

THE ONGOING DEBATE ABOUT MEDIATION IN THE CONTEXT OF DOMESTIC VIOLENCE: A CALL FOR EMPIRICAL STUDIES OF MEDIATION EFFECTIVENESS

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INTRODUCTION

Several schools of thought exist as to whether mediation is appropriate when the underlying relationship involves domestic violence.¹ Some argue that mediation is always inappropriate when a

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¹ See, e.g., Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985); David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 MEDIATION Q. 331 (1990); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Karla Fischer, Neil Vidmar, & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1992); Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255, 264 (1994); Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 367 (1999); Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 240-41 (2002); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 147 (2003) [hereinafter Ver Steegh, *Yes, No, and Maybe*]. This paper focuses on mediation in the United States, but this topic has also been a debated issue in other countries. See, e.g., Lois Chiang, *Reports of ASIL Programs: ASIL Peking University Program Addresses Protection of Women's Rights*, THE AM. SOC'Y OF INT'L L. NEWSL. (Nov. 1995) (describing how Australia does not encourage mediation where there has been domestic violence, while China was not yet considering the power imbalances involved in mediation where the parties include a domestic violence victim and her abuser); Cynthia L. Chewter, *Violence Against Women and Children: Some Legal Issues*, 20 CAN. J. FAM. L. 99 (2003) (discussing issues related to domestic violence and mediation in the Canadian context); Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261 (2008); Barbara Davies & Stephen Ralph, *Client and Counsellor Perceptions of the Process and Outcomes of Family Court Counseling in Cases Involving Domestic Violence*, 36 FAM. & CONCILIATION CTS. REV. 227 (1998) (analyzing family law mediations of cases involving domestic violence in Australia); Sandra Zaher, *The Feminization of Family Mediation*, 53 DISP. RESOL. J. 36 (1998) (focusing primarily on the development of family mediation programs in Canada, but also addressing programs in the United States).

couple has a history of domestic violence.² Others believe that, while mediation in cases of domestic violence should not be barred, it should generally not be encouraged.³ Yet a third group focuses on mandatory mediation and argues that mandatory mediation should never occur when the relationship has a history of domestic violence, unless the victim wishes to go through mediation.⁴ Another significant group believes that each situation should be evaluated individually through screening to determine whether mediation is appropriate, and that there could be many situations where mediation could be appropriate even when there has been a history of domestic violence.⁵ Finally, there is a small group that

² See, e.g., Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 L. & INEQ. J. 21, 30–31 (1984) (describing feminist criticisms of mediation that argue that cases involving mediation should be resolved by courts); Fischer, Vidmar, & Ellis, *supra* note 1, at 2155; Christine McLeod Pate, *Family Mediation Works for Women and Children (Who Aren't Victims of Domestic Violence)*, 28 AK BAR RAG 17 (2003); Allen M. Bailey & Carmen Kay Denny, *Attorneys Comment on Mediation & Domestic Violence*, 27 AK BAR RAG 16 (2003); Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Desmond Ellis, Comment, *Marital Conflict Mediation and Post-Separation Wife Abuse*, 8 L. & INEQ. J. 317, 339 (1989) (“[M]ediation is inappropriate in the presence of pre-separation abuse and alcohol and/or drug abuse.”). Even if a state mandates exemption of cases involving domestic violence from the mediation process, there can be difficulty in determining what standard should be used to determine whether a case should be exempted. See Craig A. McEwen, Nancy H. Rogers, & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1337–38 (1995).

³ See, e.g., Lerman, *supra* note 1; William J. Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of the Children Are at Stake*, 46 FAM. CT. REV. 78, 84 (2008) [hereinafter Howe & McIsaac, *Finding the Balance*]; William J. Howe & Hugh McIsaac, Response, *Domestic Violence and Mediation: A Dialogue*, 46 FAM. CT. REV. 592 (2008) [hereinafter Howe & McIsaac, Response]; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Ver Steegh, *Yes, No, and Maybe*, *supra* note 1.

⁴ See, e.g., Hart, *supra* note 1; Gagnon, *supra* note 2.

⁵ See, e.g., Chandler, *supra* note 1; Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437, 437 (2008); Leonard Edwards & Steve Baron, Surreply, *Domestic Violence and Mediation: A Dialogue*, 46 FAM. CT. REV. 595, 596 (2008) (arguing that even in cases of child custody disputes where there is a context of domestic violence, mediation can offer both parents the ability to determine for themselves what custody arrangements will be and usually do so in a way that is at least as good, if not better, than the adversarial process); Luisa Bigornia, *Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 60–61 (2000); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 421 (2000); Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303 (1990); McEwen et al., *supra* note 2, at 1339 (“Given the view that lawyer advocacy helps balance power in cases of abuse, blanket categorical exclusion would be unnecessary if lawyers

argues that mediation can be effective in almost any family law case, even those in which domestic violence is a factor.⁶

State legislatures, courts, and mediation programs have responded to these arguments in a variety of ways. Some states have approached the issue by exempting from family mediations situations where there has been domestic violence, while other state statutes do not provide for such an exemption.⁷ Court-sponsored and community-based mediation programs also differ in their approaches to domestic violence issues. Most programs have instituted a screening process to evaluate whether disputes are

participated actively in mediation and if provisions were made for separating the parties in mediation upon request.”).

⁶ This argument was first made in the early 1980s. See Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15 (1982). Although this perspective had few supporters in the 1980s and 1990s, there has been more support for this argument in recent years. See, e.g., Leonard Edwards, Steve Baron, & George Ferrick, *A Comment on William J. Howe and Hugh McIsaac's Article "Finding the Balance"*, 46 FAM. CT. REV. 586, 586 (2008) (arguing that “mediation practice has advanced so far that even these persons (those with serious issues of domestic violence, substance abuse, and mental health) should be given an opportunity to participate in mediation before being referred to the adversarial court process”); Leon Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 663 (2007) (“After years of experience in cases involving parents, domestic violence, and child custody, I have concluded that if properly designed and operated, mediation provides a safe, effective way of resolving these custody disputes.”).

⁷ States with statutes, civil rules, or court rules creating mediation exceptions for cases involving domestic violence include: Alabama, ALA. CODE § 6-6-20(d), (e), & (f) (2007); Alaska, ALASKA STAT. §§ 25.20.080(f) & (g), 25.24.060(f) & (g), & 25.24.140(f) & (g) (1996); Arizona, ARIZ. FAM. LAW PROC. R. 67 (2007); Delaware, 13 DEL. CODE § 711A (2007); Florida, FLA. STAT. § 44.102 (2007); Hawaii, HAW. REV. STAT. ANN. § 580-41.5 (2007); Illinois, 750 ILL. COMP. STAT. § 5/607.1 (2008); Iowa, IOWA CODE ANN. § 598.7 (2006); Kentucky, KY. REV. STAT. § 403.036 (2008); Louisiana, LA. REV. STAT. ANN. § 9:363 (2007); Minnesota, MINN. STAT. ANN. § 518.1751 (2007); Missouri, MO. ANN. STAT. § 452.372 (2007); Montana, MONT. CODE ANN. § 40-4-301 (2005); New Hampshire, N.H. FAM. DIV. § 2.13 (2007); New Jersey, N.J. CT. R. 1:40-5 (2007); New Mexico, N.M. STAT. ANN. § 40-4-8 (2007); North Carolina, N.C. GEN. STAT. ANN. §§ 7A-38.4A & 50-13.1 (2007); Oklahoma, 43 OKLA. STAT. tit. 43, § 107.3 (2007); Oregon, OR. REV. STAT. § 107.755 (2005); Pennsylvania, 23 PA. CONS. STAT. ANN. § 3901 (2007); PA. R. CIV. PRO. NO. 1940.3 (2007); Tennessee, TENN. CODE ANN. §§ 36-4-131, 36-6-107, 36-6-305, & 36-6-409 (2007); Texas, TEX. FAM. CODE ANN. §§ 6.602 & 153.0071 (2007); Washington, WASH. REV. CODE § 26.09.016 (2007); West Virginia, W. VA. CODE § 48-9-202 (2007); Wisconsin, WIS. STAT. ANN. § 767.405 (2006). Indiana excepts cases involving domestic protection orders from mediation but not other types of cases involving domestic violence. IND. CODE § 34-26-5-15 (2007). See also Nebraska, NEB. REV. STAT. § 43-2939 (2007) (if screener determines couple has history of domestic violence, then couple is sent to specialized alternative dispute resolution instead of traditional mediation). Nevada does not automatically exempt domestic violence cases from mediation but gives the court the discretion to exclude those cases. NEV. REV. STAT. ANN. § 3.500 (2007). California has mandatory mediation for family law cases, with no exception for those with a history of domestic violence. CAL. FAM. CODE §§ 3170, 3181, & 3182 (2007). Leonard Edwards has analyzed the effectiveness of California's mandatory mediation program. See Edwards, *supra* note 6.

appropriate for mediation and whether the parties have a history of domestic violence that could affect the mediation.⁸ Many mediation programs provide training for mediators to recognize signs of domestic violence and be able to manage situations where it becomes an issue, but not all programs do.⁹

In spite of the fact that scholars and mediators still debate these issues and legislatures and courts have developed a variety of “solutions,” very few empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence. Those studies that have been done are very limited, involving only a small number of subjects.¹⁰ Scholars rely mostly on anecdotal evidence to support their arguments.¹¹ Although many of their claims seem intuitive, more needs to be done to evaluate how effective mediation programs are in handling disputes involving domestic violence because of the large number of those disputes that end up in mediation. In addition, because of the variations in how programs address screening and mediator training issues, empirical data is necessary to evaluate which approach(es) are better at addressing domestic violence issues in family mediations and, most importantly, which ones help to improve fairness of mediation outcomes and reduce future incidents of domestic violence.

Regardless of the ongoing debate concerning its appropriateness for domestic violence victims, mediation has become the norm in family law cases involving custody disputes, divorces, and property disputes. As a result, an increasing number of cases utilizing

⁸ Laureen D’Ambra & Christine D’Ambra, *Is Mediation a Solution to the Family Court’s Burgeoning Domestic Caseload?*, 56 R.I. BAR J. 15, 37 (2008); Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194; Edwards, *supra* note 6, at 662.

⁹ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 189–90.

¹⁰ See, e.g., Chandler, *supra* note 1 (comparing the mediation agreements of couples with a history of domestic violence with couples without a history of domestic violence); The Transition House Association of Nova Scotia, *Abused Women in Family Mediation: A Nova Scotia Snapshot*, Jan. 13, 2000, <http://www.thans.ca/file/30> [hereinafter THANS Study]; Lerman, *supra* note 1, at 81. The study that Lerman refers to in her article is also discussed in Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261; see also Jessica Pearson, *The Equity of Divorce Mediation Agreements*, 9 MEDIATION Q. 179 (1991); Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005).

¹¹ See, e.g., Lerman, *supra* note 1, at 57–61; Hart, *supra* note 1, at 321–22; Bailey & Denny, *supra* note 2, at 16; THANS Study, *supra* note 10; Grillo, *supra* note 3, at 1562–64, 1567–70, 1586, 1594, 1600; Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994).

mediation involve victims of domestic violence.¹² In Part I, this Article will explore the potential challenges of mediating family law cases involving domestic violence, including definitional challenges, process issues, outcome issues, and public policy implications. Concerned about the implications of this trend for domestic violence victims, state legislatures, courts, and mediation programs have sought to develop improved processes for fair and safe family law mediations, and the Article will analyze the most common of those processes in Part II. Additionally, Part III will describe what scholars have done to determine the effectiveness of mediation programs in addressing domestic violence issues and will advocate further empirical research in this area. Finally, Part IV will propose a potential study to be implemented on a widespread basis to evaluate mediation effectiveness where parties have a history of domestic violence.

I. POTENTIAL PROBLEMS WITH FAMILY MEDIATION WHEN THE COUPLE HAS A HISTORY OF DOMESTIC VIOLENCE

Legal scholars, mediation advocates, and domestic violence victims' advocates have long debated whether mediation is appropriate for parties that have a history of domestic violence.¹³ Their concerns generally fall into four basic categories. First, there are challenges about how to define "domestic violence" when determining whether cases are appropriate for mediation.¹⁴ Second,

¹² For example, a survey of California's court-sponsored mediation program found that approximately fifty percent of all cases involve a history of some domestic violence. Edwards, *supra* note 6, at 665. See also Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 *FAM. & CONCILIATION CTS. REV.* 335, 335 (1999) (estimating that between fifty and eighty percent of all cases referred to court-based family mediation programs involve domestic violence); Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 *FAM. & CONCILIATION CTS. REV.* 6, 7 (1995) (stating that at least fifty percent of cases referred to family court mediation programs involve domestic violence). *But see* Chandler, *supra* note 1, at 331 (finding that only twenty-three percent of a group of 216 divorcing couples had a history of domestic violence).

¹³ This Article does not address some scholars' arguments that mediation can be used, in the context of restorative justice, to specifically address domestic violence issues. See, e.g., Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 *V.A. J. SOC. POL'Y & L.* 263 (2000–2001); Arby Aiwazian, Note, *Transformative Mediation: Empowering the Oppressed Voices of a Multicultural City to Foster Strong Democracy*, 11 *SCHOLAR* 31, 39–40 (2008).

¹⁴ See *infra* Part I.A. For examples of arguments about whether mediation should be mandatory in family law cases and, if so, whether there should be an exception for cases involving a history of domestic violence, see, for example, Knowlton & Muhlhauser, *supra* note 1, at

there are concerns about whether the mediation process can be fair, voluntary, safe, and neutral when the parties have a history of domestic violence.¹⁵ Third, there are concerns about potential outcomes of such mediations and whether those outcomes can be fair and safe for victims.¹⁶ Finally, there are public policy concerns that are interwoven with the debates about mediation when there is a history of domestic violence.¹⁷ The following subsections develop these potential problems with family mediation when the parties have a history of domestic violence.

A. The Challenge of Defining “Domestic Violence”

One of the most immediate problems with determining when it is appropriate to mediate family law cases where there is a history of domestic violence is that there are a number of challenges in determining how to even define “domestic violence” in this context.¹⁸ First, because legislatures have passed laws to address domestic violence, there are legal definitions of “domestic violence.” Those definitions may or may not reflect definitions of “domestic violence” or “domestic abuse,” as understood by society, victims’ rights advocates, or scholars.¹⁹ Second, although “domestic violence” has historically been used to refer specifically to physical abuse, most experts today recognize that there are other forms of abuse that may fit into this category as well, including emotional or verbal abuse, extreme levels of control over actions or finances,

264; Loomis, *supra* note 1; Edwards, *supra* note 6, at 661–62; Grillo, *supra* note 3; Lauri Boxer-Macomber, *Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 *ST. THOMAS L. REV.* 883, 889 (2003); Alana Dunnigan, Comment, *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 (2003); Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 *S. ILL. U. L.J.* 559 (2002); Maxwell, *supra* note 12, at 337–38.

¹⁵ See *infra* Part I.B.

¹⁶ See *infra* Part I.C.

¹⁷ See *infra* Part I.D.

¹⁸ See, e.g., Loretta M. Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 *FAM. CT. REV.* 523, 524–26 (2008); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 *LA. L. REV.* 1379 (2005) [hereinafter Ver Steegh, *Differentiating Types of Domestic Violence*].

¹⁹ Frederick, *supra* note 18, at 524–26; Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 *FAM. CT. REV.* 454, 456 (2008) [hereinafter Ver Steegh & Dalton, *Report from the Wingspread Conference*].

etc.²⁰ Third, mediation proponents have begun to recognize that not only violent *acts* but also *threats* of violence may have a negative impact on the mediation process.²¹ Fourth, although many mediation advocates would agree that mediation should not be used where there are allegations of “serious” domestic violence, most are not in agreement about how to define “seriousness.”²² Finally, mediation experts recognize that there are additional factors that influence how “domestic violence” should be defined when determining which parties are capable of mediating, including timing issues and the specific context in which the domestic violence has occurred.²³

Loretta M. Frederick, senior legal and policy advisor of the Battered Women’s Justice Project, has raised an important issue that courts and other mediation programs should consider in designing screening processes.²⁴ For example, how a mediation program defines “domestic violence” can be relevant to whether the screening process is effective in discovering whether domestic violence exists in a relationship and therefore how the court or mediation program should treat that situation.²⁵ When state laws specify what programs should be available based on whether there is a history of domestic violence, the legal definition of domestic violence

²⁰ See, e.g., Bryan, *supra* note 11, at 177–93 (describing financial control and verbal abuse as part of an example of domestic violence); Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 456; Ver Steegh, *Differentiating Types of Domestic Violence*, *supra* note 18, at 1379; Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 *FAM. L.Q.* 719, 719 n.1 (citing Roberta Valente, *Domestic Violence and the Law*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK*, THE AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE (1996)) (“Domestic violence” occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner.”); Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 *FAM. CT. REV.* 658 (2006); Desmond Ellis, *Divorce and the Family Court: What Can Be Done About Domestic Violence?*, 46 *FAM. CT. REV.* 531, 531–36 (2008); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 *BERKELEY J. GENDER L. & JUST.* 2 (2007); Connie J. A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 *PSYCHOL. PUB. POL’Y & L.* 1, 7 (2006).

²¹ See, e.g., Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 456–57; Ellis & Stuckless, *supra* note 20.

²² Lerman, *supra* note 1, at 73, 76, 102.

²³ Loretta Frederick & Julie Tilley, *Effective Interventions in Domestic Violence Cases: Context is Everything*, BATTERED WOMEN’S JUSTICE PROJECT, May 2001, http://data.ipharos.com/bwjp/documents/effective_interventions.pdf.

²⁴ Frederick, *supra* note 18. See also Ver Steegh, *Differentiating Types of Domestic Violence*, *supra* note 18.

²⁵ Frederick, *supra* note 18, at 524–26.

will be relevant.²⁶ At the same time, there can also be “contextual” definitions of domestic violence.²⁷ In other words, how one evaluates the potential influence of domestic violence in a specific situation with a couple may depend on:

- (1) the perpetrator’s intent in using violence and abuse against a partner, with implications for his or her approach to parenting;
- (2) the meaning which the victim and children take from the violence; and (3) the effect of the abuse on the adult victim and children, including the harm done and the risk of physical and other forms of violence.²⁸

Scholars have also begun to differentiate between different types of domestic violence and to argue that the type may matter when determining whether a couple can effectively mediate.²⁹ For example, Joan Kelly and Michael Johnson have defined four different types of domestic violence: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence.³⁰ Kelly and Johnson define coercive controlling violence, also sometimes called “intimate terrorism,” as “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.”³¹ Coercive controlling violence is what most people typically associate with domestic violence. The second type of domestic violence, violent resistance, has also been defined as “female resistance,” “resistive/reactive violence,” and “self-defense.”³² Situational couple violence is a “type of partner violence that does not have its basis in the dynamic of power and control.”³³ Finally, separation-instigated violence is a term used to describe violence that does not occur until a couple is in the process of ending their relationship.³⁴ Kelly

²⁶ *Id.* at 524. See also *Model Standards of Practice for Divorce and Family Mediators*, 38 *FAM. & CONCIL. CTS. REV.* 110, 120 (2000) (Standard XI.A.) (setting out that domestic violence will be defined by state law).

²⁷ Frederick, *supra* note 18, at 524–26.

²⁸ *Id.* at 524.

²⁹ See, e.g., Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 456–57; Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 *FAM. CT. REV.* 476, 477 (2008); Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 *J. MARRIAGE & FAM.* 948, 950, 954 (2000).

³⁰ Kelly & Johnson, *supra* note 29, at 477.

³¹ *Id.* at 478.

³² *Id.* at 479.

³³ *Id.*

³⁴ *Id.*

and Johnson believe that an understanding of the different types of domestic violence can lead to better screening processes.³⁵

Applying these different definitions, it is possible to see how many cases involving situational couple violence might still be possible to mediate, because that history would not necessarily signal potential problems with power imbalances or intimidation.³⁶ On the other hand, many cases involving coercive controlling violence would most likely not be appropriate for mediation.³⁷ Cases involving separation-instigated violence would most likely have to be evaluated on a case-by-case basis to determine whether the victim is capable of mediating, but those cases would certainly emphasize the need to have protocols in place before, during, and after the mediation to protect the victim from additional violence.³⁸

Ohio provides an example of how some states have chosen to define domestic violence more broadly than the statutory term. The Ohio Supreme Court's domestic violence training program for mediators focuses on detecting and addressing "domestic abuse" rather than "domestic violence," because "domestic abuse" "connote[s] a broader range of behaviors that should be of concern to mediators and their stakeholders when assessing an individual's capacity to negotiate on his or her own behalf and on behalf of his or her children."³⁹ In contrast, the term "domestic violence" is a statutory term in Ohio, and the court was concerned that its use "may result in a narrowed understanding of the dynamics at play in these situations."⁴⁰

For example, the Ohio Supreme Court's training materials set out the following definition of "domestic violence," as defined by the National Council of Juvenile and Family Court Judges (NCJFCJ) Model Code on Domestic and Family Violence:

the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

- Attempting to cause or causing physical harm to another family or household member

³⁵ *Id.* at 477–78 (“The value of differentiating among types of domestic violence is that the appropriate screening instruments and processes can be developed that more accurately describe the central dynamics of the partner violence, the context, and the consequences.”).

³⁶ Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 456–57.

³⁷ *Id.*

³⁸ *Id.*; see also William G. Austin, *Partner Violence and Risk Assessment in Child Custody Evaluations*, 39 *FAM. CT. REV.* 483 (2001).

³⁹ SUPREME COURT OF OHIO, *DOMESTIC ABUSE ISSUES: TRAINING FOR MEDIATORS AND OTHER PROFESSIONALS I* (2d ed. 2007).

⁴⁰ *Id.*

- Placing a family or household member in fear of physical harm or
- Causing a family or household member to engage involuntarily in sexual activity by force, threat of force or duress.⁴¹

In contrast, the training materials also provide the American Bar Association Commission on Domestic Violence's broader definition of "domestic abuse":

A pattern of abusive and controlling behaviors that one current or former intimate partner or spouse exerts over another as a means of control, generally resulting in the other partner changing his or her behavior in response.

Domestic abuse may include physical violence, coercion, threats, intimidation, isolation, and emotional, sexual or economic abuse. Violence or fear of violence does not have to be present for these behaviors to be abusive.⁴²

By defining "domestic violence" broadly to include the term "domestic abuse," Ohio seeks to ensure that its screening programs are able to include more aspects of a couple's history that could potentially undermine the validity and safety of the mediation process.⁴³ Because behavior associated with domestic abuse could have a similar influence on the mediation process as domestic violence, it makes sense to screen more broadly for domestic abuse prior to conducting family law mediations.

Because most mediation advocates agree that cases involving a "serious" history of domestic violence should be excluded from family law mediations, it is important to think about how "seriousness" should be defined.⁴⁴ "Seriousness" is often a factor in determining which cases are appropriate for mediation, and definitions which are either too broad or too narrow may include cases that are really not appropriate for mediation or exclude cases that could be successfully mediated. For example, one way to evaluate

⁴¹ *Id.* at IV-20.

⁴² *Id.*

⁴³ *Id.* at I.

⁴⁴ Lerman, *supra* note 1, at 73 ("The disagreement between mediation advocates and the law enforcement advocates centers on the questions of what constitutes serious violence, and which situations are so imbued with coercion that mediation cannot be a fair remedy for the weaker party."). See Murphy & Rubinson, *supra* note 10, at 58. Murphy and Rubinson distinguish cases involving a "culture of battering" as those which should not be mediated rather than referring to the "seriousness" of the domestic violence. They define "culture of battering" as "a systematic pattern of control and domination characterized by forms of physical, emotional, sexual, familial and/or financial abuse." *Id.*

whether cases involving domestic violence could be mediated would be to measure how serious the injury is,⁴⁵ while another way would be to look at the number of incidents involved.⁴⁶

A few hypothetical examples illustrate this debate. Imagine a case where the abuser had sent the victim to the hospital one time with several broken bones, a concussion, and bruising over much of her body. If the mediation program applied the first definition of seriousness, serious of injury, to the screening, then this couple would be excluded from mediation. However, one could easily imagine situations in which the victim would be fully capable of participating in mediation in spite of the severity of that past incident. Maybe this single incident occurred several years ago and has not had the kind of psychological effect on the victim that would prevent her from mediating effectively. Maybe the victim filed charges against her abuser and moved out, seeking counseling. There are many potential situations in which the victim may be fully capable of protecting her own interests in mediation, depending on the circumstances.

In contrast, one could imagine a case where the physical injuries from the abuse were very slight or even nonexistent but the psychological effect on the victim was very significant because of the repetitive nature of the abuse. Maybe the abuser has consistently belittled his spouse and threatened her over the course of the years of their relationship, pinching her and slapping her when she has displeased him but never injuring her in such a way that she needed medical attention. Depending on individual circumstances, the victim from this second scenario could potentially be much less capable of mediating effectively than the victim from the previous case involving the one incident. This discussion of “serious” domestic violence clearly illustrates the importance of evaluating whether couples should mediate on a case-by-case basis.

In addition, the consideration of context is also important. Some scholars argue that, even where there is a history of domestic violence, there may be some cases where mediation is still appropriate based on the timing of past incidents and other contexts.⁴⁷ For example, Sandra Zaher has argued that categorical exclusion of cases involving domestic violence from mediation would deprive “those women who make a free and informed choice to use a con-

⁴⁵ Lerman, *supra* note 1, at 76.

⁴⁶ *Id.* at 102.

⁴⁷ See, e.g., Zaher, *supra* note 1, at 42; Chandler, *supra* note 1, at 334–36; Frederick, *supra* note 18, at 524–25.

venient and inexpensive service . . . of that choice.”⁴⁸ In contrast to some feminist critiques of mediation in this context,⁴⁹ Zaher believes that “there are some women who are capable of comprehending the mediation process, who understand the alternatives, and who are no longer adversely affected by the violence of their partners, and who therefore are capable of voicing their own rights and interests, as well as those of their children.”⁵⁰ The effect of past violence on the victim is a determining factor in whether he or she could effectively mediate.⁵¹

David Chandler observes that whether or not a victim can effectively mediate with her abuser may depend on individual circumstances.⁵² Some women, although victims of domestic violence, have strong support systems in place that can help them negotiate through the process, and those women may be able to benefit from mediations.⁵³ Other women, whose experiences with abuse are too recent or who do not have such support systems in place, may be further harmed by power imbalances that emerge during the mediation.⁵⁴ Timing may be important in determining whether a victim can effectively mediate—over time, participation in victim counseling might provide the victim with the tools necessary to successfully mediate family law issues.⁵⁵ By comparing the mediation agreements reached by couples who had a history of domestic violence with those couples who did not, Chandler determined that pre-mediation screening was effective in determining which cases could be successfully mediated.⁵⁶

This discussion of the challenges of defining “domestic violence” for purposes of family law mediations emphasizes the true

⁴⁸ Zaher, *supra* note 1, at 42.

⁴⁹ See, e.g., Krieger, *supra* note 1, at 245–48; Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43 (1995); Dianna Post, *Mediation Can Make Bad Worse*, NAT’L L.J., June 8, 1992, at 1; Susan L. Pollet, *Mediating Domestic Violence: A Potentially Dangerous Tool*, 77 N.Y. ST. B.J. 41 (2005); Mary Pat Treuthart, *In Harm’s Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 721 (1993); Gagnon, *supra* note 2; Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger For Victims of Domestic Violence*, 1 BERKELEY WOMEN’S L.J. 175 (1985); Lerman, *supra* note 1; Rifkin, *supra* note 2, at 23; Kate McCabe, *A Forum For Women’s Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459 (2001). *But see* Boxer-Macomber, *supra* note 14, at 890.

⁵⁰ Zaher, *supra* note 1, at 42.

⁵¹ *Id.*; Frederick, *supra* note 18, at 524–25.

⁵² Chandler, *supra* note 1, at 335–36.

⁵³ *Id.* at 335.

⁵⁴ *Id.* at 334–35.

⁵⁵ *Id.* at 335.

⁵⁶ *Id.* at 344–45.

value of considering whether parties are capable of mediating on a case-by-case basis. Rigid definitions do not take into account subtle variations in individual circumstances that could be a factor in whether a couple is capable of mediating their differences. This shortcoming could lead to broad-scale inclusion of cases that should not be mediated or exclusion of cases that could, in fact, be successfully mediated. At the same time, the debate over how to define domestic violence also emphasizes the importance of having well-developed screening protocols and well-trained mediators in these situations—if programs are to consider the appropriateness of mediation on a case-by-case basis, the mediator or screener must have a significant understanding of the complexity of domestic violence issues and an ability to make determinations about which cases can be safely, effectively, and fairly mediated.

B. Concerns About the Mediation Process When the Parties Have a History of Domestic Violence

Both mediation advocates and victims' advocates have significant concerns about the mediation process where the parties have a history of domestic violence. Although the mediation process is designed to manage the power imbalances that often exist in mediations, a history of domestic violence has the potential to create insurmountable power imbalances.⁵⁷ In fact, an abuser may use intimidation, e.g., either verbal or nonverbal threats of future violence, as a way to create power imbalances that act to his or her advantage.⁵⁸ Even without actual threats, a victim may feel intimidated to the point that he or she feels incapable of standing up for his or her interests in the mediation.⁵⁹

In addition, one hopes that parties voluntarily participate in mediations. However, some states require parties to mediate family law issues,⁶⁰ and not all provide exceptions for cases with a his-

⁵⁷ See, e.g., Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 256 (2001); Buel, *supra* note 20, at 731.

⁵⁸ Rana Fuller, *How to Effectively Advocate for Battered Women When Systems Fail*, 33 WM. MITCHELL L. REV. 939, 947 (2007); Jane C. Murphy, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005); Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425 (2003).

⁵⁹ Fuller, *supra* note 58, at 946; Murphy, *supra* note 58; Saccuzzo, *supra* note 58; Grillo, *supra* note 3, at 1601.

⁶⁰ See CAL. FAM. CODE §§ 3170, 3181, & 3182, *supra* note 7.

tory of domestic violence.⁶¹ Even if victims can “opt out” of mediation, many victims’ advocates are concerned that victims feel pressured to participate, thus undermining the voluntary nature of the process.⁶² Further, there are concerns about how to ensure that the mediation process is safe for victims.⁶³ These issues create further challenges for mediators, who must balance their professional responsibility to remain neutral in mediations with the need to rectify power imbalances, ensure fairness, and maintain safety.⁶⁴

1. The Potential for Power Imbalances and Concerns About Intimidation

Some victims’ rights advocates argue that it is never appropriate to mediate a family law dispute, such as divorce, division of property, or child custody, where there is a history of domestic violence.⁶⁵ These advocates argue that mediation places the victim in an impossible situation where he or she is more likely to feel pressured and, because of unequal bargaining power, end up with an agreement that does not protect his or her interests.⁶⁶ The assumption is that those power imbalances lead to results in mediation that would not have happened in an adversarial setting.⁶⁷

Barbara J. Hart argues that mediation of child custody disputes should not be mandatory in situations where the mother has been battered.⁶⁸ Because battered women do not feel like they have power in the abusive relationship, Hart argues that they are likely to not be strong advocates for themselves in custody mediations and end up with an agreement that puts both themselves and their children in further danger.⁶⁹ Other scholars have also voiced serious concerns about the power imbalances that can exist in a

⁶¹ *See id.*

⁶² *See, e.g.,* Fuller, *supra* note 58, at 946.

⁶³ Frederick, *supra* note 18, at 526; Fuller, *supra* note 58, at 946.

⁶⁴ *See* Fuller, *supra* note 58, at 947–48; Grillo, *supra* note 3, at 1592.

⁶⁵ Bryan, *supra* note 2; Lerman, *supra* note 1; Gagnon, *supra* note 2; Hart, *supra* note 1; Grillo, *supra* note 3. A good overview of the various arguments against the use of mediation in cases involving domestic violence can be found in Rene L. 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, 96–99 (2001).

⁶⁶ Lerman, *supra* note 1; Bryan, *supra* note 2; Gagnon, *supra* note 2; Hart, *supra* note 1; Grillo, *supra* note 3.

⁶⁷ Buel, *supra* note 20, at 731. *But see* Edwards, *supra* note 6, at 663 (disputing the argument that the adversarial process is more “fair” for domestic violence victims and arguing that the intimidating effect of going to court could be just as negative, if not more so, than going to mediation).

⁶⁸ Hart, *supra* note 1.

⁶⁹ *Id.* at 317.

mediation where there has been domestic violence and believe that mediation is often not appropriate, or at least should be handled very carefully, in that context.⁷⁰ As one writer has observed, “[O]ne can [not] expect a victim of abuse to voluntarily want or be able to sit safely at the negotiating table with their abusive partner.”⁷¹ The victim is inclined to give in on issues that she should not give in to because she wants to get out of the room as quickly as possible or because she fears retaliation if she stands up to her abuser.⁷²

Mediators are always concerned about the potential for unfair power imbalances in mediation and seek to create an environment in which parties who do not have as much power can have their interests met through the process.⁷³ In the case of family mediations where there is a history of domestic violence, programs have done much to address the potential problem with power imbalances.⁷⁴ Studies that have looked at mediation outcomes in this context provide limited, conflicting data about whether such efforts have been successful, pointing to a need for further studies on the subject.⁷⁵

2. Can Mediation in this Context Really Be Voluntary?

One of the underlying principles of mediation is that it is a voluntary process that can be terminated by any participant at any time.⁷⁶ As discussed previously, some states, however, mandate mediation in family law cases.⁷⁷ States like California do not have

⁷⁰ Fischer, Vidmar, & Ellis, *supra* note 1; Saccuzzo, *supra* note 58, at 432–35; Buel, *supra* note 20, at 731 (“The extraordinary power imbalance and the batterer’s refusal to negotiate in good faith usually sabotage even well-intentioned mediations. In too many cases victims have lost custody of their children, marital property, and other rights to which they were entitled.”); Fuller, *supra* note 58, at 947 (Fuller observes that “[t]he dynamics of domestic violence are such that the abuse can be continuing in the mediation right in front of the attorneys and the mediator,” in the form of “meaningful looks” and short, innocuous references to past threats); Grillo, *supra* note 3, at 1601.

⁷¹ Pate, *supra* note 2, at 17 (“Abuse victims have been belittled and demeaned for expressing their needs. They will likely be fearful of expressing their opinions, expecting retribution from the abusive partner. A victim of abuse will not be ‘empowered’ by mediation, but will rather view it as one more tactic by the batterer to continue their control.”).

⁷² Hart, *supra* note 1, at 317. This concern about mediation process is closely related to the concern about mediation outcome, discussed more fully *infra* at Part II.C.

⁷³ See, e.g., Fuller, *supra* note 58, at 947–48.

⁷⁴ See *infra* Part II.B.

⁷⁵ Frederick, *supra* note 18, at 526.

⁷⁶ Fuller, *supra* note 58, at 947–48.

⁷⁷ California is one state that has mandatory mediation for family law cases, without a domestic violence exception. See CAL. FAM. CODE §§ 3170, 3181 & 3182 (2007).

an exception for cases involving domestic violence, meaning that even where the parties have such a history, they will still be referred to mediation.⁷⁸ Regardless of whether mediation is mandatory or not, there are some scholars and victims' advocates who believe that there is no voluntary participation in mediation for a victim of domestic violence.⁷⁹ They observe that victims may feel that they cannot refuse to mediate because of either pressure from the court or from the abuser.⁸⁰ Victims' advocates also believe that the process cannot be viewed as voluntary when the victim is intimidated to accept an agreement during a mediation that is not in her best interests, because of force or manipulation.⁸¹ Mandatory mediation does not mean mandatory settlement, but victims' advocates are concerned that power imbalances and fears of future violence may lead victims to believe that they have no choice but to agree to their abusers' demands.⁸²

3. Safety: The Potential for Violence During Mediation

Even assuming that appropriate screening will filter out the vast majority of cases that should not be mediated, it does not mean that mediators can feel assured of the victim's safety both during and after the mediation takes place.⁸³ As a couple moves through the mediation process or other legal proceedings, the situation could quickly change.⁸⁴ There may be subtle indicators—or sometimes overt signs—that the abuser is still intimidating the victim to get what he or she wants from the mediation, and if the mediator is not vigilant he or she will miss those signals.⁸⁵ Rather than viewing screening as a one-time process, one scholar has argued that the mediator needs to think of screening as an ongoing need.⁸⁶ In addition, there are many ways to approach the mediation process in order to reduce the potential threat of violence ei-

⁷⁸ For discussion of California's mandatory mediation programs, see Grillo, *supra* note 3.

⁷⁹ Hart, *supra* note 1, at 317; Fuller, *supra* note 58, at 946.

⁸⁰ Fuller, *supra* note 58, at 946.

⁸¹ *Id.* ("Obviously, someone who feels forced or manipulated into the process and/or outcome is not participating voluntarily."); Buel, *supra* note 20, at 731.

⁸² Hart, *supra* note 1, at 317; Fuller, *supra* note 58, at 946.

⁸³ Frederick, *supra* note 18, at 526; Fuller, *supra* note 58, at 947.

⁸⁴ Frederick, *supra* note 18, at 526.

⁸⁵ *Id.*; Fuller, *supra* note 58, at 947.

⁸⁶ Frederick, *supra* note 18, at 526. See also *Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26, at 120 (Standard XI.C) (discussing a need for screening for a history of domestic violence both prior to and during the mediation process).

ther during or immediately after a mediation session, including shuttle mediation, caucusing, and telephone mediation.⁸⁷

4. Concerns About Mediator Neutrality

Another potential problem in mediations with parties who have a history of domestic violence is mediator neutrality. In theory, what makes mediation unique—and therefore effective—is the fact that a neutral third party acts as a facilitator for the process of negotiating a settlement. But in mediations where the participants have a history of domestic violence, the mediator is tasked with managing power imbalances and remaining vigilant against threats, intimidation, and potential violence.⁸⁸ As one scholar has observed, this can be a delicate, difficult balance for the mediator to maintain:

If a mediator is truly going to balance the bargaining power differential, the mediator may have to compromise her neutrality, at least in the eyes of the batterer. It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator attempts to ignore or fails to give credence to the allegations of abuse, the victim may feel that the mediator is on the abuser's side, destroying the victim's belief that the mediator is neutral.⁸⁹

Another scholar agrees that mediator neutrality can be almost impossible to maintain in the face of power imbalances, even when there is no history of domestic violence: “[w]hen a mediator analyzes and attempts to correct a power imbalance, she can no longer claim to be simply a facilitator of the couple's process; rather, she is taking an active role in affecting the outcome of that process.”⁹⁰ How does the mediator maintain neutrality while at the same time ensuring safety, managing power imbalances, and encouraging fair settlements? Programs have taken a variety of approaches to this challenge,⁹¹ but more needs to be done to assess their effectiveness.

Some victims' advocates take a more extreme stance about the role that the mediator should play in these mediations, arguing that the mediator should not really be neutral at all—instead, the medi-

⁸⁷ These approaches to the mediation process are discussed more fully at *infra* Part II.B.

⁸⁸ Fuller, *supra* note 58, at 947–48.

⁸⁹ *Id.*

⁹⁰ Grillo, *supra* note 3, at 1592.

⁹¹ See, e.g., *Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26, at 116, 120 (Standards VI, XI) (establishing the need for mediator impartiality in one standard but in another standard establishing appropriate steps that mediators should take in “a family situation involving domestic violence” that may or may not allow the mediator to remain neutral).

ator should be responsible for ensuring that the victim gets a fair settlement.⁹² One of the problems with this approach is that it puts the mediator in a difficult position. On the one hand, one can see the obvious benefits of focusing on the needs of the victim of violence in mediations, but at the same time the mediator no longer functions as a neutral party.⁹³

In addition, one scholar advocates the mediator being the monitor of whether or not the abuser complies with the agreement afterwards.⁹⁴ However, that approach to mediation would place so many responsibilities on mediators that it might be difficult to find mediators willing to take on these responsibilities. First, there would be concerns that such requirements might create a standard of care for mediators that would open them up to a lawsuit for negligence or mediator malpractice. In addition, having to monitor whether an abuser is complying with an agreement puts an additional burden on the mediator and might place the mediator, as well as the victim, in an unsafe position. Finally, such high expectations of the mediator's role in the process would put a lot of stress on mediators who might worry that they would not perform their role well. As a result of these potential issues, programs have not usually placed such responsibilities on the mediator, but mediators still struggle with how to remain neutral in this context.⁹⁵

C. Concerns About How a History of Domestic Violence Might Affect Mediation Outcomes

Because of the potential for problems with the mediation process that relate to a couple's history of domestic violence, there are also concerns about mediation outcomes in this context. If the couple is able to come to an agreement as a result of the mediation, that agreement may not reflect the needs or legal rights of the victim.⁹⁶ Victims may be so intimidated by their abusers in the mediation that they end up with unfair agreements.⁹⁷ Additionally,

⁹² See, e.g., Lerman, *supra* note 1.

⁹³ Fuller, *supra* note 58, at 947–48.

⁹⁴ Lerman, *supra* note 1, at 109.

⁹⁵ Fuller, *supra* note 58, 947–48.

⁹⁶ Buel, *supra* note 20, at 731.

⁹⁷ Grillo, *supra* note 3, at 1601–02.

victims' advocates are concerned that either the mediation or the agreement could increase the chance for further violence.⁹⁸

1. Fairness of Agreements

Victims' advocates and feminist scholars have also expressed concerns that a history of domestic violence can so taint a mediation session that any agreement arrived at is likely to be unfair to the victim.⁹⁹ For example, Sarah Buel has argued that “[t]hreats made prior to the session, or one look inside, can force victims to give up rights and remedies to which they are entitled, in exchange for the illusion of safety.”¹⁰⁰

In addition, it may be difficult in a particular situation to determine what constitutes a “fair” agreement. Trina Grillo has observed that a mediator’s own personal beliefs about “fairness” have the potential to color the outcomes of mediations.¹⁰¹ Among possible definitions of a fair agreement, as Grillo lays them out, is “one that closely resembles what the court would have ordered had the case gone to trial.”¹⁰² Other mediators “look for an intuitive conception of fairness shared by the parties and, at least to a limited extent, by the mediator.”¹⁰³ Grillo recognizes the difficulties inherent in this latter definition, as the parties—as well as the mediator—may have differing concepts of fairness.¹⁰⁴ A third approach uses “law not primarily as a set of necessary applied rules, but providing a relevant reference point, both in terms of a practical alternative and as an expression of societal norms and, perhaps, some underlying principles.”¹⁰⁵ What the range of definitions of “fairness” reflects is the difficulty of determining what is actually a “fair” outcome of mediation—“fairness” may be in the eye of the beholder.

⁹⁸ Lerman, *supra* note 1; Dunnigan, *supra* note 14, at 1052; Boxer-Macomber, *supra* note 14, at 896.

⁹⁹ Buel, *supra* note 20, at 731 (“In too many cases victims have lost custody of their children, marital property, and other rights to which they are entitled.”). *See also* Grillo, *supra* note 3, at 1601–02; Fuller, *supra* note 58, at 946–47.

¹⁰⁰ Buel, *supra* note 20, at 731.

¹⁰¹ Grillo, *supra* note 3, at 1592–93.

¹⁰² *Id.* at 1593.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting CENTER FOR DEVELOPMENT OF MEDIATION IN THE LAW, *THE PLACE OF LAW IN MEDIATION* 1 (Aug. 1983) (training materials)).

2. Potential for Future Violence

One concern about mediating cases where the couple has a history of domestic violence is whether the mediation process has the potential to exacerbate or escalate the potential for future violence.¹⁰⁶ Some victims' advocates believe that, as a result of participating in mediation, the victim has a much greater chance of being battered again in the future.¹⁰⁷ Others feel that the risk of future violence is no greater in mediation than it is in the adversarial process, and may in fact be less.¹⁰⁸

Victims' rights advocates who oppose mediation where domestic violence is at issue are often advocates of the law enforcement model. As described by one scholar, "the law enforcement model advocates formal legal action combined with punishment or rehabilitation of wife abusers," in order to "ensure the safety of the victim and to give the abuser a clear message that society will not tolerate his continued violence against his mate."¹⁰⁹ Law enforcement model advocates argue that the only way to prevent future domestic violence is to use legal processes, such as criminal prosecution of the abuser and civil protection orders for the victims.¹¹⁰ They believe that the only way to protect the victim is by prosecuting the abuser.¹¹¹

It is undisputable that mediators, mediation program administrators, and court personnel need to be aware of the potential for future violence. One way to reduce the potential for future vio-

¹⁰⁶ See, e.g., Lerman, *supra* note 1; Dunnigan, *supra* note 14, at 1052; Boxer-Macomber, *supra* note 14, at 896.

¹⁰⁷ Lerman, *supra* note 1; Dunnigan, *supra* note 14, at 1052 ("Research has found that battered women are more likely to be abused after mediation than after a formal trial.").

¹⁰⁸ See, e.g., Boxer-Macomber, *supra* note 14, at 896.

¹⁰⁹ Lerman, *supra* note 1, at 70.

¹¹⁰ See, e.g., Sherman & Berk, *supra* note 10. *But see* Alexandra Pavlidakis, Comment, *Mandatory Arrest: Past Its Prime*, 49 SANTA CLARA L. REV. 1201 (2009) (arguing that mandatory arrest laws are ineffective, potentially increase the potential for future violence, result in the increased chance of victims who fight back also being arrested, and have a chilling effect on the victims).

¹¹¹ Lerman, *supra* note 1, at 61; Sherman & Berk, *supra* note 10. *See also* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2162 (1995). Schulhofer also discusses the Sherman and Berk study, completed in Minneapolis, Minnesota in the 1980s, in which the results supported the argument that mandatory arrest was the best solution for dealing with domestic violence incidents, significantly reducing recidivism. After this study was published, more and more police departments adopted mandatory arrest policies for responses to domestic violence calls. *Id.* *See also* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 802-03 (2007). Although feminists originally supported mandatory arrest policies for abusers, they later began to question whether the long-term results of such policies were as beneficial as originally thought. *Id.*

lence is to focus on the mediation process and train mediators in how to handle the dynamics of family law mediations in this context.¹¹² Through screening, it seems likely that the more volatile cases that really have a significant threat of future violence would not be scheduled for mediation.¹¹³

D. Public Policy Concerns

Scholars and victims' advocates are divided about the potential public policy implications of mediating family law cases where there is a history of domestic violence. Some domestic violence victims' advocates argue that mediation, as a matter of public policy, sends the wrong message about domestic violence.¹¹⁴ They argue that, because domestic violence does not require the abuser to take responsibility for the abusive acts, it "sends a message to both the participants and to society in general that domestic violence is either tolerable, or that both parties are responsible for domestic violence."¹¹⁵ Others stress the potential positive effects of mediation for the victims, and the possibility that mediation may empower those women to have more of a voice in what happens to their future.¹¹⁶

1. Mediation May Put Domestic Violence "in the Shadows"

Because mediation is a private process, victims' advocates are concerned that mediation has the potential to hide domestic violence in the shadows, where it will not be addressed, and creates more potential for violence against victims in the future.¹¹⁷ As a result, the law enforcement model does not contemplate using me-

¹¹² See generally *infra* Part II.

¹¹³ See *infra* Part II.A.1.

¹¹⁴ Fuller, *supra* note 58, at 946.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Edwards, Baron, & Ferrick, *supra* note 6, at 587; Edwards, *supra* note 6, at 665; Zaher, *supra* note 1, at 41; Rimelspach, *supra* note 65, at 102.

¹¹⁷ Krieger, *supra* note 1, at 240–41; Loomis, *supra* note 1, at 367; Woods, *supra* note 1. *But see* Rimelspach, *supra* note 65, at 102 ("In response to the argument that the mediation process protects batterers from legal sanctions and in turn fails to treat battering as a crime, it can be argued that mediation actually encourages participants to seek outside help. . . . Mediation . . . provides batterers and their spouses the opportunity to address the violence in a way that enables them to devise safety mechanisms. The mediation process, unlike traditional litigation, encourages the participants to create guidelines governing future relations."); Murphy & Rubinson, *supra* note 10, at 66 n.76 ("The availability of criminal proceedings mitigates concerns of some scholars that in addition to power imbalances, mediation fosters a 'private' resolution of a

diation to solve family disputes involving domestic violence, because critics feel that mediation “covers up” potential violence and potentially re-victimizes the victims.¹¹⁸

Probably the article most cited for arguing against mediation in the context of domestic violence is Lisa G. Lerman’s *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*.¹¹⁹ Lerman, a supporter of the law enforcement model, argues that cases involving domestic violence are never appropriate for mediation and instead should be referred to the courts.¹²⁰ Lerman focuses on cases where women are seeking help with domestic violence issues specifically and are directed into mediation as a way to resolve their problems.¹²¹ She believes that mediators avoided dealing with the issue of violence in those mediations, preferring to focus on issues that are simpler to resolve, such as “visitation schedules, financial problems, or time spent with other friends or lovers.”¹²² Because mediators usually focused on the issues that were easiest to negotiate, mediation agreements tended to address these subsidiary issues rather than addressing the larger issue of domestic violence.¹²³ In addition, Lerman believes that many mediators view the victims as partially to blame for the violence targeted towards them, thus skewing the mediation even further by encouraging women to accept part of the responsibility for the violence.¹²⁴

The real question is whether Lerman’s assumptions hold true in situations where abused women enter into the mediation process

problem that many women’s advocates have long sought to bring out of the ‘private’ realm and into public consciousness and condemnation.”).

¹¹⁸ Lerman, *supra* note 1, at 61. See also Anne E. Menard & Anthony J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 *MEDIATION Q.* 293, 299 (1990) (in mediation, “the message of offender accountability for his use of violence becomes blurred.”); Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 *WILLAMETTE L. REV.* 905, 911 (1997) (“[M]erely allowing batterers to negotiate with their victims undermines the criminal justice system’s message to batterers that their conduct is illegal and wrong.”).

¹¹⁹ Lerman, *supra* note 1.

¹²⁰ *Id.* at 61, 70.

¹²¹ *Id.* at 84.

¹²² *Id.*; see also Buel, *supra* note 20, at 731 (“Mediators have often said, ‘We will deal with custody, visitation, and property division issues right now and will *not* discuss the abuse.’”) (emphasis added).

¹²³ Lerman, *supra* note 1, at 84. Lerman relies on training materials for a workshop for mental health professionals for this information. It does not appear that this conclusion was based on empirical data. See *id.* at 84, n.124 (citing A. GANLEY, *COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS—PARTICIPANT’S MANUAL* 28 (1981)).

¹²⁴ Lerman, *supra* note 1, at 86, 96.

for other reasons, for example, to resolve child custody issues or issues related to separation or divorce. Does mediation always have the kind of impact that she assumes it does in these types of situations? Does proper training of mediators help to ensure that the problems that Lerman views within mediation in this context result in a different type of outcome? Or, has even the passage of time made enough difference in public perceptions of domestic violence that what was true when Lerman voiced her initial criticism in 1984 is no longer the case in 2010?

2. Can Mediation Empower Domestic Violence Victims?

In direct contrast to the preceding view, some mediation advocates argue that the mediation process has the potential to empower victims of domestic violence, giving them the tools that they need to create agreements that support their interests and enhance their safety, rather than further victimize them.¹²⁵ Sandra Zaher has explained that “mediation can empower the powerless by enabling them to speak in their own voice and assert their own interests, perhaps for the first time.”¹²⁶ Supporters of this view stress the necessity of having quality mediators involved in a mediation process that safeguards victims’ interests and physical safety.¹²⁷ In fact, John Haynes, the founding president of the Academy of Family Mediators, has argued that mediation can encourage the victim (and the abuser as well) “to focus . . . on where they are going in their lives as separate, whole, independent people.”¹²⁸ Some authors have found that such a process can have the effect of empowering the victim in the mediation, rather than solely defining him or her as someone who has been abused.¹²⁹

Of course, not all victims’ advocates and scholars agree that mediation can empower victims of domestic violence. Tina Grillo agrees generally that mediation has the ability to empower partici-

¹²⁵ See, e.g., Edwards, Baron, & Ferrick, *supra* note 6, at 587; SUSAN SCHECHTER & JEFFREY L. EDELSON, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE, available at <http://www.thegreenbook.info/documents/Greenbook.pdf> (“[W]here mediation is mandated or permitted, if it is conducted in accordance with the guidelines described in this section, the process can effectively empower victims of violence and enhance their safety as well as the safety of their children and other family members.”); Zaher, *supra* note 1, at 41; Rimelspach, *supra* note 65, at 102.

¹²⁶ Zaher, *supra* note 1, at 41.

¹²⁷ Edwards, Baron, & Ferrick, *supra* note 6, at 586–87; Zaher, *supra* note 1, at 41.

¹²⁸ John Haynes, Advanced Training Presented at the 6th Annual Conference of the Academy of Family Mediators, Breckenridge, CO, July 1989, as discussed in Corcoran & Melamed, *supra* note 5, at 313.

¹²⁹ Corcoran & Melamed, *supra* note 5, at 313.

pants by “permit[ing] persons to speak for themselves and make their own decisions,” but not when there is a history of domestic violence.¹³⁰ Instead of being empowering, Grillo argues that mediation “would surely be psychologically traumatizing” for a woman to be in a “direct confrontation with [an abusive] husband, with the safety of herself and her children at stake.”¹³¹

II. APPROACHES TO MEDIATION PROGRAM DESIGN TO ADDRESS CONCERNS ABOUT DOMESTIC VIOLENCE

Mediation programs have taken into account many, if not all, of the preceding considerations in their design of mediator training programs, screening protocols, mediation program policies, and approaches to mediations where couples have a history of domestic violence. As a result, many scholars and mediation advocates today believe that mediation can be an effective way to resolve family disputes regarding issues such as divorce proceedings, property allocation, and child custody, even when the parties have a history of domestic violence.¹³² The following section analyzes some of the approaches to addressing the potential challenges for mediating in this context.

A. Approaches to Family Mediation Program Design: Pre-Mediation

1. Screening

In response to concerns about inappropriate cases, i.e., cases involving domestic violence, making their way into the mediation process, most mediation programs have developed screening protocols to ensure that cases are appropriate for mediation.¹³³

¹³⁰ Grillo, *supra* note 3, at 1581, 1601.

¹³¹ *Id.* at 1601.

¹³² See, e.g., Maxwell, *supra* note 12, at 337; Chandler, *supra* note 1; Salem & Dunford-Jackson, *supra* note 5, at 437; Edwards & Baron, *supra* note 5, at 596; Bigornia, *supra* note 5, at 60–61; Shepard, *supra* note 5, at 421; Corcoran & Melamed, *supra* note 5, at 303; Edwards, *supra* note 6, at 661–63; Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19.

¹³³ Lerman, *supra* note 1, at 93; Chandler, *supra* note 1; Gerencser, *supra* note 49; Edwards, *supra* note 6, at 662; Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 21, at 460–61; Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194.

Screening can involve written questionnaires and/or interviews,¹³⁴ and its purpose is to determine whether there has been domestic violence in the relationship that could interfere with the effectiveness, fairness, or safety of the mediation process for the victim.¹³⁵ The Model Code, the Model Standards, and the American Law Institute all require screening of possible family conflict mediation cases for a history of domestic violence, although they do not mandate a particular approach to screening.¹³⁶

Screening requires a thoughtful and careful approach, and the screening process must be confidential.¹³⁷ Many victims of domestic violence are reluctant to disclose the violent acts, so screeners must ask questions that go deeper than the surface level.¹³⁸ Screeners must be flexible in how they ask questions to anticipate potential problems with mediation, and screenings must occur in a private place that allows victims to feel safe.¹³⁹

Screening programs have come a long way in the past couple of decades. In the early 1980s, there were mediation scholars who advocated screening to determine whether cases involving domestic violence were appropriate for mediation,¹⁴⁰ but Lerman criticized screening because she felt that “screening standards are often amorphous and are not consistently applied.”¹⁴¹ In particular, Lerman criticized Bethel and Singer who, rather than developing specific guidelines for screening, instead stated vague recommendations that “[w]hatever case intake method is used must provide careful screening of complaints. Those cases suitable for mediation should be identified and preserved, and others should be referred to appropriate legal or social agencies.”¹⁴² She argued that screening of potential parties for mediation should be much more carefully implemented in the context of domestic violence, and that

¹³⁴ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194; Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 460–61.

¹³⁵ Chandler, *supra* note 1, at 331, 345.

¹³⁶ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194. *See also Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26, at 120 (Standard XI.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.”).

¹³⁷ Murphy & Robinson, *supra* note 10; The Honorable Chester B. Chance & Alison E. Gerencser, *Screening Family Mediation for Domestic Violence*, 70 FLA. BAR J. 54, 54 (1996); Pearson, *supra* note 10, at 325; Rimelspach, *supra* note 65, at 104–05.

¹³⁸ Pate, *supra* note 2, at 17; Edwards, *supra* note 6, at 665.

¹³⁹ Pate, *supra* note 2, at 17; Rimelspach, *supra* note 65, at 104–05.

¹⁴⁰ Lerman, *supra* note 1, at 93, n.172. *See also* Gerencser, *supra* note 49, at 43.

¹⁴¹ Lerman, *supra* note 1, at 93.

¹⁴² *Id.* at 93, n.172.

more carefully defined, specific criteria should be used to determine whether mediation is appropriate.¹⁴³ At the outset, the screening process should include questions about potential past violence in disputes between couples or family members.¹⁴⁴ In addition, Lerman believes that those screening for mediation appropriateness should make clear to alleged domestic violence victims that there are other alternatives to mediation.¹⁴⁵ In general, it seems that the vast majority of screening processes today have heeded Lerman's concerns about the need to determine whether domestic violence currently is or has been present in the relationship, although fewer screeners may notify alleged victims of other alternatives to mediation.

There are many debates over what approach to take to the screening process.¹⁴⁶ For example, many mediation programs use a written questionnaire to screen for domestic violence, while others use oral screening of the parties.¹⁴⁷ Some experts argue that a combination of approaches is more effective than choosing just one, as every situation is a little bit different, and it can be difficult to pick up on clues of domestic violence.¹⁴⁸ It is also important that screeners pay attention to non-verbal cues and do not just rely on what the interviewee says.¹⁴⁹ Current practice is varied—states approach screening in a variety of ways, if they require formal screening processes at all.¹⁵⁰ Although approximately eighty percent of

¹⁴³ *Id.* at 100–01. *See also* Gerencser, *supra* note 49.

¹⁴⁴ Lerman, *supra* note 1, at 101–02.

¹⁴⁵ *Id.* at 102, 103.

¹⁴⁶ For a discussion of various critiques of screening, see Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 *LOY. J. PUB. INT. L.* 37, 46–47, 55–56 (2003). *See also* Chander, *supra* note 1; Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 460–61.

¹⁴⁷ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194.

¹⁴⁸ *Id.*

¹⁴⁹ Maxwell, *supra* note 12, at 345.

¹⁵⁰ *See, e.g.*, ARIZ. R. FAM. LAW PROC. 68(B) (“Unless the parties agree to mediation by a private mediator, the court or conciliation services shall determine whether mediation or ADR services are appropriate in a particular case. The court or conciliation services may deem mediation inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause.”); OR. REV. STAT. § 107.755(1)(d)(C)(i) (2007) (“All mediation programs must develop and implement . . . [a] screening and ongoing evaluation process of domestic violence issues for all mediation cases.”); TENN. SUP. CT. R. 31, § 17(b)(1)(D) (2006) (requiring mediators to have at least four hours training in domestic violence issues and screening techniques). Most states do not have statutes or statewide rules requiring screening for domestic violence before couples are referred to mediation.

mediation programs screen for domestic violence, half of those who screen only use written questionnaires.¹⁵¹

The next issue is what types of questions should be included in the screening process. One questionnaire started with the basic question, “Was abuse present in the marriage relationship?”¹⁵² If the party answered “Yes” to that first question, then the questionnaire asked them to check the box of the type of abuse that was present.¹⁵³ Another screening program required the screener to ask the party, “Would you tell me if you have been physically abused by your husband during your relationship?”¹⁵⁴ If the person admitted that abuse had taken place, the interviewer followed up with questions about the last abusive incident, fears of future abuse, and whether the woman felt “that the abuse has limited her ability to communicate ‘on an equal basis’ with her spouse.”¹⁵⁵

Often, screening focuses solely on women.¹⁵⁶ By assuming that only men are abusers and only women are victims, screening programs may miss other instances of domestic violence, such as where the man may be the victim or where the parties involved in the mediation process are same-sex domestic partners. In addition, screening programs that focus solely on past physical violence may miss other types of abuse such as verbal threats and intimidation, psychological abuse, and economic control over the other person.¹⁵⁷

On the opposite end of the screening spectrum is the Conflict Assessment Protocol.¹⁵⁸ Also completed through an interview process, the Conflict Assessment Protocol has several components:

First, the Conflict Assessment Protocol probes for the couple’s decision-making patterns, resolution of conflicts in the relationship, and expressions of anger. The purpose of this section of the protocol is for mediators to be “attuned to the issue of control.” The second section of the interview proceeds through a

¹⁵¹ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 194.

¹⁵² Fischer, Vidmar, & Ellis, *supra* note 1, at 2155.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; *see also* Chandler, *supra* note 1, at 336.

¹⁵⁶ Chandler, *supra* note 1, at 336.

¹⁵⁷ Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 460–61; Buel, *supra* note 20, at 729 (noting that “financial abuse is quite common, yet may not be readily apparent, unless the [screener] asks discerning questions and knows which behaviors may be indicative of coercion.”).

¹⁵⁸ Fischer, Vidmar, & Ellis, *supra* note 1, at 2156, describing process discussed in Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 *MEDIATION Q.* 365, 366–72 (1990).

series of questions designed to elicit acknowledgment of specific abusive behaviors. Based on the Conflict Tactics Scale used in domestic violence research, the questions about abuse tap into emotional, sexual, and physical domains. The interview closes with specific questions about control, jealousy, child abuse, and substance use. Each of these questions is asked of each spouse in an individual session, but phrased in terms of whether either partner has abused the other.¹⁵⁹

Because the Conflict Assessment Protocol has numerous layers and asks broad questions that go beyond obvious questions about domestic violence, it may be more effective in unearthing past histories of domestic violence and accumulating the information that would be necessary for a screener to determine whether the parties can mediate safely and effectively. On the other hand, not all mediation programs may have sufficient resources—including staff, private screening spaces, and even time—to make effective use of such an extensive screening protocol.

Another example of a more nuanced approach to screening is Desmond Ellis and Noreen Stuckless's *Domestic Violence Evaluation*, known as "DOVE."¹⁶⁰ Having completed extensive quantitative research into how a history of domestic violence or abuse translates into the potential for further violence after litigation or mediation, Ellis and Stuckless created a nineteen-item screening process to identify risks for violence and the appropriate approach to managing those risks.¹⁶¹ The focus of the screening process is predicting the potential for future abuse, not necessarily determining whether a victim is capable of mediating effectively with his or her abuser.¹⁶²

DOVE divides predictors of future violence or abuse into several categories: (1) evidence of past violence, such as assaults, serious physical injuries, sexual assaults, leaving home because of partner's violence, and calling the police because of partner's violence; (2) evidence of past abuse, such as emotional abuse or serious emotional injury; (3) evidence of emotional dependency, such as threats to harm or kill self or partner if partner left; (4) evidence of relationship problems, such as an inability to get along with partner, communication problems, a pattern of blaming partner for problems, or anger; (5) evidence of mental health issues, including

¹⁵⁹ *Id.* at 2156 (internal citations omitted).

¹⁶⁰ Ellis & Stuckless, *supra* note 20, at 658.

¹⁶¹ *Id.*

¹⁶² *Id.*

taking medication for mental health diagnoses; (6) evidence of control, such as attempts to control partner or use of violence or abuse to control partner; and (7) evidence of alcohol or drug abuse.¹⁶³ Responses to questions regarding these predictors result in a score,¹⁶⁴ and the screener uses the score to determine what the couple's risk category is: low, moderate, high, or very high.¹⁶⁵ Based on the risk category, the court or mediation program then institutes a Safety Plan that is tailored to the couple's level of risk of future violence.¹⁶⁶

¹⁶³ *Id.* at 660.

¹⁶⁴ *Id.* at 661–62.

¹⁶⁵ *Id.* at 664–65.

¹⁶⁶ Ellis & Stuckless, *supra* note 20, at 664. For example, if a couple is determined to fit into the “low risk” category, Ellis and Stuckless recommend the following “interventions”:

1. Clearly stated written “rules of civility” that encourage respectful communications and specifically exclude coercive conduct during and between mediation sessions.
2. Parties agree in writing to terminate mediation if the mediator obtains credible evidence of threatened or actual violence and/or abuse.
3. Face-to-face mediation.
4. Referrals to appropriate treatment interventions.

Id.

If a couple is “moderate risk,” the following additional “interventions” are recommended:

5. Mediator carefully monitors compliance with violence/abuse prevention rules during private interviews with partners, and/or by communicating with third parties identified as trusted contact persons by partners.
6. Partners arrive and leave at different times or routes and do not wait in the same room.
7. Mediators provide both partners with a list of community resources such as shelters, men's programs, health services, male and female support groups, and legal information.
8. Face-to-face mediation with advocate or supporter present, or shuttle mediation.
9. Referrals to appropriate treatment interventions.

Id.

If a couple is “high risk,” the following “interventions” are recommended:

10. Partners given safety warnings in writing.
11. Interpersonal contact only takes place in public places, or with trusted third parties present.
12. Arrange for third party to be present during exchanges or children, or third party transports children.
13. Communications only through trusted third parties or through journals exchanged with children and subject to monitoring by mediator.
14. Partners escorted to and from premises where mediation is being conducted.
15. Shuttle, telephone, or on-line mediation.
16. Referral to appropriate treatment interventions.

Id. at 664–65.

Finally, for “very high risk” couples the following “interventions” are recommended:

17. Referral to appropriate treatment interventions.
18. Telephone or on-line mediation if referrals produce credible evidence of positive personal and/or situational change.

Id. at 665.

2. Mediator Training

Lerman advocates that mediators be trained more extensively to recognize and deal with domestic violence issues.¹⁶⁷ This argument is one that most mediation advocates agree with, regardless of their views about whether mediation should take place when a couple has a history of domestic violence.¹⁶⁸ One author states that “[t]raining should include understanding the dynamics of domestic violence, effectively screening parties for domestic violence, accommodating the needs of domestic violence victims in mediation and assisting victims with safety planning.”¹⁶⁹ Another scholar argues that men and women generally negotiate differently from each other, and mediators must be trained to recognize, understand, and manage gender-based power differentials in mediation sessions.¹⁷⁰ Training in domestic violence issues is especially important because mediators come from a variety of backgrounds, may not have legal training, and in some cases may not have gone through any formal training prior to becoming a mediator.¹⁷¹

The Association of Family and Conciliation Courts has developed Model Standards of Practice for Divorce and Family Mediators (“Model Standards” or “Standards”).¹⁷² Standard II.A.2 states that an effective mediator should “be aware of the psychological impact of family conflict on parents, children, and other family members, including education and training in domestic violence”¹⁷³ Standard XI.B states that “[a] mediator shall 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 those

¹⁶⁷ Lerman, *supra* note 1, at 110, 111 (“[M]ediators therefore need both the skills of a legal advocate and those of a therapist. These include: (1) techniques for identifying battering cases; (2) techniques for counseling victims and abusers; (3) knowledge of local laws, and of law enforcement and court practices regarding domestic violence; (4) awareness of legal, mental health, and other services for people in violent relationships; (5) awareness of collateral services, such as treatment programs for alcoholics or public benefits programs; and (6) a general understanding of political, psychological, and sociological perspectives on wife abuse.”); *see also* Maxwell, *supra* note 12, at 345.

¹⁶⁸ *See, e.g.*, D’Ambra & D’Ambra, *supra* note 8, at 38; Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 188–90; Belzer, *supra* note 146, at 58; Edwards, *supra* note 6, at 662; Rimelspach, *supra* note 65, at 107.

¹⁶⁹ Pate, *supra* note 2, at 17 (Pate believes that attorneys acting as mediators have an ethical obligation to obtain domestic violence training if they will be mediating family law disputes).

¹⁷⁰ Zaher, *supra* note 1, at 42.

¹⁷¹ Knowlton & Muhlhauser, *supra* note 1, at 264.

¹⁷² *Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26.

¹⁷³ *Id.* at 112.

subjects.”¹⁷⁴ The standards caution that a mediator who does not have adequate training should not undertake mediation if he or she knows there is a history of domestic violence.¹⁷⁵

Although the Model Standards state that mediators should be trained as mediators and have knowledge of family law and knowledge and training about how family issues can impact all members of the family, there is no specific description of what appropriate training in domestic violence issues might entail.¹⁷⁶ In addition, although the Standards state that the mediator should not mediate a case in which there is a history of domestic violence if he or she has not gone through “adequate training,” without that training the mediator may not have the knowledge required to recognize cases that may have slipped through the screening process without being identified.¹⁷⁷

States have varied in their approach to mediator training requirements, both in terms of general mediation training as well as specialized training in domestic violence issues.¹⁷⁸ For example, one survey found that only about seventy percent of mediators went through domestic violence training on a regular basis.¹⁷⁹ California, which has mandatory mediation requirements for child custody disputes, has created statutory requirements for mediator training on domestic violence issues.¹⁸⁰ California requires mediators to “complete sixteen hours of advanced domestic violence training within the first twelve months of employment and four hours of domestic violence training each year thereafter.”¹⁸¹ In addition, mediator supervisors must attend training workshops on domestic violence.¹⁸²

The Ohio Supreme Court’s training program on Domestic Abuse Issues for Mediators and Other Professionals provides a useful example of what a training program could involve and what value it has. Ohio’s program was designed by judiciary experts, domestic violence prevention advocates, and batterers’ interven-

¹⁷⁴ *Id.* at 120.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* See also Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 189.

¹⁷⁷ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 189. Ver Steegh notes that the American Law Institute also requires mediators to have domestic violence training. *Id.*

¹⁷⁸ *Id.* at 189–90; Edwards, *supra* note 6, at 650 (discussing California’s requirements that mediators “participate in continuing education that covers a number of subjects including family dynamics, substance abuse, domestic violence, child abuse, and certain aspects of custody law.”).

¹⁷⁹ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 189.

¹⁸⁰ CAL. FAM. CODE § 1816 (2007).

¹⁸¹ Boxer-Macomber, *supra* note 14, at 892.

¹⁸² *Id.*

tion specialists.¹⁸³ The training takes place over two days and is designed to improve mediators' skills in screening/detecting domestic abuse, and their ability to "ensure voluntary, appropriate and safe mediation."¹⁸⁴ The training includes a review of Ohio's mediation statutes and public policy concerns related to mediation; how to define domestic abuse and how to understand its dynamics; techniques for screening, terminating a mediation, and using the mediator's power and influence to create power balances; resources available for victims of domestic violence; and relevant statutory materials related to domestic abuse and domestic violence issues.¹⁸⁵

Family mediators, without a doubt, should go through some form of domestic violence training in order to be able to recognize cases involving domestic violence and manage the mediation process in a safe and fair manner. At a minimum, that training should include education about how to recognize signs of domestic violence, the power dynamics involved in a relationship in which there is domestic violence, and the psychological effect of violence on the victim. Additionally, mediators must be trained to properly screen for domestic violence, how to use different techniques such as caucusing to manage power imbalances, and how to plan for safety prior to, during, and after mediation sessions. Finally, mediators should receive substantive training in the legal issues associated with domestic violence and what resources are available for victims in the community. To understand more fully how much training is needed, how often mediators should be required to undergo training, and specifically what topics should be included in training sessions, there is a need to study the effectiveness of mediator training programs that already exist.

3. Attorney Training

Although the focus is usually on the need for mediator training programs, some mediators and attorneys also argue that family law attorneys need better training in order to more effectively represent domestic violence victims in mediation—and for that matter, in litigation as well.¹⁸⁶ Most attorneys have not undergone any

¹⁸³ Chief Justice Thomas J. Moyer, *Letter to Training Participants, in* SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, *supra* note 39, at I.

¹⁸⁴ *Id.*

¹⁸⁵ SUPREME COURT OF OHIO, DOMESTIC ABUSE ISSUES, *supra* note 39.

¹⁸⁶ Gerenscer, *supra* note 49, at 63–66; Chance & Gerenscer, *supra* note 137, at 56 (advocating that all Florida attorneys be required to take training in domestic violence, as well as arguing that judges should take mandatory training as well in appropriate screening processes); Howe &

special training to be able to recognize when family law cases involve domestic violence. This lack of training is significant because most clients do not volunteer that information to their attorneys.¹⁸⁷ Because those same attorneys often request that the court send their clients to mediation, such training could be valuable in helping them to better represent their clients' interests and plan for their clients' safety.¹⁸⁸ In fact, one report has found that "attorneys and judges mishandle an array of domestic violence cases, in part because they lack basic education and knowledge on the issue."¹⁸⁹ In order to provide adequate training, victims' advocates argue that law school courses should incorporate domestic violence issues more often and should sponsor more clinical programs offering legal services for abuse victims.¹⁹⁰

Family law attorneys should have training in both domestic violence issues and mediation in order to most effectively counsel and advocate for clients who are victims of domestic violence.¹⁹¹ In particular, appropriate training can help the attorney to act as a screener throughout the process to ensure that the client's safety and interests are protected.¹⁹² Prior to mediation, a well-trained attorney can evaluate whether the case is even appropriate for mediation and can advise clients about other possible legal strategies or remedies.¹⁹³ If lawyers are able to recognize their clients' needs, lawyers can also "act as power enhancers and equalizers" during mediation sessions.¹⁹⁴

McIsaac, *Finding the Balance*, *supra* note 3; Treuthart, *supra* note 49, at 726–27. Penelope Eileen Bryan has discussed the need for attorneys to more adequately represent victim-clients in mediation. See generally Bryan, *supra* note 11. Nancy Ver Steegh also recognizes the need for attorneys to have further training to address the complex issues of family law mediations. See *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 666–67 (2008). One example of the type of training that could be done is included in the Massachusetts Divorce Law Practice Manual. See Pauline Quirion, *Representing Victims of Domestic Violence*, in II MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL ch. 25 (2008).

¹⁸⁷ Bailey & Denny, *supra* note 2, at 16.

¹⁸⁸ *Id.*; Buel, *supra* note 20, at 720.

¹⁸⁹ Buel, *supra* note 20, at 722 (citing THE GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT (Feb. 1994)).

¹⁹⁰ *Id.*

¹⁹¹ Murphy & Rubinson, *supra* note 10, at 65–66 ("By learning and understanding the specific circumstances surrounding domestic violence and by knowing and understanding how mediation is likely to be conducted in a given jurisdiction, lawyers can counsel clients about whether or not mediation is an appropriate process.").

¹⁹² *Id.* at 65.

¹⁹³ *Id.* at 65–66.

¹⁹⁴ *Id.*

4. Mediator-Domestic Violence Professional Collaboration

Scholars have also advocated more collaboration between mediators and domestic violence professionals.¹⁹⁵ One of the key ways that collaboration has occurred has been through mediator training programs.¹⁹⁶ Training organizers now regularly bring in domestic violence advocates to do components of their training, thus improving the level of communication between these two groups of professionals.¹⁹⁷ Very recently, the call for collaboration was renewed once again, with a warning that a failure to collaborate may lead to the mediation community and the domestic violence community sending mixed messages.¹⁹⁸ In some locations, the victims' advocates, family courts, and mediation programs have successfully collaborated to accomplish a number of goals, such as developing screening protocols and coordinating community responses to domestic violence issues.¹⁹⁹ At the same time, the two communities still face significant obstacles to increased collaboration, such as differences in how each defines domestic violence, a mutual lack of trust, and resistance to change.²⁰⁰

¹⁹⁵ Pearson, *supra* note 10, at 327; Salem & Dunford-Jackson, *supra* note 5, at 437; Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 *MEDIATION Q.* 39 (1990); Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 468–69 (“Need for Ongoing Collaborative Endeavor . . . Families will be better served if practitioners, researchers, advocates, clients, and policy makers engage in ongoing dialogue to identify shared knowledge about domestic violence and agree on areas warranting additional investigation and attention. Listening to diverse voices improves the likelihood that important issues will be addressed, gaps in knowledge identified, best practices developed, and unintended consequences avoided. . . . To the extent that professionals from different disciplines use different terminology to describe and discuss domestic violence, communication will be enhanced by working together to develop shared understanding and vocabulary. . . . Practitioners and researchers gain valuable insights from each other when given the opportunity for meaningful exchange. Empirical research is most useful to practitioners when it addresses issues and dilemmas that are currently being faced. Similarly, practitioners offer wisdom to researchers regarding pertinent questions and the need for pragmatic solutions. . . . Resources should be sought and allocated for the purpose of funding jointly identified research projects, enhancing communication about hypotheses and results, and implementing findings.”).

¹⁹⁶ Pearson, *supra* note 10.

¹⁹⁷ *Id.*

¹⁹⁸ Salem & Dunford-Jackson, *supra* note 5, at 442.

¹⁹⁹ *Id.* at 444.

²⁰⁰ *Id.* at 444–50.

B. Approaches to Family Mediation Program Design: Mediation Process

Although much of the focus of family mediation specialists and victims' advocates has been on what happens prior to the mediation, such as the development of and use of screening protocols and mediator and attorney training programs, they have also stressed the importance of designing appropriate mediation processes in order to minimize the potential for power imbalances, intimidation, unfair agreements, and further violence or abuse.²⁰¹ Much of the attention on the mediation process has been focused on two areas in particular: (1) the form of the mediation session; and (2) the presence of attorneys or support persons in the mediation session.²⁰² An appropriate mediation process can reduce the potential for future violence and lead to more fair results that protect the legal interests of the victim.²⁰³

1. Different Approaches to Form

The form of the mediation process can have a significant impact on the direction of the mediation, as well as on potential intimidation issues and safety concerns. Many scholars believe that caucusing with the alleged victim is an essential part of mediation where there is a history of domestic violence, although there is some variation in how they believe that caucuses should be used.²⁰⁴ For example, Lerman stresses the importance of the mediator meeting privately with the victim at the beginning of the mediation in order to learn about information that the victim might not feel comfortable revealing in her abuser's presence.²⁰⁵

One approach is to hold the entire mediation session with the parties in separate rooms. Believing that mediation is usually not advisable where there has been past domestic violence, Sarah M. Buel argues that if a court orders mediation, the victim and the abuser should not be in the same room with each other during the mediation—in other words, the entire mediation would take place

²⁰¹ See, e.g., Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 199; Buel, *supra* note 20, at 732; Pate, *supra* note 2, at 17; Corcoran & Melamed, *supra* note 5, at 312.

²⁰² See Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 199; see also McEwen et al., *supra* note 2, at 1376.

²⁰³ See, e.g., Ellis & Stuckless, *supra* note 20, at 663–64.

²⁰⁴ Lerman, *supra* note 1, at 103–04; Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 199; Buel, *supra* note 20, at 732; Pate, *supra* note 2, at 17; Corcoran & Melamed, *supra* note 5, at 312 (“Caucusing procedures may be utilized to ensure safety or disclosure.”).

²⁰⁵ Lerman, *supra* note 1, at 103–04.

in caucus.²⁰⁶ Christine McLeod Pate has called this type of process “shuttle mediation.”²⁰⁷ California law provides for a similar “separate mediation” process when there is a protective order in place.²⁰⁸ If a party to the mediation is concerned about his or her safety in the mediation, the statute also allows that person to request that the mediation take place at separate locations and times.²⁰⁹ Although the Model Standards do not require separate mediation sessions, Standard XI.D.1 establishes that a mediator should consider, for the safety of participants and the mediator, “holding separate sessions with the parties even without the agreement of all parties.”²¹⁰

Rana Fuller suggests an alternative form of shuttle mediation when an abuse victim’s attorney believes that the abuser is threatening or intimidating the victim, but the victim still wants the mediation to go forward:

[T]he victim would be in one room, the abuser in a second, and the attorneys and the mediator in the third. The attorney could work toward an agreement with only the mediator and opposing counsel or the abuser, then take the proposed agreement to the victim for discussion.²¹¹

Fuller recognizes that her proposed shuttle mediation process could make a client feel like she is no longer in control of the process, and thus she cautions attorneys to fully communicate what happened in the meeting between the attorney, the mediator, and opposing counsel.²¹² Still, even with that communication, this process has the potential to result in an agreement in which the domestic violence victim has had little voice. Even if it reflects her attorney’s beliefs about legal fairness, it may not fully reflect the victim’s personal wishes.

2. The Role of Attorneys, Support Persons, and Victims’ Advocates

Many scholars believe that victims should have the opportunity to be represented by advocates, either by an attorney or by

²⁰⁶ Buel, *supra* note 20, at 732.

²⁰⁷ Pate, *supra* note 2, at 17.

²⁰⁸ CAL. FAM. CODE § 3181 (2007); *see also* Edwards, *supra* note 6, at 662.

²⁰⁹ CAL. FAM. CODE § 3181 (2007); *see also* Boxer-Macomber, *supra* note 14, at 889.

²¹⁰ *Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26, at 120.

²¹¹ Fuller, *supra* note 58, at 949–50.

²¹² *Id.* at 950.

some other person trained in domestic violence victim advocacy.²¹³ One practitioner has advocated that “each time the court referred a victim to mediation or a mediator discovered domestic violence through screening, a pro bono attorney could be called upon to assist financially indigent victims through the mediation process.”²¹⁴ In fact, an attorney or another support person in mediations with the victim could help “balance negotiating power and eliminate intimidation and fears of underrepresentation.”²¹⁵ In addition, an attorney, victims’ rights advocate, or other representative could help the victim to articulate his or her concerns within the mediation and provide advice about whether a proposed agreement is actually in the victim’s interest.²¹⁶

The Model Standards also stress the value of having parties represented by attorneys in mediation, both in situations in which the couples have a history of domestic violence and those that do not include such a history.²¹⁷ Although the Standards state that “[t]he mediator should allow counsel for the parties to be present at the mediation sessions,”²¹⁸ the Standards also allow the mediator

²¹³ Lerman, *supra* note 1, at 104. See also Buel, *supra* note 20, at 732; Schepard, *supra* note 5, at 421 (“Some victims of domestic violence may have recovered their self-confidence enough to be a suitable mediation participant if advised by counsel and protected by appropriate safeguards in the mediation process.”); McEwen et al., *supra* note 2, at 1376 (“Lawyers prevent or moderate the effects of a face to face encounter with an abuser, thus diminishing the likelihood of unfairness in domestic violence cases. . . . Past violence, which may be a key factor in determining whether the parties will submit to an unfair settlement or will be forced into a frightening situation, becomes less of a bargaining factor if the parties attend with their lawyers.”); Zaher, *supra* note 1, at 42 (“[A]ccess to legal expertise and advice must be made available to the opposing parties prior to the mediation. The tendency on the part of women to bargain within a legal vacuum, oblivious to their rights, vitiates the crucial element of voluntariness in ultimately reaching an agreement.”).

²¹⁴ Pate, *supra* note 2, at 17. But see Buel, *supra* note 20, at 722 (arguing that victims need legal representation but noting the shortage of attorneys available due to funding issues for legal services organizations); Murphy & Rubinson, *supra* note 10, at 65 (“An initial problem in approaching the role of lawyers in protecting victims of domestic violence is that the vast majority of such victims cannot obtain counsel.”).

²¹⁵ Corcoran & Melamed, *supra* note 5, at 312.

²¹⁶ *Id.*

²¹⁷ *Model Standards of Practice for Divorce and Family Mediators*, *supra* note 26, at 112 (Standard I.C) (“A family mediator should encourage the parties to seek information and advice from a variety of sources during the mediation process including their attorneys and other professionals, where appropriate.”); *Id.* at 113 (Standard III.A.4) (prior to mediation, the mediator should “encourag[e] the parties to employ independent legal counsel prior to the conclusion of the mediation process.”); *Id.* at 116 (Standard VII.F) (“The mediator should recommend to the parties that they obtain independent legal representation before concluding an agreement.”); *Id.* at 117 (Standard VII.G) (“The mediator should allow counsel for the parties to be present at the mediation sessions.”).

²¹⁸ *Id.* at 117 (Standard VIII.G).

to exclude an attorney from the session if only one party is represented by counsel.²¹⁹ In Standard XI, which specifically covers domestic violence issues, the mediator is to “strongly encourage the parties to be represented by counsel or an advocate throughout the mediation process if they are not already,”²²⁰ and to “allow[] a friend, representative, advocate, or attorney to attend the mediation sessions to support the victim of domestic violence.”²²¹

The Uniform Mediation Act (“UMA”) requires mediators to allow parties to any mediation to bring a support person with them,²²² and thus states that have adopted that provision of the UMA already have that right in place. States that have not adopted the UMA or another statutory provision similar to the support person provision should consider the reasoning behind the provision and institute their own versions of that right, as an attorney or victim’s advocate may be necessary to safeguard the legal interests of domestic violence victims. The right to bring a support person is just another way of assuring that procedural safeguards will be maintained throughout the mediation process.

C. Approaches to Family Mediation Program Design: Other Considerations

Unlike some victims’ advocates who see mediation and the adversarial process as an either-or decision, some mediation advocates point out that there is nothing to prevent a victim from both proceeding in court to obtain legal protection against his or her abuser, whether in the form of a protective order or prosecution of the abuser, and pursuing mediation of family issues.²²³ In fact, “[t]he availability of criminal proceedings mitigates concerns . . . that in addition to power imbalances mediation fosters a ‘private’ resolution of a problem that many women’s advocates have sought to bring out of the ‘private’ realm and into public consciousness and condemnation.”²²⁴

Additionally, knowledgeable mediators and mediation program administrators may also introduce both victims and abusers

²¹⁹ *Id.*

²²⁰ *Id.* at 120 (Standard XI.D.2).

²²¹ *Id.* at 120 (Standard XI.D.4).

²²² Uniform Mediation Act § 10 (“An attorney or other individual designated by a party may accompany the party and participate in a mediation.”).

²²³ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 181.

²²⁴ Murphy & Rubinson, *supra* note 10, at 66 n.76.

to other community and professional resources available to them. For example, some mediation proponents believe that the mediation process, because of its privacy and the role of the neutral mediator, actually encourages the abuser to admit his actions and seek help.²²⁵ Mediators can educate participants about a variety of options that may be available, including:

batterers' treatment and anger management programs; alcohol and drug treatment; dual-diagnosis consultants and treatment; victim support and treatment; posttraumatic stress groups; therapy; . . . supervised access and exchange facilities; reunification therapists; parenting coordination; assistance in implementing court-ordered parenting plans; treatment for traumatized children; parenting without violence classes; parenting education, skills training, and coaching; custody evaluation; child protection services; protective orders; removal of weapons; criminal penalties; court orders with triggers; suspended or supervised visitation; case management; interpreter services; housing and employment assistance; immigration services; establishing child support and paternity; child care; and advocacy.²²⁶

Being in a position to offer information about these types of resources requires that mediation programs, supervisors, and mediators be prepared and educated about those resources beforehand. Screeners and mediators should have simple pamphlets and other forms of information readily available for parties,²²⁷ and mediator training programs should educate mediators about the range of resources that are available and how to put victims and their abusers in contact with those resources.²²⁸

²²⁵ Ver Steegh, *Yes, No, and Maybe*, *supra* note 1, at 181–82. See also Bigornia, *supra* note 5, at 60–61.

²²⁶ Ver Steegh & Dalton, *Report from the Wingspread Conference*, *supra* note 19, at 462.

²²⁷ For example, the Franklin County Court of Common Pleas Domestic Relations and Juvenile Mediation Services program offers flyers with information about family counseling, youth counseling, and family violence resources.

²²⁸ As an example, the Ohio Supreme Court's domestic violence training program for mediators contains an exercise to have mediators identify services that are available to aid victims of domestic violence. OHIO SUPREME COURT, DOMESTIC VIOLENCE ISSUES, *supra* note 39, at 224–27. The training materials also provide a list of domestic violence resources, both state-wide and local, available in Ohio. *Id.* at 457–68.

III. STUDIES OF MEDIATION EFFECTIVENESS IN THE DOMESTIC VIOLENCE CONTEXT

Most of the arguments about mediation effectiveness where couples have a history of domestic violence rely upon anecdotal evidence rather than empirical data. For example, one scholar tells the story of a battered woman who felt that she had been unfairly intimidated into granting custody concessions to her husband during a mediation.²²⁹ Another describes an anecdotal account of a relationship that she argued would not be appropriate because of a ten-year history of physical abuse,²³⁰ but she included no specific data to support her point. Although these stories provide useful information, more systematic studies of mediation screening, training, processes, and outcomes are needed to determine what effect past domestic violence has on family law mediations and whether attempts to design systems to address potential problems are actually working.²³¹ Many assumptions made by mediation advocates and victims' advocates make sense on the surface, but it is important to determine whether those assumptions hold true in reality.

Scholars have completed numerous studies analyzing the effectiveness of mediation in the family law context,²³² but very few

²²⁹ Hart, *supra* note 1, at 321–22.

²³⁰ Grillo, *supra* note 3, at 1600.

²³¹ For example, Jessica Pearson has used a study of mediation practices in court-based mediation programs to determine how mediators address domestic violence cases, but that study did not include a survey of victims and batterers. See Pearson, *supra* note 10, at 319.

²³² A sampling of the numerous empirical studies of family mediations include: Suzanne Reynolds, Catherine T. Harris & Ralph A. Peebles, *Back To the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629 (2007) (comparing child custody outcomes from litigation and mediation, but not addressing the effect of domestic violence on these processes or outcomes); Robert E. Emery, David Sbarra & Tara Groer, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22 (2005); Judith V. Caprez & Micki A. Armstrong, *A Study of Domestic Mediation Outcomes With Indigent Parents*, 39 FAM. CT. REV. (2001); GEORGE C. FAIRBANKS & IRIS C. STREET, TIMING IS EVERYTHING—THE APPROPRIATE TIMING OF CASE REFERRALS TO MEDIATION: A COMPARATIVE STUDY OF TWO COURTS, James City County Court (2001); LAURA F. DONNELLY & REBECCA G. EBON, CHILD CUSTODY AND VISITATION PROGRAM IN NORTH CAROLINA: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS (2000); ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATION MEDIATION IN MAINE AND OHIO COURTS (1999); JAYNE ZUBERBUHLER, EARLY INTERVENTION MEDIATION: THE USE OF COURT ORDERED MEDIATION IN THE EARLY STAGES OF DIVORCE LITIGATION TO RESOLVE PARENTING ISSUES, Hamilton County Court of Domestic Relations (1994); Tricia S. Jones & Andrea Bodtker, *Satisfaction with Custody Mediation: Results from the York County Custody Mediation Program*, 16 MEDIATION Q. 185 (1998); Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353 (1997); Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children after Divorce*, 28 FAM.

of those studies have addressed the effect that the history of domestic violence has had on those mediations. Those studies that have focused specifically on mediation in the context of a couple's history of domestic violence are very limited.²³³ Although they provide some useful data, much more work is needed on this front in order to fully understand how domestic violence affects the mediation process and how mediation programs can be designed to ensure safety and lead to fair, enforceable, and positive outcomes.

So what have we learned from the research thus far? First, scholars have spent much time comparing parties' perceptions of mediation, private negotiations, and litigation as methods of solving family law disputes, usually analyzing participants' satisfaction with the process and process results.²³⁴ In most cases, these studies have not analyzed whether couples who have a history of domestic violence have similar perceptions and results to those who do not have that history.²³⁵ In these studies, mediation usually compares favorably to other forms of dispute resolution.²³⁶

L.Q. 223 (1994); Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda For Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 98–99 (1993); SUSAN KALITZ, A MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING (1992); Joan B. Kelly & Mary A. Duryee, *Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings*, 30 FAM. & CONCILIATION CTS. REV. 34 (1992); Joan Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, 24 MEDIATION Q. 71 (1989); Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 MEDIATION Q. 33 (1989); Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 24 MEDIATION Q. 3 (1989); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Results*, in DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Ann Milne eds., 1988), at 429, 435–41; Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984).

²³³ See, e.g., Chandler, *supra* note 1 (comparing the mediation agreements of couples with a history of domestic violence with couples without a history of domestic violence); THANS Study, *supra* note 10; Sherman & Burk, *supra* note 10; Pearson, *supra* note 10; Murphy & Rubinson, *supra* note 10; Ellis & Stuckless, *supra* note 20; Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375 (1999); Nancy Thoennes, Peter Salem, & Jessica Pearson, *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6 (1995); Roselle Wissler, *Family Law Mediation: Study Suggests Domestic Violence Does Not Affect Settlement*, 6 DISP. RESOL. MAG. 29 (1999).

²³⁴ See, e.g., Reynolds et al., *supra* note 232; Bohmer & Ray, *supra* note 232; Kelly, *Mediated and Adversarial Divorce*, *supra* note 232; Jessica Pearson, *The Equity of Mediated Divorce Settlements*, 9 MEDIATION Q. 179 (1991); Emery & Jackson, *supra* note 232; Pearson & Thoennes, *supra* note 232; Mary G. Marcus et al., *To Mediate or Not to Mediate: Financial Outcomes in Mediated Versus Adversarial Divorces*, 17 CONFLICT RESOL. Q. 143 (2007).

²³⁵ See *supra* note 234.

²³⁶ See, e.g., Marcus et al., *supra* note 234 (finding that, among mediated and adversarial cases, there was virtually no difference in women receiving or being required to pay alimony, but that women who mediated were more likely to obtain a greater percentage of joint assets, re-

A small number of studies have studied the effects of a history of domestic violence on a couple's ability to mediate their differences successfully.²³⁷ These studies help establish a preliminary understanding of the issues discussed in this Article, although much more needs to be done to fully understand what effects domestic violence may have on the mediation process and outcomes—and what mediation programs, mediators, and attorneys can do to protect victims and make the process more safe, fair, and effective.

No studies thus far have sought to expand the scope of their inquiry into the full range of issues discussed in this Article, including: the connection between mediator training and effective, safe, and fair mediation screening, processes, and outcomes; whether particular types of screening are more effective at identifying cases that should not be mediated or need special protocols in place; what perceptions mediation participants have of the mediator, mediation process, and mediation outcome and how those perceptions correlate, if at all, to mediator training and process design; comparisons between different programs that have different approaches to these issues; and whether other factors such as the race, ethnicity, income, educational background, etc. of the mediation participants have any influence on what works and does not work in this context.

IV. THE NEED FOR FURTHER STUDIES

Most scholars and victims' advocates agree that the first step in having effective mediations is proper screening of mediation participants. Screening should have three important goals: (1) determining what cases are not suitable for mediation because of concerns about safety, severe power imbalances, or other issues; (2) making the mediator aware of domestic violence issues or other

ceive alimony longer, or obtain more child support than those women who litigated their cases); Reynolds et al., *supra* note 232 (finding no increase in the number of joint custody arrangements resulting from child custody mediations); Kelly, *Mediated and Adversarial Divorce*, *supra* note 232 (finding that parties were usually more satisfied with the mediation process than with litigation). *But see* Bohmer & Ray, *supra* note 232 (finding no differences in outcomes for women between mediation and litigation in Georgia but determining that mediation settlements were not as beneficial to women as adversarial results in New York).

²³⁷ See, e.g., Chandler, *supra* note 1; THANS Study, *supra* note 10; Pearson, *supra* note 10; Murphy & Rubinson, *supra* note 10; Ellis & Stuckless, *supra* note 20; King, *supra* note 233; Thoennes et al., *supra* note 233; Wissler, *supra* note 233, at 29.

issues that could interfere with a fair, safe mediation process and therefore will have to be carefully managed; and (3) educating alleged domestic violence victims about how the mediation process will work, what rights they have, what resources are available to them, etc. Family-law mediators should have mandatory training and continuing education requirements for domestic violence issues, in order to help them be more effective screeners and more able to recognize power dynamics and potential safety issues within mediations.

The question then becomes, how does this work in practice? If mediators use screening in an attempt to accomplish the above goals, are they effective in doing so? Does training in domestic violence issues make a mediator more effective and, if so, how can that effectiveness be measured? Is it possible to design a mediation process whereby a victim of domestic violence feels safe in negotiating an agreement with his or her alleged abuser, is empowered to be involved in the mediation process in a meaningful way, and feels that the process and outcome are fair? To what extent do factors such as economic status, race, ethnicity, immigration status, sexual orientation, or other factors make a difference in the mediation process and its outcome? Does it make a difference, in the domestic violence context, if mediation is required or voluntary, is part of a court-sponsored program or community mediation program, or is staffed by paid mediators or volunteers? A systematic study of family law mediation programs could address at least some, if not all, of these questions.

The following are some background questions that such a study should consider, related to the mediation program, screening process, mediator training, and other issues. This information is relevant to understanding the results of any interviews/surveys/questionnaires of parties to the mediations.

- How is the mediation program structured? Is mediation voluntary or mandatory? How do the parties come to mediation—are they referred by the courts, for example, or do they seek out mediation on their own?
- What screening process does the mediation program use? Does the mediation program use a questionnaire, individual interviews, or a combination of the two? What questions are asked as part of the screening process? Who handles the screening process—the mediator, mediation program staff, or court personnel?

- When a screener determines that the relationship involved domestic violence, how does the screener decide whether the parties are capable of mediating their dispute? What factors are considered most important to the screener?
- What is the educational background, training (in domestic violence issues and mediation), and experience of the screeners and mediators involved in the program?
- What types of techniques are mediators trained to use in mediations when the parties have been involved in domestic violence?

If possible, the study should incorporate any written results of the screening process for those cases involving domestic violence in order to have more context for the questions that would later be asked of the mediation participants.

As part of the study, mediation participants should be surveyed regarding their experiences. Most survey questions would focus on alleged victims of domestic violence who are parties to mediations, but it would also be helpful to do an abbreviated form of the survey for the alleged abusers, focusing on their perceptions of fairness of the process and their satisfaction with the mediation process, the mediator, and any agreement that was reached. The following are some topics that a survey should focus on, in order to determine how satisfied participants were with the mediation process as well as more generally how effective mediations are when there is a history of domestic violence.

- **Post-Mediation Threats or Incidents of Domestic Violence:** Were there any later incidents of domestic violence or threats of violence (post-mediation)? If so, a follow-up question would ask whether the victim felt that that incident(s) was related to the mediation.
- **Participant Satisfaction:** Were the participants satisfied with the mediation process? It would be interesting to see whether alleged abusers perceived any bias on the part of the mediator because of the mediator's attempts to manage any power imbalances during the mediation. It is also important to understand whether victims felt satisfied with the mediation process. Would the participant use mediation again or recommend it to others for resolving family law issues?
- **Safety:** Did the victim feel that he or she was safe during the mediation process? What things did the mediator do that made the victim feel more/less safe? Was there anything

about the mediation process itself that made the victim feel more/less safe? What could the mediator do differently to ensure safety?

- Outcome: Was there an agreement reached? If so, were both parties satisfied with that agreement? Did each party feel that the agreement was workable?
- Mediation Process: Did the mediator use caucuses or meet separately with the participants during the mediation? If so, what did the parties feel about these separate meetings (i.e., were caucuses/separate meetings helpful, did they make the victim feel safer, etc.)?
- Did the mediator do anything else in the screening process or during the mediation process that the participants felt was effective/ineffective?
- The survey should also ask demographic questions related to economic status, race, ethnicity, immigration status, sexual orientation, and other factors that may have an impact on how data should be interpreted.

Using the above approach, a large-scale study of mediation participants, from a variety of different mediation programs that use different approaches to screening, mediator training, and other aspects of the mediation process, would provide a greater understanding of what currently works and what could be done better in mediating family law disputes where the couple has a history of domestic violence. It is not enough to assume that screening, training, and other innovations are working—we must know that these approaches are effective. Regardless of whether everyone agrees about the appropriateness of mediation in these situations, it is indisputable that mediations do take place and will continue to do so. In order to work towards a mediation process that is safer, fairer, and less traumatic for victims of domestic abuse, we have to know what works and what does not.

