



**CONSIDERING THE NEEDS OF DOMESTIC VIOLENCE VICTIMS:  
THE EXCEPTIONS TO MINNESOTA'S  
ALTERNATIVE DISPUTE RESOLUTION RULE 114**

**Anne Fuchs**

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The Battered Women's Justice Project  
1801 Nicollet Ave S. Suite 102 Minneapolis, MN 55403  
[technicalassistance@bwjp.org](mailto:technicalassistance@bwjp.org)  
800-903-0111, prompt 1

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**Introduction**

Mediation has become a recurring alternative to litigation in family law disputes and Minnesota is no exception. By 2004, at least 42 states had enacted statutes encompassing the use of mediation in custody disputes.<sup>1</sup> Mediation emphasizes the principles of self-determination and autonomy of the participants to find a mutually acceptable solution to their dispute. While many in the legal community support mediation for family law disputes, many domestic violence victim advocates are wary of the appropriateness of mediation. Minnesota does not require mediation in domestic violence disputes. However, limited research on reliable indicators of abuse has contributed to the difficulty of identifying domestic violence. Developing careful screening to expose coercive behaviors, which undermine a victim's ability to effectively negotiate and an abuser's likelihood of genuinely negotiating, would further protect domestic violence victims in Minnesota family proceedings.

**Policy Arguments**

*Advantages of Mediation*

Supporters of mediation advance several policy arguments for the use of mediation in domestic violence settings. One argument is that mediation might empower victims because unlike traditional litigation settings, they are part of the decision-making process.<sup>2</sup> Also, effective mediators are trained

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<sup>1</sup> Jane C. Murphy and Robert Rubinson, *Domestic Violence and Mediation*, 39 Fam. L.Q. 53, 60 (2005).

<sup>2</sup> Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators.*, 37 Fam. & Conciliation Cts. Rev. 335, 337 (1999).

to recognize and attempt to equalize the power disparities between participants. Thus, mediation might distribute power more equally between abuser and victim, a situation which did not previously exist.<sup>3</sup>

Another assertion is that mediation can be more flexible than litigation. Mediation allows the participants to customize the process to their specific needs.<sup>4</sup> In contrast to judges and lawyers, most family dispute mediators have received intensive training on protocols and safeguards for victims' safety.

Supporters also consider how mediation might be more financially feasible than litigation for victims.<sup>5</sup> The litigation system often fails to provide adequate legal representation to victims;<sup>6</sup> low-income clients often precede pro se. This is because victims of domestic violence often have little financial recourse of their own, and certainly fewer resources available to them than their abusers. Domestic violence abusers often protract litigation in order to utterly drain victims financially. Moreover, mediation might offer quicker results than litigation, thereby reducing financial burdens on participants.<sup>7</sup>

Also, supporters allege mediation might allow for economic and efficient use of limited judicial resources. Judges, because of heavy caseloads, only have a minimal amount of time to assess and follow up on the presence of domestic violence. Domestic violence and its implications for custody and parenting determinations add complexity to family law proceedings. They commonly precipitate the appointment of guardians ad litem, court appointed special advocates, custody evaluators and other experts to sort out the nature, severity, context and impact of violence on children and their litigating

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<sup>3</sup> Rene Rimelspach, *Mediating Family Disputes In a World With Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 Ohio St. J. on Disp. Resol. 95, 100 (2001).

<sup>4</sup> Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. Disp. Resol. 253, 260 (2001).

<sup>5</sup> Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 Cardozo Women's L.J. 235, 243 (2002).

<sup>6</sup> Zylstra, *supra* note 4 at 259.

<sup>7</sup> Rimelspach, *supra* note 3 at 104.

parents, all of which add time and expense to traditional adversary approaches to resolving family law disputes. Mediation, supporters contend, promotes the efficient use of spare judicial resources.

Lastly, some supporters of mediation argue that mediation might lessen future incidents of abuse, although there is no research that supports this argument.<sup>8</sup> Litigation requires the victim to approach the abuser in an adversarial system.<sup>9</sup> Furthermore, litigation frequently offers no incentives for an abuser to admit to past abusive acts, but encourages further denial. Often inherent in litigation is increased hostility, and blaming; this does not improve communication nor empower victims.<sup>10</sup> Thus, supporters argue, litigation might work to escalate conflicts between the parties.<sup>11</sup>

#### *Disadvantages of Mediation*

Opponents of using mediation in domestic violence disputes highlight disadvantageous policy arguments; many of which are the inverse of the arguments supporting the use of mediation. One of their objections is that mediation might not, and often cannot, address the inherent power imbalances between abuser and victim.<sup>12</sup> Victimized women are often unable to identify or express their needs.<sup>13</sup> Sometimes, victims of abuse can capably bargain on their own behalf, but recognize that their abusers will neither value nor respect the outcome of mediation. For these reasons, full participation in mediation is often just beyond the reach of many victims.<sup>14</sup>

Mediator neutrality can prevent the mediator from correcting power imbalances and mediation might allow the abuser to continue to manipulate and exercise control. In this way, mediator neutrality often has the ironic effect of further empowering the abuser, thereby increasing rather than decreasing

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<sup>8</sup> Rimelspach, *supra* note 3 at 103.

<sup>9</sup> *Id.*

<sup>10</sup> Zylstra, *supra* note 4 at 259.

<sup>11</sup> Rimelspach, *supra* note 3 at 103.

<sup>12</sup> Zylstra, *supra* note 4 at 275.

<sup>13</sup> Abbott, Ellen A. *Should I or Shouldn't I?: An ADR Provider's View of Referring Victims of Domestic Abuse to Mediation, Collaborative Law and Early Neutral Evaluation*. 16 Family Law Forum (Fall 2007) at 3.

<sup>14</sup> Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Programs on Victims of Domestic Violence through Feminist Positionality Lens.*, 15 STTLR 883, 886 (2003).

the already disproportionate power dynamics and relational distress between the parties. The purported benefit of flexibility may reinforce power imbalances between participants.<sup>15</sup> This can further exacerbate the unequal bargaining power of victims. Furthermore, the advantages of reduced expenses and efficiency when compared to litigation are not always present,<sup>16</sup> as mediated agreements in the context of domestic violence often do not hold up over time. Skillful abusers often engage in persistent litigation even after mediated agreements have been reached.

Some domestic violence victim advocates suggest mediation in domestic violence settings might actually increase the risk of future physical and psychological violence.<sup>17</sup> The immediate period after a victim leaves an abuser is often fraught with increased violence and threats toward the victim.<sup>18</sup> Even the most structured mediation process requires some form of contact between the parties, even if indirect. A victim's attorney might provide a more effective shield from an abuser's manipulation tactics than a shuttling neutral party. In addition, abusers might find mediation a simpler process through which to manipulate victims, and some victims might find it a very difficult environment to strive for self determination and actualization.<sup>19</sup>

Another concern raised regarding the use of mediation in cases involving domestic violence is that the mediation process involves fewer formal protections for victims. Victims might lose due process protections they have in the court setting when in the mediation setting because there is less of a record for review, and fewer rules to control an abuser's behavior and attempts at manipulation. It can be more difficult to hold accountable the various family court professionals involved in a case in the meditative setting.

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<sup>15</sup> Murphy, *supra* note 1 at 55.

<sup>16</sup> Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases.*, 8 Cardozo Women's L.J. 235, 247 (2002).

<sup>17</sup> Rimelspach, *supra* note 3 at 98.

<sup>18</sup> Krieger, *supra* note 16 at 247.

<sup>19</sup> Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard.*, 86 Or. L. Rev. 599, 618 (2007).

Opponents to the use of mediation in cases involving domestic violence assert that the training mediators receive is mostly unregulated. Insufficient training of mediators can cause immense injury to victims.<sup>20</sup> Mediators who are trained without a carefully vetted and formal curriculum may lack the requisite tools and expertise to identify coercive controlling abuse, identify proper candidates for a meditative process and control for the manipulation and fear involved in such cases.<sup>21</sup> Abusers often appear cooperative while victims appear uncooperative in mediation; this creates greater inequities when abusive behavior is not recognized.<sup>22</sup> Moreover, mediators may be unable to form the necessary trust with victims to procure a fair mediation agreement. Unskilled mediators may also lack the ability to evaluate the safety and viability of mediated agreements in relation to the best interests of the child.

Lastly, some opponents to mediation in domestic violence cases emphasize social policy implications. Any form of mediation may humanize an abuser's behavior. The mediation process might frame acts of violence and coercive control as relational issues, sending dangerous messages to both victims and abusers. The abuser is not necessarily required to take responsibility for their past abuse in mediation – a family court neutral might not be able to take a strong and clear stand against the abuser's past and present acts of abuse.<sup>23</sup> A judge may be able to better hold a litigant responsible for abusive behavior and clearly articulate how their order is a direct consequence of the past abusive behavior.

### *The Mandatory Mediation Problem*

Increasingly throughout the country, mediation is mandated for custody, visitation, and divorce disputes.<sup>24</sup> As of 2002, eleven states uniformly order mandatory mediation in family law cases.<sup>25</sup> In

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<sup>20</sup> Murphy, *supra* note 1 at 56.

<sup>21</sup> Rimelspach, *supra* note 3 at 99.

<sup>22</sup> Thompson, *supra* note 19 at 618.

<sup>23</sup> Abbott, *supra* note 13 at 5.

<sup>24</sup> Maxwell, *supra* note 2 at 335.

addition to the previously discussed disadvantages of the mediation process, mandatory mediation in domestic violence settings poses unique challenges to the principle goals of mediation.

First of all, central to mediation is actual voluntary participation of parties.<sup>26</sup> Parties are less emotionally invested in the process and outcomes of mandatory mediation.<sup>27</sup> Thus, this crucial engagement is lost when parties are forced to mediate.<sup>28</sup> In domestic violence situations, mandatory participation reinforces the power imbalances between abuser and victim.<sup>29</sup>

California has been both applauded and reproached for its current mandatory mediation plan. Since 1981, California has required parties disputing child custody to participate in mediation with a no-opt-out rule.<sup>30</sup> Unlike California, most states with mandatory family dispute mediation do not require mediation when allegations of domestic abuse are present.<sup>31</sup> However, California does provide a method for mediators to remove themselves from a case when they cannot achieve a power balance. Furthermore, where an order for protection exists, mediators in California are able to conduct mediations separately and can mandate counseling for domestic violence issues.<sup>32</sup>

In some mandatory mediation models, such as California's, the mediator can be placed in a role of recommender.<sup>33</sup> Under this model, mediators make recommendations to courts on unresolved issues; this alters the traditional confidential neutral role of a mediator.<sup>34</sup> Not only does this undermine

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<sup>25</sup> Alana Dunnigan, *Restoring Power to the Powerless: The Need to reform California's Mandatory Mediation for victims of Domestic Violence.*, 37 U.S. F.L. Rev. 1031, 1036 (2003).

<sup>26</sup> *Id.* at 1041.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1031.

<sup>31</sup> Dunnigan, *supra* note 25 at 1036.

<sup>32</sup> Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Programs on Victims of Domestic Violence through Feminist Positionality Lens.*, 15 STTLR 883, 889 (2003).

<sup>33</sup> Dunnigan, *supra* note 25 at 1046.

<sup>34</sup> *Id.* at 1047.

the trust the parties would have in a neutral mediator, it also creates an opportunity for the abuser to manipulate the mediation setting.<sup>35</sup>

Mandatory mediation is often restricted to a good faith standard. The good faith standard necessitates a certain level of good-faith participation in the mediation process.<sup>36</sup> On the surface, the good faith standard appears to protect domestic violence victims because it demands that abusers come to the table in with a genuine interest in devising fair and mutually beneficial solutions to shared problems. Yet, the concepts of fairness, mutuality, equality, and shared interests are anathema to many coercively controlling batterers. While they may indicate a willingness to participate in mediation, in actuality, they often lack the capacity to do so “in good faith.” Mediations often proceed on the basis of the parties’ apparent willingness to mediate, without attending to whether the parties are capable of participating in good faith. On the other hand, many victims, for protective reasons, express a reluctance or unwillingness to mediate. This justifiable unwillingness to mediate is often misconstrued by mediators and other court personnel as evidence of a victim’s bad faith. Logically, individuals cannot be expected to negotiate-away their or their children’s safety and security. When courts and mediators routinely fail to identify safety issues for mediating families, batterers’ coercive tactics and victims’ protective behaviors are often terribly misconstrued.

### **Minnesota, Mediation and Domestic Violence**

Minnesota exemplifies many of the best practices for mediation in family disputes; yet, improvement is possible. In Minnesota, mediation and other alternative dispute resolution processes are increasingly recommended in family law cases. Under Rule 310.01 of Rules of Family Court Procedure, all family disputes in District Court are subject to the Alternative Dispute Resolution (ADR) Rule 114 except for limited circumstances, such as claims arising under the Domestic Abuse Act or when

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<sup>35</sup> *Id.*

<sup>36</sup> Thompson, *supra* note 19 at 604.

a party claims to be a victim of domestic abuse. Rule 114 defines several ADR processes involving an individual who is a neutral third party presiding over the ADR or mediation process.<sup>37</sup> The exceptions to Rule 114 recognize the complex issues surrounding domestic violence and the opportunity for manipulation by abusers. Crucially, they ensure the voluntariness of mediation processes for those individuals for whom it might be very deleteriousness.

However, the actual identification of domestic violence is a persistent problem in family disputes across the country. Hence, thoughtful exceptions to mediation are under-utilized, and often in the most problematic of cases, because often we are screening for the wrong kind of behavior, or failing to view the behavior in its proper context. Improved safeguards, including improved screening tools and procedures, to identify domestic violence and provide insight into how violence is affecting family members and their ability to participate meaningfully in mediation, would greatly enhance safety and provide good outcomes.

Part of the difficulty of screening for domestic violence in family disputes is the limited amount of research on the subject; researchers are not yet clear on what exactly to screen participants for. Connie Beck's current research, which concentrates on the issues surrounding domestic violence in mandated divorce mediation, provides the most helpful insight we have to date.<sup>38</sup> Beck's research highlights the importance of screening for coercive controlling behavior in addition to physically abusive behavior to assess relationships inappropriate for mediation.<sup>39</sup> Physical violence alone, especially an isolated incident of physical violence, is not the most reliable indicator of individuals' appropriateness for mediation.<sup>40</sup> According to Beck's research, screening for physical violence alone does not capture

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<sup>37</sup> Minn. Gen. R. Prac., Rule 114.02

<sup>38</sup> Connie J.A. Beck, Michele E. Walsh, Rose Weston, *Analysis of Mediation Agreements of Families Reporting Specific Types of Intimate Partner Abuse*. 47 Fam. Ct. Rev., No. 3, 401, 414 (July 2009) (Beck, Ph.D., is an assistant professor of psychology at the University of Arizona).

<sup>39</sup> See Generally, Connie J.A. Beck and Chitra Raghavan, *Intimate Partner Abuse Screening In Custody Mediation: The Importance of Assessing Coercive Control*. 48 Fam. Ct. Rev., Vol. 48, No. 3, 555 (July 2010).

<sup>40</sup>*Id.* at 562.

how that violence is operating in a family and to what effect on the parties. Rather, screening for coercive controlling behaviors prior to and during mediation better reveals one party's vulnerabilities in a mediative setting as well as the other party's lack of amenability, or probable bad faith, in the mediative setting. Furthermore, in mediation settings, the victim and abuser are often living separately from one another; thus, it is likely the current physical violence is less frequent.<sup>41</sup> Nevertheless, less frequent physical violence does not preclude the absence of controlling and manipulating behaviors by abusers in mediation settings.<sup>42</sup> Measuring for coercive control may be a more accurate measure of the presence of domestic violence.<sup>43</sup> As Ellen Abbott also noted in her 2007 article *Should I or Shouldn't I?: An ADR Provider's View of Referring Victims or Domestic Abuse to Mediation, Collaborative Law And Early Neutral Evaluation* in the Family Law Forum, pre-screening and re-screening for both physical and coercive controls will more accurately identify relationships inappropriate for mediation.<sup>44</sup>

Safeguards throughout the mediation process must also be established. Minnesota mediators have the responsibility to express the voluntary nature of mediation to all participants.<sup>45</sup> Any screening or assessment tool should be conducted with each party separately, in private, by a person not involved in the mediation process.<sup>46</sup> Furthermore, the assessment tool should consist of verbal and written components and be designed to elicit the various forms of domestic violence including not only physical violence, but also the presence of coercive control. In addition, providing safety measures to protect participants throughout the mediation process may increase the well-being of participants in Minnesota.

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<sup>41</sup> Beck and Raghavan, *supra* note 44 at 562.

<sup>42</sup> Beck and Raghavan, *supra* note 44 at 562.

<sup>43</sup> *Id.* at 556.

<sup>44</sup> Abbott, *supra* note 13 at 8.; *Cf.*, Amy Holtzworth-Munroe, Connie J.A. Beck, and Amy G. Applegate, *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*. 48 Fam. Ct. Rev., No. 4, 646 (Oct. 2010) (discussing clinical research indicating mediators consistently underestimate the presence of domestic violence among participants. The research showed the importance of screening for domestic violence and the continued need for researching and developing screening measures for domestic violence).

<sup>45</sup> Minn. Gen. R. Prac., Rule 114. Mediation Rule 1 Self-Determination.

<sup>46</sup> Maxwell, *supra* note 2 at 345.

Post-mediation safeguards in Minnesota should include providing participants with information on community services, civil protection orders and Rule 114's procedure to allege a formal complaint of the mediation.<sup>47</sup>

The roles of the court, attorneys and mediators can all act as safeguards to advocate for the best interest of domestic violence victims in mediation. By initially offering both parties information on relevant community services, victims will be informed without requiring them to disclose information specific to abuse. It is important for attorneys to understand the dangers faced by their client before, during and after meeting with their abuser. Lawyers representing clients during mediation should have domestic violence training. Attorneys also can assist clients in evaluating potential mediation agreements.<sup>48</sup> Once trained, collectively, attorneys and judges can cooperate with the mediator to set guidelines to prevent unsafe situations.

## **Conclusion**

Minnesota's exceptions to ADR in instances of domestic violence are a commendable part of its statutory schema. However, identification and screening processes of domestic violence are lacking; domestic violence victims will unavoidably progress to mediation proceedings without anyone having a genuine understanding of how a mediation process might fail victims. Thus, it is all the more important for Minnesota's ADR processes to consider the special needs of domestic violence victims in mediation. Providing robust domestic abuse training to Minnesota mediators, attorneys and judges will help reduce mediation dangers for victims. Pre-mediation screenings or assessment tools that not only identify specific acts of violence, but coercive controlling behaviors as well as the impact of the behaviors on the parties, will further protect domestic violence victims and their children in Minnesota. All of

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<sup>47</sup> *Id.* at Code of Ethics Enforcement Procedure. Rule II(A) Procedure.

<sup>48</sup> Murphy, *supra* note 1 at 66.

Minnesota's ADR processes should reflect the difficulties that surround domestic violence in family legal disputes.

## Annotated Bibliography

### Mediation and Domestic Violence

Azure Schermerhorn-Snyder, Battered Women's Justice Project (2009)

#### Articles Supporting Mediation when Domestic Violence is Present

**Domestic Violence and Mediation: A Dialogue.** *Opinion Series, Family Court Review* 46.4 (2008): 586-597. 3 Consecutive Articles.

Article 1:

**Edwards, Hon. Leonard, Steve Baron, and George Ferrick. "A Comment on William J. Howe and Hugh McIsaac's Article "Finding the Balance" Published in the January Issue of *Family Court Review*. 586-591.**

The authors here respond to a previous article arguing mediation is not appropriate for persons with serious issues of domestic violence. Based on their experiences with the California Court system's policy on mandatory mediation for all child custody disputes, Edwards and company assert that an automatic exclusion of parties who have experienced domestic violence is improper because persons with these issues should be allowed to participate in mediation before an adversarial court process. The authors believe that mediators who have been properly and extensively trained in the area of domestic violence, such as California mediators, have the ability to mediate agreements that are particular to special circumstances and decrease the amount of violence and frustration. In addition, Edwards feels that courts have difficulty identifying persons with domestic violence issues and that the adversarial court process may further irritate an existing violent relationship. They pose the solution that instead of establishing categories of people to exclude from mediation, permit parties to choose a process and allow mediators to screen out any inappropriate cases where there is a perceived power imbalance between the parties. Mediators, in the meantime, must be extensively trained and give skills to identify domestic violence and where it may be present while mediating child custody disputes.

Article 2, Response to Article 1:

Howe, William J., and Hugh McIsaac. "Response". 592-594.

Howe and McIsaac counter discuss the issues raised by Article 1, and state that significant domestic violence issues are not appropriate for mediation in child custody disputes. Rather, they argue, an attorney, a mental health professional and a judge with expertise in domestic violence issues in a litigation format will protect children because their parents will have the right to formal review. Additionally, the authors argue that the existence mandatory mediation programs does not necessarily mean that mediators are highly educated in the area of mediation, or that the appropriate venue for raising domestic violence issues is mediation, due to its strict focus on solving child custody disputes.

Article 3, Response to Article 2.

Edwards, Hon. Leonard, Steve Baron, and George Ferrick. "Surreply." 595-597.

In response, Edwards and company argue that the court system does not do a better job of identifying domestic violence issues than the mediation process. For some clients a lawyer is financially impossible, causing them to self-represent in court. The result can be an unfair and unworkable judge-rendered decision that does not take into account the issue of domestic violence, especially if no one is present to advocate for the abused party. The authors offer the solution that mediation should be the first step in a child custody dispute, and that access to the adversarial system is available should mediation fail. The authors would also like to see more funding for mediation programs to insure competency of domestic violence issues.

**Rimelspach, Rene L. "Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program." Ohio State Journal on Dispute Resolution 17 (2001): 95-112.**

Rimelspach offers valid points on both sides of the mediation debate, but emphasizes that mediation must be a safe and effective to legitimately continue to serve victims of domestic violence. In addressing the issues that create an argument to omit domestic violence cases from mediation, the author examines the loss of power a victim may lack due to the mediation environment, along with the assumption that female victims lack capacity to compromise on issues involving power due to their past experiences with abuse. The concerns of consent given under duress and inability to discern one's own interest over the needs of a spouse are also examined. Finally, the argument that mediation places a victim at increased risk for future violence, since in most instances the battered woman is separated from her partner and reunited in mediation is discussed.

In exploring the advantages to mediation, the above criticisms are countered by examining proposed advantages of mediation. These advantages include giving victims access and information to outside resources such as counseling programs, OFP information, and other social programs for recovery, therefore giving them further options for support. Additionally, it is argued that confidentiality creates a safe place to discuss the abuse and can promote cooperation between the two parties. The idea that an abuser may not admit abuse in court for fear of criminal punishment is lost in mediation due to its confidential nature. Lastly, it is argued that mediation creates an empowering environment for the victim because they are allowed to finally make their own choices and not be subordinated by a power figure, such as a judge.

In a final analysis, Rimpelspach examines devising a court connected mediation program that serve and protect domestic violence victims. This program have in place pre-mediation safeguards, which would include a written screening process that separates the parties prior to the mediation to screen for domestic abuse by an unbiased third party (not the mediator). Verbal and translated versions of the screening tool would be available to illiterate and ESL parties. Based on the outcome of the screening, the third party could determine if the type of dispute would but a party in danger if mediated,

if separate room mediations needed to be conducted, or if it would be proper to mediate. Additionally, either party could decline mediation.

**Zylstra, Alexandria. “Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators.” Journal of Dispute Resolution (2001): 253-280.**

The author examines criticism of the mediation process, followed by the flaws of the criticism. She discusses the lack of training mediators receive, the failure of the mediator to protect victims due to the brief encounter that occurs, and the lack of focus on past behavior. Zylstra explains the flaws of these criticism and explains that mediators don't attempt to mediate the occurrence of violence as a as an interpersonal issues. Rather, that mediation is not a substitution for counseling and psychology, it is a platform for individuals to avoid an adversarial situation that may inflame violence. It is also explained that mediation may instead by a positive process for a victim, especially if they are pro se clients, as any odd behavior by either party can be discussed across the table.

Lastly, Zylstra proposes screening methods and processes to facilitate an appropriate mediation for families that have experience domestic violence. This proposal includes judicial oversight and exclusion of domestic violence cases from mediation unless the victim consents to mediation. The obligations of the mediator would be to screen to domestic violence prior to a session and structure the process in a way to identify issues without endangering the victim. The screening process would include tuning into either verbal or non-verbal indicators that violence may have occurred in the partnership. These obligations would include separate intake sessions for the parties, inclusion of a support system, implementation of safety protocols and reporting any threats to the authorities.

**Thompson, Megan G. “Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard.” Oregon Law Review 86 (2007): 599-633.**

Thompson examines the Good-Faith standard, which she describes as “the minimum level of well-intentioned participation” in mediation. Under this standard, battered women in mandatory mediation are being sanctioned for their uncooperative behavior. Thompson argues that the good-faith standard must be reconceptualized to include the needs of battered women. The current status of good-faith, according to the author, punishes women for failing to attend, prepare or put in effort in the mediation. The acts of the women failing to act in good faith is misunderstood, as due to the abuse in their lives they are often unable to articulate their own interests, understand their bargaining power, and are fearful of retribution following the mediation.

The following court cases are reviewed by Thompson as an examination of the flaws of mediating with a good-faith standard present.

- Dep't of Transp. v. City of Atlanta, 380 S.E.2d 265, 267-68 (Ga. 1989).
- Graham v. Baker, 447 N.W.2d 397, 399 (Iowa 1989).
- Nick v. Morgan Foods Inc., 270 F.3d 590, 597 (8<sup>th</sup> Cir. 2001)
- Francis v. Women's Obstetrics and Gynecology Group, 144 F.R.D. 646, 647 (W.D.N.Y. 1992).

- Foxgate Homeowners' Ass'n v. Bramalea California, Inc., 25 P.3d 1117,1119 (Cal. 2001).

The author also examines the effort to reformulate the good-faith standard with domestic violence in the mediation setting. She notes the dangers and dissatisfaction that accompany litigation, and would reform the good-faith standard by training mediators to target inconspicuous behaviors. Thompson also proposes dismantling mandatory mediation, implementing screening tools for mediators, and the ability to terminate a mediation session when coercion is present. She would also allow the mediator to testify that bad faith was present in a mediation, but only when evidence is strong and there is a legitimate public interest to break the confidentiality bounds of mediation.

**Ellis, Desmond and Noreen Stickless. "Domestic Violence, DOVE and Divorce Mediation. Family Court Review 44 (2006): 658-670.**

Ellis and Stickless investigated the claim that divorce mediation is "unsafe for women." Their conclusions posture that there is no evidence that 1) abused women are more likely than non-abused women to be victims of physical violence and/or emotional abuse during and following their participation in divorce mediation and no evidence that 2) abused women participating in divorce mediation are more likely to be victims of male ex-partner violence than abused women participating in adjudication or lawyer-negotiated separations/divorces.

To improve the mediation process in assessing the risk of violence, the authors created DOVE (Domestic Violence Evaluation). It is a tool to assess and manage risk of domestic violence between partners during and following their participation in divorce mediation. In building the DOVE process, the authors identified 19 statistically significant predictors of male partner violence and abuse against female partners after they separated. This article includes tables and appendices outlining the questions asked to obtain the 19 predictors, along with how to calculate risk categories for individuals.

**Boxer-Macomber, Lauri. "Revisiting the Impact of California's Mandatory Custody Mediation Program of Victims of Domestic Violence Through Feminist Positionality Lens". St. Thomas Law Review 15 (2003): 883-906.**

Through the feminist legal methodology of positionality, the author examines the arguments for and against court-mandated mediation in California Family Law courts for cases that contain allegations of domestic abuse. These arguments include mandatory mediation as an oxymoron; the threatened safety of domestic violence victims; that the goals of mediation are incompatible with domestic violence cases; mediators are not properly trained to deal with violence issues, and lastly that allowing a batterer to participate in mediation makes them think their behavior is acceptable. In response to these accusations, the "for" arguments are answered by the California legislature. These responses include an exemption for mediation when a mediator believes no power balance is attainable; allowance of an attorney or advocate for the victimized party; separate mediations where an order for protection has

been filed, and requiring mediators to encourage parties to seek counseling and domestic violence services.

Parts III and IV of this article applies the positionality lens to the California's present approach to mandatory custody mediation and arrives at the conclusion that California should not have a mandatory mediation requirement is unevolved law because it assumes victims of domestic violence are "appropriately slated" to engage in mediation. By not allowing the mediation process to be optional, the California court system, according to Boxer-Macomber, is threatening the physical safety of the victim. While mediation may be a great option from a positional standpoint for the victim to be heard, requiring participation alienates the possible good outcomes of voluntary mediation.

#### Articles Discouraging Mediation when Domestic Violence is Present

**Fischer, Karla, Neil Vladmir & Rene Ellis. "The Culture of Battering and the Role of Mediation in Domestic Violence cases." SMU Law Review 46 (1993): 2117-2174.**

The authors in this article take that stance that battery is not an interpersonal dispute that can be mediated. Rather, the culture of battering is not an about interpersonal disputes, but instead a systematic pattern of domination and control. The authors posit that both the theory and practice of mediation pose serious problems when dealing with the culture of battering. Fischer and her colleagues examine judicial discretion to order mediation, mandatory mediation, the process of screening for domestic violence in divorce mediation, and eight examples explaining the how the ideology of mediation is an incompatible ideology with the culture of battering. These ideologies are include:

- Ideology of Mediation: Abuse arises out of conflict vs. Culture of Battering: Conflict is the only pretext for abuse
- Ideology of Mediation: Focus on Future, not past behavior vs. Culture of Battering: Ignoring past behavior denies victim's experiences of violence
- Ideology of Mediation: Each Party participate Equally in the search for a mutual agreement vs. Culture of Battering: Equal participation is impossible
- Ideology of Mediation: Avoid Blame and Finding of Facts vs. Culture of Battering: Avoidance of abuse perpetuates status quo of victim responsibility and abuse domination
- Ideology of Mediation: Private caucuses will encourage victim to speak her needs vs. Culture of Battering: Private caucuses will not assist victims who are afraid of consequences of speaking their needs
- Ideology of Mediation: Batterers need to be coerced into Mediation vs. Culture of Battering: Batterers may coerce victims into mediation
- Ideology of Mediation: The novelty of written agreement detailing the rules of the relationship will end the violence vs. Culture of Battering: Rules in a battering relationship will justify the Batterer's further abuse

- Ideology of Mediation: The Process of Mediation can Protect Battered Women from future violence vs. Culture of Battering: Battered women will not disclose abuse to mediators, during or after session

**Krieger, Sarah. "The Dangers of Mediation in Domestic Violence Cases." Cardozo Women's Law Journal 8 (2002): 235-259.**

Krieger investigates the trend of mediation and how it possibly causes the re-privatization of family law, therefore creating a setback for the battered women's movement. Areas examined and analyzed are the concept of domestic violence, the battered women's movement, and alternative dispute resolution (ADR). In comparing the earlier two concepts with the latter, Krieger finds that equal bargaining power isn't present in mediation where domestic violence has occurred. Rather, mediation puts the victim at greater danger by making them face their abuser, save minimal money on court fees, and removes the protection of the court from the situation. Additionally, the author examines the legislative response to domestic violence, and how cases are now unreported due to the private nature of mediation. Lastly, Krieger finds that mediators are not qualified to mediate domestic violence issues, as they lack the psychological training necessary for this complex topic.

**Maxwell, Jennifer P. "Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for courts and Mediators." Family and Conciliation Courts Review 37 (1999): 335-349.**

In asserting that mediation is not an appropriate alternative to the court system, the author tackles the subject of fairness and empowerment that is supposed to occur in mediation. Maxwell argues that there is no way to create a fair environment without humanizing the batterer. In addition, the mediation scene has been failing to professionally acknowledge the seriousness of domestic violence.

Included in this article is a proposed mediator's response to these ideas posited by Maxwell. These solutions include implementing a screening process, keeping up with internet resources, refusing to mediate the violence in the relationship, making sure both sides get equal speaking time, and most importantly understand the dynamics of domestic violence.

**Wheeler, Laurel. "Mandatory Mediation and Domestic Violence." Southern Illinois University Law Journal 26 (2002): 559-573.**

Wheeler asserts that mediators are not properly trained to facilitate mediations where domestic violence has occurred between the parties. While states continue to legislate and mandate mediation, the training of mediators is rarely legislated in the same way. The states of Colorado, Ohio, California and Illinois all vary systematically in their exceptions to mandatory mediation through legislation. Wheeler examines these different state's approaches and the outcomes of the approaches.

The author also proposes not only training mediators properly through a standard that is less than vague, but that we also train judges and lawyers to recognize domestic violence in legal parties and develop intake and evaluation tools to assist the parties before they get to mediation.

**Dunnigan, Alana. "Restoring Power to the Powerless: The Need to reform California's Mandatory Mediation for victims of Domestic Violence." University of San Francisco Law Review 37 (2003) : 1031-1064.**

Dunnigan examines the problematic system of mandatory mediation in California. California, unlike most other states, has no exceptions to opt out of mediation for family court issues. In general, Dunnigan argues that mandatory mediation undermines the goals of mediation, which is a voluntary, confidential process. Mandatory mediation inserts court orders into the process and forces parties to participate. Dunnigan also acknowledges the psychological advantage a batterer may have in mediations, such as the victim only having immediate safety but not knowing what the future may hold. In custody disputes, the ruling interest is that of the child, not the parents. According to the author, this interest fails to insure safety for any party involved, as violence often increases after an adversarial occurrence.

Dunnigan proposes a screening process, but warns that intake forms won't necessarily compel a party to admit any abuse. Recommending mediation, where a mediator makes a statement to a judge after mediation (differing from traditional confidential mediation) coerces a batterer to hide his behavior to be seen in a light favorable to the court. The California case *McLaughlin vs. Superior Court*. 189 Cal Rptr. 479 (Ct. App 1983) held that under a recommending mediation model, the confidentiality of the caucus portion of mediation can be destroyed, as a judge may order a mediator to testify the reasoning for their recommendation. The court rules that it would be a due process violation if the mediator was not subject to cross examination.

The author proposes dismantling mandatory mediation and making it again a voluntary process as a solution to the problems addressed previously. Additionally, Dunnigan examines the North Carolina exemption policy, which allows a waiver of mediation for good cause, including domestic violence. Other proposed solutions in this article are safeguarding confidentiality, comprehensive pre-mediation therapeutic intervention, and comprehensive pre-mediations screening.

#### Other Resources

**Ver Steegh, Nancy and Claire Dalton. "Report from the Wingspread Conference on Domestic Violence and Family Courts." Family Court Review 46 (2008): 465-467.**

Based on a 2007 Conference, the authors recognize that family courts are experiencing an increased and complex caseload. While the caseloads have increased, fewer parties are represented by attorneys. When parties are not represented, they are less likely to be notified of legal options such as mediation. They are also least likely to be protected from abusive partners who are using the court system as a control mechanism. Additionally, families are lacking the resources to pay for ADR services such as mediation and parenting coordinators. Due to the complexity of the case management the court is experiencing, the authors assert that courts need to coordinate with other courts in their system as well as community based agencies in order to unify the system and avoid conflicting orders.