, and, if this is not possible, terminate the mediation process and refer the couple to an appropriate alternative. Such alternatives might include shelters, therapists, abuse prevention groups, and attorneys.
   9. Allow a support person to be present in the waiting room and/or mediation session.
10. Terminate the mediation if either of the participants is unable to mediate safely, competently, and without fear of coercion. Precautions should be taken in terminating to assure the safety of the parties. For example, the mediator should not reveal information to one party or to the court that could create a risk for the other party.

11. Consider offering a follow up session to assess the need for a modification of the agreement.

THE AFM BOARD AFFIRMS THE FOLLOWING:

I. AFM encourages members to work with the diverse cultural and ethnic groups serving violent families to develop strategies for cooperation, including public awareness, mobilization and development of resources, and the expansion of problem solving options.

II. The Academy of Family Mediators hereby incorporates this policy within the Academy’s Standards of Practices outlining the conduct expected of mediators in family mediation cases when family violence is an issue.
Appendix B

Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation

By American Bar Association Family Law Section Task Force
July, 1997

Dedication:
These Standards are dedicated to the memory of Kenneth D. Kemper, a valued colleague on the Task Force which drafted them and a New York matrimonial lawyer. Ken worked diligently to reduce the trauma of divorce and separation on children and families and left us too early.

PREAMBLE

These model Standards of Conduct for lawyers who serve as divorce and family mediators are intended to perform three major functions: (1) to serve as a guide for the conduct of family mediators; (2) to inform the mediating parties; and (3) to promote public confidence in mediation as a process for resolving disputes.

The Standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in divorce and family mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in divorce and family mediation.

Divorce and family mediation (family mediation or mediation) is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute between family members by promoting their voluntary agreement (or "self-determination"). The family mediator facilitates communications, promotes understanding, focuses the family members on their interests, and seeks creative solutions to problems that enable the family members to reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. Experience has, however, established that, as a component of a multifaceted dispute resolution system, family mediation is a valuable option for many families because it can: (1) increase the self-determination of family members; (2) promote the best interests of children; and (3) reduce the economic and emotional costs involved in resolution of family disputes.

Experience has also established that lawyers with knowledge of family law and the necessary special training and aptitudes can effectively perform the mediator's
role. It is to such lawyers that these Standards are addressed. These Standards can also provide helpful guidance to non-lawyers who are engaged in family mediation, as many of the problems they address are common to all family mediators, regardless of professional background.

Effective mediation requires that the family mediator be qualified by training, experience and temperament; that he or she be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the best interests of children be taken into account and that the mediator be prepared to identify families whose history includes domestic violence or child abuse and take appropriate measures.

Standards I, IV-VI1, IX, and XIV deleted as they do not relate to issues of domestic abuse.

Standard II

A family mediator should be qualified by education, training and temperament to undertake the mediation and satisfy the reasonable expectations of the parties.

A. To effectively perform the role of family mediator, a lawyer should:
   1. be knowledgeable about family law;
   2. be aware of the psychological impact of divorce and separation on parents and children;
   3. have special education and training in the process of mediation;
   4. have special education and training in domestic violence and child abuse and neglect.

B. Family mediators should have information available for parties regarding their relevant training, education and expertise.

C. Family mediators should accept cases only when they can satisfy the reasonable expectations of the parties concerning the timing of the process.

D. Individual states should set standards and qualifications for family mediators including procedures for performance-based evaluations and for grievances against mediators. In developing these standards and qualifications, state regulators should consult with appropriate professional groups, including professional associations of family mediators.

E. The requirements for appearing on a list of family mediators appointed or recommended by a court should be made public and available to all interested persons.

F. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to insure that each mediator is qualified for the appointment.
Standard III

A family mediator should define and describe the process of mediation and assess the capacity of the parties to mediate before the parties reach an agreement to mediate.

A. Before family mediation begins a mediator should provide the parties with an overview of the process and its purposes, including:
   1. informing the parties that family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;
   2. distinguishing family mediation from therapy, marriage counseling, the provision of legal advice, or other forms of dispute resolution such as arbitration or litigation;
   3. advising the parties that mediation is one of several alternative processes potentially available to resolve their dispute and describing the advantages and disadvantages of the alternatives to mediation;
   4. informing the parties about the need to employ independent legal counsel throughout the mediation process;
   5. discussing the issue of separate sessions with the parties, including a description of the circumstances in which the mediator may meet alone with either of them or with any third party and the conditions of confidentiality concerning these separate sessions;
   6. informing the parties that the presence or absence of other persons at a mediation depends on the agreement of the parties and the mediator, unless the mediator believes that the presence of another person is required because of a history or threat of violence or other serious coercive activity by a party;
   7. describing the obligations of confidentiality on the mediator and the parties; and
   8. advising the parties of the circumstances under which the mediator may terminate the mediation process and that a party has a right to terminate mediation at any time.

B. The parties should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.

C. The family mediator should assess the capacity and willingness of the parties to mediate before proceeding with the mediation. A mediator should not agree to conduct the mediation if the mediator believes one or more of the parties is not able to participate or is unwilling to participate in good faith.
Standard VIII

A family mediator should maintain the reasonable expectations of the parties with regard to confidentiality.
A. A mediator should not disclose any matter that a party expects to remain confidential unless given permission by all parties or unless required by law, other public policy or other provision of these Standards.
B. The mediator should discuss the parties expectations of confidentiality with them prior to undertaking the mediation.
C. The mediator should inform the parties of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting prior to undertaking the mediation.
D. The mediator shall disclose a party's threat of violence against another party likely to result in imminent death or substantial bodily harm to the threatened party and the appropriate authorities.
E. If the mediator holds private sessions with a party, the obligations of confidentiality with regard to those sessions should be discussed and agreed upon prior to their being undertaken.
F. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the parties immediately to afford any of them an opportunity to quash the process. The mediator should not testify or provide documents in response to a subpoena which the mediator reasonably believes would violate an obligation of confidentiality to the parties without an order of the court.
G. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible individuals. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

Standard X

A family mediator should be trained to recognize a family situation involving child abuse or neglect and should take appropriate steps to shape the mediation process accordingly.
A. As used in these Standards, child abuse or neglect is defined by applicable state law.
B. The mediator should be knowledgeable about the symptoms and dynamics of child abuse and neglect and the governing laws and procedures and attend appropriate training programs on the subject. A mediator should not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without adequate training.
C. If the mediator has reasonable ground to believe that the child is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall report the suspected abuse to the appropriate authorities.
   1. The mediator should consider making appropriate referrals for the parents and children for therapy and assessment.
   2. The mediator should consider suspending the mediation process until the allegations are resolved.

Standard XI

A family mediator should be trained to recognize a family situation involving domestic violence and take appropriate steps to shape the mediation process accordingly.
A. As used in these Standards, domestic violence is defined by applicable state law.
B. A mediator should be knowledgeable about the symptoms and dynamics of domestic violence and other forms of domestic abuse and the governing laws and procedures and attend appropriate training programs on these subjects. A mediator should not undertake a mediation in which the family situation has been assessed to involve domestic violence without adequate training.
C. A mediator should make a reasonable effort to screen for the existence of domestic violence prior to entering into an agreement to mediate with the parties. The mediator should continue to be alert to the possible need for further screening for domestic violence throughout the mediation process.
D. If domestic violence appears to be present the mediator should consider taking the following measures:
   1. holding separate sessions with the parties even without the agreement of all parties;
   2. strongly encouraging the parties to be represented by counsel throughout the mediation process if they are not already;
   3. establishing appropriate security arrangements;
   4. allowing a friend, representative or attorney to attend the mediation sessions to support the victim of domestic violence; and
   5. referring the parties to appropriate community resources; 6. suspension or termination of the mediation sessions, with appropriate steps to protect the safety of victims.
E. The mediator should understand the impact of witnessing violence between parents on children and make appropriate referrals, if necessary, for therapy and assistance to both parents and children.
F. The mediator should ensure that victims of domestic violence consider whether parenting plans resulting from mediation protect the physical safety and psychological well-being of themselves and their children.
Standard XII

A family mediator should withdraw from further participation in the mediation process when the mediator reasonably believes that further participation will not further the parties self-determination.

A. Circumstances under which the mediator should consider withdrawing include, but are not limited to:
   1. If a party has committed or is threatening to commit acts constituting domestic violence or child abuse or neglect against the other or the child;
   2. if a party is unable to participate further in the mediation due to drug, alcohol, or other physical or mental incapacity;
   3. if the parties are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
   4. if a party or parties is using the mediation to further illegal conduct;
   5. if a party's conduct indicates that the party is not participating in the mediation in good faith.

B. If the mediator does withdraw, the mediator should take all reasonable steps to minimize prejudice to the parties which may result from withdrawal.
Appendix C

**Tolman Screening Model**

1. Mediation often occurs with both spouses in the same room together. Do you have any concerns about mediating in the same room together with your spouse?
   
   (The rationale for this question is that it may tap reluctance to participate in mediation because of physical abuse without directly asking for it. Thus, it may be effective as a broad screening question, even if abuse victims are reluctant to directly disclose abuse. On the other hand, reasons other than abuse may result in concerns about mediation, and these would have to be sorted out in further screening.)

2. Are you afraid of your spouse for any reason?
   
   (This question taps the subjective perspective of the respondent. It does not assume fear is a result of physical abuse, nor is it limited to fear of physical harm. It may identify fears of various types (taking the children away, fear of humiliation, fear of spouse harming him/herself, etc.).)

3. Has your spouse ever threatened to hurt you in any way?
   
   (This question is similar to question #2 in that it asks about threats in a broad manner, not limited to physical abuse. It adds information about the spouse's behavior, rather than focusing on the subjective perspective of the respondent.)

4. Has your spouse ever hit you or used any other type of physical force towards you?
   
   (This question directly asks about physical abuse, though it does not use the term abuse. Many women who experience physical abuse may not label it with that term. This question is more neutral in its terminology and may elicit more positive responses. On the other hand, further screening may clarify the physical force used as non-abusive. For example, a spouse's use of physical force may be legitimately self-defensive.)

5. Have you ever called the police, requested a protection from abuse order, or sought help for yourself as a result of abuse by your spouse?
   
   (An affirmative answer to this question would demonstrate that abuse is a significant problem. However, serious abuse might have occurred even if it is answered negatively.)

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3. Published by the State Justice Institute as an appendix to *Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risk* under Grant Number 89-082. Copyright 1989 by Richard M. Tolman, Ph.D. Reprinted with permission.
6. Are you currently afraid that your spouse will physically harm you?
   (This repeats #2, except that it more pointedly asks about physical abuse.
   An affirmative answer to #2 and a negative answer to #6 would point the screening
towards a clarification of the nature of the respondent's fears. It also may clarify
that while the respondent experienced abuse in the past, she is not currently fearful.
This also would indicate a direction for further screening.)

7. Mediation is a process in which divorcing spouses work together with a
neutral third person to their divorce. Do you believe you would be able to
communicate with your spouse on an equal basis in mediation sessions?
   (This question indicates the respondent's subjective perspective about
ability to mediate. A negative response would lead to further screening about the
reasons for the inequality. If previous questions about abuse were answered
negatively, but this question is answered positively, it may indicate that the reason
for inequality is not physical abuse, but some other factors, including psychological
mistreatment. This could then be clarified further. On the other hand, if abuse
questions are answered positively, but this question is answered negatively, it might
reflect the respondent's belief that the abuse has not hampered her ability to use
mediation effectively.)

If there are children:

8. Has your partner ever threatened to deny you access to your children?
9. Do you have any concerns about the children's emotional or physical
   safety with you or the other parent?
10. Has children's protective services ever been involved with your family?
Female Questionnaire

This questionnaire asks about actions you may have experienced in your relationship with your partner. Answer each item as carefully as you can by placing a number beside each one as follows:

1=NEVER  
2=RARELY  
3=OCCASIONALLY  
4=FREQUENTLY  
5=VERY FREQUENTLY  
NA= NOT APPLICABLE

IN THE PAST SIX MONTHS:

1. My partner put down my physical appearance.  
2. My partner insulted me or shamed me in front of others.  
3. My partner treated me like I was stupid.  
4. My partner was insensitive to my feelings.  
5. My partner told me I couldn't manage or take care of myself without him.  
7. My partner criticized the way I took care of the house.  
8. My partner said something to spite me.  
9. My partner brought up something from the past to hurt me.  
10. My partner called me names.  
11. My partner swore at me.  
12. My partner yelled and screamed at me.  
13. My partner treated me like an inferior.  
14. My partner sulked or refused to talk about a problem.  
15. My partner stomped out of the house or yard during a disagreement.  
16. My partner gave me the silent treatment or acted like I wasn't there.  
17. My partner withheld affection from me.  
18. My partner did not let me talk about my feelings.  
19. My partner was insensitive to my sexual needs and desires.

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20. My partner demanded obedience to his whims.  & 1 2 3 4 5 NA  
21. My partner became upset if dinner, housework, or laundry was not done when he thought it should be.  & 1 2 3 4 5 NA  
22. My partner acted like I was his personal servant.  & 1 2 3 4 5 NA  
23. My partner did not do a fair share of the household tasks.  & 1 2 3 4 5 NA  
24. My partner did not do a fair share of childcare.  & 1 2 3 4 5 NA  
25. My partner ordered me around.  & 1 2 3 4 5 NA  
26. My partner monitored my time and made me account for my whereabouts.  & 1 2 3 4 5 NA  
27. My partner was stingy in giving me money to run our home.  & 1 2 3 4 5 NA  
28. My partner acted irresponsibly with our financial resources.  & 1 2 3 4 5 NA  
29. My partner did not contribute enough to supporting our family.  & 1 2 3 4 5 NA  
30. My partner used our money or made important financial decisions without talking to me about it.  & 1 2 3 4 5 NA  
31. My partner kept me from getting medical care that I needed.  & 1 2 3 4 5 NA  
32. My partner was jealous or suspicious of my friends.  & 1 2 3 4 5 NA  
33. My partner was jealous of other men.  & 1 2 3 4 5 NA  
34. My partner did not want me to go to school or other self-improvement activities.  & 1 2 3 4 5 NA  
35. My partner did not want me to socialize with my female friends.  & 1 2 3 4 5 NA  
36. My partner accused me of having an affair with another man.  & 1 2 3 4 5 NA  
37. My partner demanded that I stay home and take care of the children.  & 1 2 3 4 5 NA  
38. My partner tried to keep me from seeing or talking to my family.  & 1 2 3 4 5 NA  
39. My partner interfered in my relationships with other family members.  & 1 2 3 4 5 NA  
40. My partner tried to keep my from doing things to help myself.  & 1 2 3 4 5 NA  
41. My partner restricted my use of the car.  & 1 2 3 4 5 NA  
42. My partner restricted my use of the telephone.  & 1 2 3 4 5 NA  
43. My partner did not allow me to leave the house.  & 1 2 3 4 5 NA  
44. My partner did not allow me to work.  & 1 2 3 4 5 NA  
45. My partner told me my feelings were irrational or crazy.  & 1 2 3 4 5 NA  
46. My partner blamed me for his problems.  & 1 2 3 4 5 NA  
47. My partner tried to turn my family against me.  & 1 2 3 4 5 NA  
48. My partner blamed me for causing his violent behavior.  & 1 2 3 4 5 NA  
49. My partner tried to make me feel crazy.  & 1 2 3 4 5 NA
50. My partner’s moods changed radically.  
51. My partner blamed me when he was upset.  
52. My partner tried to convince me I was crazy.  
53. My partner threatened to hurt himself if I left.  
54. My partner threatened to hurt himself if I didn't do what he wanted me to do.  
55. My partner threatened to have an affair.  
56. My partner threatened to leave the relationship.  
57. My partner threatened to take our children away from me.  
58. My partner threatened to commit me to an institution.
Appendix E

Conflict Assessment Protocol

Purpose: to identify spouse abuse in divorce-related cases and assess appropriateness of cases for mediation.

Structure: Protocol is to be administered in separate sessions. The same basic set of questions is to be asked of both parties in separate sessions. The following is a sample text of the types of questions to be asked.

Content:

A. Introduction to the Separate Screening Session: The purpose of the brief introduction is to put the client at ease, develop rapport, and clarify expectations. The mediator should explain what will happen, give the clients the opportunity to explain their situation, and answer any questions raised about the mediation process.

Suggested text: “The reason why I am meeting with you individually is to give you and your spouse the opportunity to tell me about concerns you might have about mediation and your situation. I also will be asking you specific questions about how you and your spouse got along, so that I can assess whether mediation is appropriate for you and how I might help you. I will not share any of the information you tell me with your spouse unless I have your permission. Is there anything you would like to ask me or tell me before we continue?”

If not, reassure the client that there will be other opportunities to ask questions. If so, allow the client to speak briefly. By opening with this question the mediator enables the client to express something that might otherwise interfere with his or her ability to be attentive and responsive during the rest of the session.

“Could you tell me a little about how the decision to divorce was reached?” (I generally ask this in the orientation session and open the topic in the individual session with a statement based on the client’s topic in the individual session with a statement based on the client’s earlier response, such as: “It sounds like you don’t want the divorce. Could you tell me about that?”)

Explanation: It is very unlikely that clients will quickly reveal that they are abused by the spouse. Abusers are even less likely to volunteer this. Clients are more apt to admit that their spouse has a drug or drinking problem at this earlier stage. The mediator should be observant of the clients’ behavior in the waiting room and the orientation session. The mediator may want to raise an observation directly during the introductory stage. In this stage and throughout the separate session, the mediator needs to be attentive to certain cues that could indicate an abusive

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5. Linda K. Girdner, Mediation Triage: Screening for Spouse Abuse in Divorce Mediation, 7 Mediation Q. 365. Copyright 1990 by John Wiley & Sons, Inc. This material is used by permission of John Wiley & Sons, Inc.
relationship. The question about the divorce decision helps the mediator assess where the party is in the divorce process. Information from that question and the following series is important in determining conflict style.

B. Decisions, Conflict, and Anger: This section is designed to identify the clients’ patterns of making decisions, managing conflict, and expressing anger, all of which are important indices of power and control in the relationship. The first questions in each set is open-ended and circular and is designed to tap into the clients’ perceptions of how issues were handled in their relationship. The responses provide information about the clients’ expectations of the relationship and their views of the power dynamics. This is followed by questions eliciting a specific example of that pattern from the clients’ experiences. Further probing may be necessary to fully understand the pattern. After asking about an example of the first pattern, the mediator asks for other ways in which these issues were handled. This is followed by another round of questions asking for specific examples that explain the pattern. After each round, questions are asked about how this pattern might affect mediation. The purposes of this session are information gathering for the mediator and reality testing for the client. The tone should be positive and understanding.

Suggested text: “Now I am going to ask you some specific questions about how you and your spouse got along over the course of your relationship. How were decisions made in your marriage? Give me an example.”

“Can you tell me about other ways in which decisions were made? Give me an example.”

“How would you like for decisions to be made in mediation? What would the two of you need to do for that to happen?”

“What happens when the two of you fight (have a conflict) about something? Tell me about a time when the two of you had a fight (conflict). What happened then? What other ways do you fight? Tell me about your worst fight. What things do you fight about? What do you think you both might fight about in mediation? How would you like to work things out in mediation? What would need to change for that to be possible?”

“How about anger? How do you and your spouse act when angry? Describe an occasion when you were angry. What did you do? What did your spouse do? What types of things make you angry? Describe an occasion when your spouse was angry. What did he (she) do? What did you do? What types of things make your spouse angry? How would I know that your spouse is feeling angry in mediation? How would I know that you are feeling angry?”

Explanation: These questions are relatively nonthreatening ways of identifying power and control in the relationship. If the decision-making pattern has been one of dominance and acquiescence, it is important to clarify what would need to change for the parties to be able to mediate fairly and whether the parties thought that was possible. In asking questions about fighting and anger, be perceptive of responses that tell only part of a story. For example, if one person says, “We don’t fight very much, because I don’t like things to really blow up,” the mediator can ask,
"Tell me what happened the worst time things blew up." Also, if someone mentions that their spouse throws things or punches walls when angry, ask how that makes them feel. Often acts of violence not directed at the person still can leave them feeling physically threatened and fearful of angering their partner. Be attuned to the issue of control. Is each party able to make decisions about his or her own life, or does one spouse control the other’s daily life and activities? Does one spouse control economic resources in a way that is abusive? Does one spouse “always get his way?” Do examples of anger reveal one party’s need to control the other or have the other be submissive?

In addition to identifying abusive behavior, the mediator can determine, from these questions and the previous divorce question, whether the couple’s pattern is enmeshed, autistic, direct, or disengaged. These categories stem from a typology of divorcing couples by Kressel and others (1980). This knowledge can help the mediator determine what strategies work better with enmeshed couples.

C. Specific Abusive Behaviors: The purpose of this section is to elicit responses relating to specific types of abusive behaviors. The first set of questions relates to physical and emotional abuse and control. It is adapted from Straus’s (1979) Conflict Tactics Scale, which has been empirically tested. The second set probes for potential dangerousness and is based on dangerousness assessment research (Campbell, 1986; Stuart and Campbell, 1989; Sonklin, Martin, and Walker, 1985; Monahan, 1981). The third set of questions addresses the abuse of alcohol and drugs, and the last set briefly addresses the issue of possible child abuse.

Suggested text: “Now I’m going to describe things that some people do when they are angry or try to get their way. I want you to think back over the entire time that you and your spouse have been together and tell me if any of these things have ever happened. Please take your time.”

“Have either of you ever used threats? In other words, saying something bad would happen if the other person didn’t do what she (he) was told? Has there ever been any shoving or pushing? Choking, biting, hitting, or kicking? Have either of you ever prevented the other from leaving a situation? Have you or your spouse ever threatened to or actually destroyed the other person’s property or harmed pets? Have either of you ever forced the other to do anything against his or her will (for example, sexual acts)? Were there other ways, physically or psychologically, in which you and your spouse showed anger or tried to get your way in your marriage that we haven’t mentioned yet today?” (If the woman acknowledges that there has been abuse, probe for frequency and severity.)

“Let me continue with some more questions. Does your spouse control most of your daily activities? Do you control most aspects of your spouse’s life? Have you or your spouse ever been violently or constantly jealous of the other? Have either of you ever used or threatened to use a knife, gun, or other weapon to harm the other or anyone else? Do either of you own or have either of you recently considered purchasing a weapon? Has your spouse ever contemplated or attempted suicide? Have you?
"Now I have a few questions about alcohol and drug use. Have you or your spouse ever had a drinking problem? Has anyone ever complained about your drinking or your spouse’s drinking?” (Probe further, if necessary, for the extent of the problem and its consequences.) “Do you or your spouse use illegal drugs?” (Probe further, if necessary, for type of drug, frequency, and consequences of use.)

If a problem, “How might this affect your/spouse’s ability to participate in mediation? How might it affect your/spouse’s ability to follow through on any agreements you reach in mediation?”

“How about the children: have any of the children ever been abused by an adult physically, sexually or psychologically?” (If it is not a clear no, explore. Clarify whether the harm constitutes child abuse and whether the child is in danger.)

Explanation: The mediator needs to remain constantly alert for cues that there has been physical or psychological abuse. Acts of abuse are likely to be minimized or rationalized by both parties. The abusive spouse might be quite controlling and abrasive with the mediator or might be accommodating and charming. Both spouses are likely to blame the abuse on the abused person or on alcohol. The abused spouse also might fear that revealing the abuse will put her in danger. The mediator needs to use follow-up questions to clarify responses and to understand the situation more clearly.

Factors to look for in the explanation of any incident are intent, attribution, decision making, and subsequent behavior. Intent refers to the context of the abusive incident. It may have occurred out of anger or out of a calculated attempt to control the other person’s behavior, for example. Attribution refers to explanations of cause and responsibility. Does the person who acted abusively accept responsibility for the behavior or does he blame the target of that behavior? Does the person harmed blame herself or hold the abuser responsible for his own actions? Decision making refers to the decision a person makes as a consequence of the incident. Does she learn from it that she should back off and let him have what he wants? Does he decide that this is an effective means of getting his way or does he decide that he will not act in an abusive manner again? How do these decision affect their subsequent behavior?

If either party discloses an incidence of abusive behavior, it is critically important not to join them in minimizing it, even if it was an isolated experience. By the end of this section, the mediator should have a picture of the context, type, frequency, and severity of abuse in the relationship as well as some indicators of potential dangerousness. Any indications of dangerousness should be taken very seriously. Increases in the frequency or severity of abuse, presence of firearms, extreme jealousy, violence toward others as well as one’s spouse, and suicidal ideation on the part of the abuser often are present in men who later kill or attempt to kill their partners and sometimes themselves (Campbell, 1986). The questions about substance abuse and child abuse have been added to allow the mediator, in a brief amount of time, to identify other conditions that might have a bearing on the appropriateness of mediation for the parties. If child abuse is suspected, it would need to be reported.
D. **Closing the Separate Screening Session:** The purpose of this section is to achieve closure for the separate screening session. Attention is directed away from the past and toward the present and future. The questions aim to discover the fears and concerns that the client has about mediation and about working with his or her spouse. These questions also set the stage for traded assurances in the event the parties pursue mediation. The traded assurances technique, developed by Isolina Ricci, is used to assist the parties in identifying concerns and underlying issues and constructively addressing them.

*Suggested text:* “I’ve been asking you a lot of specific questions about you and your spouse and how you have handled things in the past. Next I would like to ask you some questions about concerns you might have right now and your expectations for the future.”

“First, do you have any questions for me about mediation? What is it that concerns you the most about mediating with your spouse? What are you afraid your spouse might do to undermine mediation? What could he/she do to assure you that won’t happen? What might your spouse think you would do to undermine mediation? What could you do to assure him/her that that won’t happen?”

“What would you like to see as an outcome of mediation? What do you think your spouse would like to see as an outcome? What would need to happen for it to be a workable and livable outcome for each of you and be in the interests of your children?”

“Is there anything else you would like to ask me? If you remember something later that you did not bring up in this session, don’t hesitate to let me know. Is there anything that you told me in our time together that you would not want me to tell your spouse?”

*Explanation:* If a woman explains that she wants to mediate because her husband does not want her to go to a lawyer, follow up by asking why he does not want her to retain an attorney and what would happen if she did. Also ask both parties if they could raise their concerns about each other in a joint session. If not, explore the anxiety or fear that may be at the basis of that.