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IN HARM'S WAY? FAMILY MEDIATION AND THE ROLE OF THE ATTORNEY ADVOCATE

Mary Pat Treuthart*

OVERVIEW

Mediation purports to allow participants to reach an agreement without the hostility and the psychological costs often imposed by adversary litigation.¹ Mediation enthusiasts contend the process is particularly well-suited to resolving disputes among family members. Mutually agreed solutions, rather than the public acrimony of an adversarial legal proceeding, are viewed as less destructive to family relationships, particularly parent-child ties.² Reduction of expense, efficiency, user satisfaction, and increased access to the legal system are perceived as advantages of alternative dispute resolution mechanisms, including mediation.

Concerned attorneys may be uncertain about the impact of mediation on their clients. Based on available research, women's advocates have legitimate reservations about the detrimental impact of mediation on women in general. Battered women are particularly at risk.

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² DONALD SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES 19 (1983).
At the same time, by statute, court rule, or judicial policy, mandatory mediation is a reality in many places. Although some mandatory mediation schemes theoretically provide exemptions for battered women and others, it may not be easy to avoid mediation even when that method of dispute resolution will not benefit the client. Other locales are exploring the possibility of using alternative dispute resolution mechanisms. An attorney advocate, in conjunction with the client, should have maximum input into the way in which a specific family law matter is handled, including the selection of an appropriate dispute resolution method.

The first part of this article presents some background information about mediation and the current mediation trend, emphasizes that the use of mediation is dangerous and inappropriate when one disputant has been abused by the other, and identifies potential problems for women which may be created by family mediation. The second part of this article focuses on the role and responsibilities of the attorney advocate when the client chooses, or is compelled, to mediate, with particular attention to the special concerns involved in representing battered women. In the scholarly literature, much time and energy has been devoted to issues addressed in the first part. Little guidance is available, however, to attorneys who must confront the reality of mediation and its impact on their relationships with clients. Hopefully, the second part of this article will stimulate discussion of this relatively unexplored topic.

I. BACKGROUND INFORMATION ON MEDIATION

A. Basic Definition

Mediation is a voluntary process in which a neutral third person assists participants in reaching a consensual agreement on disputed issues after considering available options and alternatives. Mediation is a “private, nonappealable, and unenforceable approach” to dispute resolution which has no consistency in
its application or outcome. Family mediation commonly resolves such matters as division of property, alimony, child custody, visitation, and child support.

The focus of the mediation process is agreement between the disputants without direct regard for specific legal baselines. Although participants bargain in the "shadow of the law," mediation is not strictly governed by the law, guidelines, or standards. With the current gender inequality which exists in our society, the mediation process fails to fully recognize that women may be seriously disadvantaged by a process which places them in an unrestrained bargaining situation with men who are generally economically dominant and more powerful.

II. THE CURRENT MEDIATION TREND

The coalescence of several factors may have provided the impetus for the increased use of mediation as a dispute resolution process in the family law area:

1) Portrayal of mediation as a way to avoid expensive litigation involving lawyers who are allegedly concerned about their own economic interests and ignore the clients' emotional needs.

6. BLADES, supra note 3, at 1; COOGER, supra note 3, at 1.

"A society characterized by gender inequality, one differentiated and stratified by gender and supporting an institutionalized ideology justifying male domination in all socially significant contexts (educational, political, economic, religious, military) is a society that routinely provides husbands with greater resources than wives. Gender inequality, then, is the societal context for the processing of marital conflicts." Id. at 330. See also Penelope Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L REV. 441 (1992) (wherein the author explores how sex role ideology exacerbates the wife's disadvantage on financial issues. Id. at 481-98.); Carol Lefcourt, Women, Mediation and Family Law, 18 CLEARINGHOUSE REV. 266, 267 (1984), wherein the author notes: "[T]he main goal of the process is agreement without regard to legality or viability, except perhaps as perceived by the parties and the mediator at the time." Id.

2) Increased congestion in the courts generally.\(^{10}\)

3) Gradual elimination of "bright-line" rules for judicial decisionmaking.\(^{11}\)

4) Greater deference to the opinions of non-legal professionals such as psychologists and social workers who assist the court in making decisions, particularly in custody cases.\(^{12}\)

5) The apparent willingness of the bench and bar to withdraw from complex, emotionally-charged matters incapable of quick resolution.\(^{13}\)

6) A growing sense that private ordering is appropriate in intraclass controversies between intimates.\(^{14}\)

7) Return to "privatization" after women's advocates helped strengthen laws concerning domestic abuse, division of property, enforcement of spousal and child support, and sole custody for the primary caretaking parent with whom the child is psychologically bonded.\(^{10}\)

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12. The concept of mental health professionals contributing their special expertise to the custody decisionmaking process is not a novel one. See WALTER GELLHORN, A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CHILDREN AND FAMILIES ON THE COURTS OF NEW YORK 315 (1954). For an examination of the more recent trend to rely upon the special expertise and insights of psychiatrists, psychologists and social workers, see Robert J. Levy, Custody Investigations in Divorce Cases, 1985 AM. B. FOUND. RES. J. 713 (1985), and Thomas R. Litwack et al., The Proper Role of Psychology in Child Custody Disputes, 18 J. FAM. L. 269 (1980).
13. Lawyers may have difficulty coping with the psychological effects of divorce. See Bruce W. Kallner, Boundaries of the Divorce Lawyer's Role, 10 FAM. L.Q. 389 (1977).
14. Richard Abel, Informalism: A Tactical Equivalent to Law, 19 CLEARINGHOUSE REV. 375, 382 (1985). This view has gained even greater acceptability in the legal services community. After retrenchment in 1981 necessitated strict prioritizing, many field programs stopped handling contested family law matters and referred cases to volunteer participants in private attorney involvement programs. Limited program resources were preserved for "traditional" legal services work such as public housing and consumer matters. For discussion about the fundamental importance of legal services' continued commitment to family law, see Laurie Woods, The Challenge Facing Legal Services in the 80's, 16 CLEARINGHOUSE REV. 26 (1982).
15. Woods, supra note 5, at 436. The author states: [I]t is not a coincidence that, just when the state legislatures are passing strong laws with respect to battery, marital property, and child support enforcement, and when the U.S. Con-
III. THE NEGATIVE IMPLICATIONS OF DOMESTIC ABUSE ON MEDIATION

A. INTRODUCTION

Discussion of domestic abuse and mediation focuses on the use of the process in: 1) cases where domestic violence is the presenting problem, and 2) matters involving other issues such as custody, property, division, or support when domestic abuse has been inflicted by one participant on another participant. There is increasing awareness that mediation in criminal and civil domestic abuse cases themselves may be inappropriate and ineffective; however, some jurisdictions continue to use a mediation approach as part of a criminal court diversion program or civil protection order pre-hearing settlement process.

General agreement exists, even among mediation enthusiasts, that no matter, regardless of the specific issues involved, should be mediated when domestic abuse of a serious nature has occurred between disputants. Feminists and battered women's advocates decry the use of mediation in cases when any domestic abuse has been perpetrated by one disputant on the other disputant. Many mediators do recognize that the use of mediation when domestic abuse is involved does not serve either their...
profession or the public. Identifying and screening out cases in which one party has abused the other is a critical step in the pre-mediation process. In order to effectively identify and screen cases, heightened awareness about the problem of domestic abuse is needed by both advocates and mediators.

The mediation process relies on good-faith bargaining between disputants who possess equal bargaining power which never exists in an abuser/victim situation involving intimate partners of the opposite sex. The focus of mediation is to reach agreement between the participants and to avoid assessing blame on either disputant. This will not stop violent behavior or protect the victim.

B. IDENTIFYING DOMESTIC ABUSE

Domestic abuse consists of an act or acts by one partner that serves to intimidate or control the other partner. The behavior may range from criminal acts causing or threatening

18. In 1984, responding to these concerns, the Conference of Concerned Mediators and Concerned Advocates on Mediation of Family Law Issues resolved:

19. Three separate detailed booklets about mediation and domestic abuse are available from The National Center on Women and Family Law, [hereinafter NCOWFL], 799 Broadway, Room 402, New York, New York 10003, (212) 674-8200: MYRA SUN, MEDIATION AND YOU (information guide for battered women); MYRA SUN & LAURIE WOODS, A MEDIATOR'S GUIDE TO DOMESTIC ABUSE (contains a discussion of abuse, extensive research data, a screening guide and a mediation protocol); and MARY PAT TREUTHART & LAURIE WOODS, MEDIATION: A GUIDE FOR ADVOCATES AND ATTORNEYS REPRESENTING BATTERED WOMEN (includes background information on mediation and a practical guide for attorneys).

20. There is a clear disparate impact on women who are, in overwhelming numbers, the victims of physical violence inflicted for purposes of intimidation or control. In their 1976 and 1985 surveys of couples living together, researchers concluded that violence by men is more injurious and repeated about three times more often than violence by women. MURRAY STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 43 (1980). Although men and women engage in violence in about the same numbers, women are not the “primary aggressors” and their actions do not have the intimidating effects of men’s violence. RICHARD GELLES & MURRAY STRAUS, INTIMATE VIOLENCE 90 (1988). In view of the data, female pronouns are used to refer to victims and male pronouns are used to refer to primary aggressors.
physical harm, to non-criminal acts that destroy the victim's ability to act independently. A detailed description of domestic abuse is contained in Appendix A, Domestic Abuse Victim Screening Guide. The conduct may include:

- Verbal criticism of the victim,
- His unwanted presence at her home, workplace, or school, or his monitoring of her activities,
- Trespass or destruction to property in which the victim has an interest,
- Exercising control over property in which the victim has an interest,
- Physical confinement of the victim, or forcible removal of her from the premises,
- Any threat with any weapon,
- The use of any of the above threats or actions, or other actions, to control the victim's conduct,
- Attempts to commit any of the above acts,
- Any of the above acts committed against persons close to the victim, including her children.

Domestic abuse is not limited to violence that leaves the victim with bruises or injuries. A number of forms of abusive behavior may be just as coercive and ongoing as more obvious violence in terms of its effects on the victim. Even though physical abuse may not have occurred in several years, it may simply be that the perpetrator has not believed it was necessary to use violence because other behaviors, such as threats, isolation, degradation, or economic abuse were sufficient to maintain the control originally established through the use of violence.21

Regardless of which forms of abuse occur, the incidents of abuse usually recur, often increasing in severity and frequency over time unless outside deterrent intervention takes place.22 Abuse continues and typically escalates after the breakup of the

22. Lenore Walker, The Battered Woman Syndrome 24 (1984). All of Walker's research subjects had experienced physical violence by their abusers more than once, with increasing severity on each occasion. Id. Seventy-three percent of victims reported escalation in psychological abuse. Id. at 180. In another study, ninety-four percent of women reported more than one attack, and seventy-four percent reported an increase in severity and frequency. Mildred Daley Pagelow, Women Battering, Victims and Their Experience 163 (1981).
The occurrence of abuse changes the nature of the relationship between the victim and the batterer and has a negative impact on children. Domestic abuse intimidates the victim and reduces her ability to represent, or even identify, her own interests. The victim may not even recognize that she accedes to the abuser's wishes for fear of abuse, and that the pattern is detrimental to her. One cannot easily identify either the abuser or the victim. The abuser looks and acts normal, while the victim may look hysterical or act lovingly towards the abuser.

C. Screening for Domestic Abuse by Attorneys and Mediators

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

23. Mildred Daley Pagelow, Family Violence 43 (1984). Three-fourths of domestic assaults occur while victims are separated or divorced from their assailants. United States Dep't of Justice, Report to the Nation on Crime and Justice-The Data 21 (1983) [hereinafter The Data]. Despite these statistics, mediators may be reluctant to recommend supervised visitation or mandate neutral public exchange locations in cases involving domestic abuse, which may be necessary to ensure victims safety since these arrangements may be complicated and require facilitation by persons not directly involved in the mediation process.

24. Children are “secondary victims” of violence since they are negatively affected by the abuse between their parents. See Hart, supra note 17, at 322-323. For detailed information on representing battered women in custody cases, see Myra Sun & Elizabeth Thomas, Custody Litigation on Behalf of Battered Women, 21 Clearinghouse Rev. 563 (1987).


26. Lenore Walker, The Battered Woman 56 (1979). During the period that Walker defines as the “tension-building” phase, minor battering incidents occur (such as the abuser’s throwing down objects). The victim’s response is usually to become “nurturing, compliant and [to] anticipate his every whim; or she may stay out of his way.” Id. The “acute battering incident” follows the “tension building” phase and involves physical abuse perpetrated by the man and the female victim’s total inability to prevent it. Id. at 60. The “loving contrition” phase occurs almost immediately after the abuse. The abuser promises to change, insists he needs the victim, and both of them believe he means it. Id. at 65-67.
They reached an amicable settlement in the next session.\(^27\)

Attorneys and family mediators should realize that a significant percentage of potential women mediation participants are, have been, or will be abused by the partners with whom they are expected to mediate.\(^28\) Attorneys as well as mediators must screen clients for domestic abuse prior to mediation.\(^29\)

Unless the mediator in the above excerpt offered to hold individual caucuses, the most reasonable course of action for self-protection from the perspective of the woman may have been to react in an ostensibly loving way toward her partner. If the couple were in the “loving contrition” stage of the cycle of violence,\(^30\) the abuser may have been particularly conciliatory due to his remorse over a violent episode. Both research results and previous experience might have warned the mediator, if not the victim, that once the “tension building” phase began again, the agreement was likely to break down.

In the above excerpt, the victim disclosed physical abuse before the mediator even met with the participants. However, the information could have come to the mediator from other sources, such as the court file. It might not be disclosed until later, after the mediator has met with the participants. A mediator has an affirmative obligation to screen a case for domestic abuse, or other factors that affect informed consent, before proceeding with mediation.\(^31\)

\(^27\) SAPOSNEK, supra note 2, at 30 (1983). This excerpt was used in its original context to demonstrate the difficulty mediators encounter in predicting the likelihood that an agreement will be reached in a particular matter.

\(^28\) The rate of physical abuse among divorced couples could be as high as 36%. George Levinger, Physical Abuse Among Applicants for Divorce, in VIOLENCE IN THE FAMILY 86 (Murray Straus and Suzanne Steinmetz eds., 1978).

\(^29\) See Appendix A (Screening Guide) and discussion regarding attorney screening, infra notes 95-108 and accompanying text.

\(^30\) See supra note 26, for a discussion of the stages of violence as presented by Lenore Walker.

\(^31\) See also infra notes 95-108 and accompanying text.
D. Refusing Mediation When Domestic Abuse is Involved

There are two primary reasons why mediation is inappropriate in cases involving domestic abuse:

1) There is no mechanism in mediation to hold the abuser accountable for his actions. This sends out a message to the participants and to society that violent behavior is condoned and that the victim may be partially responsible for its occurrence; and

2) Perpetration of abuse by one participant on another impugns the integrity of the mediation process, resulting in further harm to victims.

E. Abuser Accountability

Mediation emphasizes the privacy and autonomy of the family. The process specifically focuses on the relationship between the parties without assessing blame for inappropriate, asocial, or criminal behavior. The batterer is not required in mediation to admit responsibility for the abuse.

In our society, the battered woman is often blamed and made to feel responsible in some way for the violence perpetrated against her. The idea of provocation on the part of the


35. Woods, supra note 5, at 433.

36. Proponents of mediation may believe that family violence is the result of "family dysfunction; stress reaction; inadequate coping responses due to health or mental health problems; lack of anger or frustration control; situationally precipitated crisis such as unemployment; and/or symptoms of addiction problems. . . . Many men experience each or some of the above and do not batter their women." Barbara Hart, Mediation for Women: Same Song, Second Verse - A Little Bit Louder and A Little Bit Worse 10 (1984) (unpublished manuscript, on file with the Golden Gate University Law Review).
victim is used to justify and support male dominance and control, and to reduce societal censure for the abuser's use of physical force against the victim.\textsuperscript{37}

Since the mediation process is not designed to deter violent behavior or to protect victims, its use is particularly problematic for battered women.\textsuperscript{38} Protection of one's safety should be considered too important to entrust to any other than the legal system, which has the power to remove the batterer from the home, to arrest when necessary, and to enforce the terms of a decree if a new assault occurs.\textsuperscript{39}

\section*{F. The Integrity of the Mediation Process}

Due to the inherent gender inequality in our culture, many women in mediation will be affected by the mediator's difficulty in handling the key elements of mediation, particularly voluntariness and equal bargaining power. However, none of the integral aspects of mediation is present when domestic abuse has occurred. By examining the impact of domestic abuse on each factor, it is clear that the only tenable position is to avoid mediation involving battered women.

\subsection*{1. Voluntariness}

A victim may be too intimidated to give an informed voluntary consent to mediation. Domestic abuse reduces the abused woman's freedom to make many choices for herself, including her freedom to choose mediation. Even when the victim has "consented to" mediation, she may only seek it and seem more than willing to go through it because she feels she really has no other viable option. Her abuser may have threatened her or may

\begin{itemize}
\item \textsuperscript{37} United States Comm'n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice 62 (1982).
\item \textsuperscript{38} Arrest may be the most effective deterrent to domestic abuse. N.Y. Times, Apr. 5, 1983, at C1.
\item Many abusers go on to abuse other partners. In one study, 57\% of victims reported their partners had been violent with former wives. Pagelow, supra note 23, at 62. In another sample, a Los Angeles abuser's counselor confirmed to the researcher that all of the 150 abusers he had treated acknowledged they had abused other partners. Id. at 106. Only 17\% of the victims reported involvement in other abusive relationships. Id. at 59.
\item \textsuperscript{39} Woods, supra note 5, at 435-36.
\end{itemize}
have convinced her that the legal system will be much more sympathetic to him, e.g., that she will lose her children or lose all financial support. Neither victim participation in the mediation process, nor any agreements achieved through such an unbalanced "mediation" is truly voluntary.

Research results indicate that participants sometimes feel coerced into reaching settlements in mediation. Women who have experienced domestic abuse are more likely than other women to have established a pattern of deferring to their abusers in disagreements. There should be an assumption that a battered woman cannot voluntarily consent to participate in mediation or to the terms of a final agreement.

2. Equality of Bargaining Power

The importance of equal bargaining power is acknowledged by mediators. However, there is limited focus on identifying and attempting to remedy power imbalances in the mediation process.

Many mediators, aware that there is never a perfect power balance between two parties in a relationship, believe that sufficient skill and sensitivity can tip the balance of power to produce a fair outcome. It is important for mediators to understand that no amount of skill or training can make up for the control that an abuser exerts over his victim, and negotiations

40. Jessica Pearson & Nancy Thoennes, Divorce Mediation: Strengths and Weaknesses Over Time, in ALTERNATIVE MEANS OF DISPUTE RESOLUTION 456 (H. Dowison et al., eds., 1982) [hereinafter, ALTERNATIVE MEANS]. In the Pearson-Thoennes study, 23% of the California participants, 20% of the Minnesota participants, and 12% of the Connecticut participants agreed with the statement: "The mediator pressured me or my (ex) spouse into an agreement." Id.

41. In Lenore Walker's study, 73% of the victims reported that the abuser "always" or "usually" prevailed in major disagreements, compared to just 16% of the control sample of non-abused women. Only 9% of the victims said that they prevailed in major disputes about half the time, compared to 59% of the non-abused women. WALKER, supra note 26, at 174.

42. See FOLBERG & TAYLOR, supra note 4, at 184-186. See also Isolina Ricci, Mediators Notebook: Reflections on Promoting Equal Empowerment and Entitlement for Women 8 (3-4) J. DIVORCE 49, 55-57 (1985), wherein the author provides some intervention strategies for use by mediators in attempting to balance power.

between these parties cannot, in good conscience, be called “mediation.”

The mere presence of the abuser may be frightening and intimidating to a battered woman, to say nothing of the prospect of her attempting to negotiate with him. The coercive effect of domestic abuse automatically skews the equality of bargaining power completely to the advantage of the abuser. There should be an automatic presumption that equality of bargaining power never exists when one disputant has abused another disputant and principled mediation cannot take place under these circumstances.

3. Neutral

Because mediation is a privatized dispute resolution process, and “justice” is defined by the parties, mediation will only be considered as fair if its facilitator is neutral. The issue of neutrality is closely linked to the notion of equality of bargaining power. Mediators might view domestic abuse as implicating mental health issues that can be resolved through changes in both participants’ behavior.

The acceptance or negation of the victim’s claim of abuse, as facilitated by the mediator, may be necessary to the resolution of a case, for example, in a jurisdiction which considers domestic abuse as a factor in custody decision making. A victim who believes her claim is valid is not likely to view as neutral a mediator who suggests that she, the victim, accept responsibility for the abuse. Nor is an abuser who believes he acted in an appropriate manner likely to view as neutral a mediator who suggests that he accept civil or criminal liability for his conduct.

The mediator appears to be placed in a “Catch 22” situation when dealing with domestic abuse issues. It would be difficult for the mediator to attempt to equalize bargaining power with-

out compromising neutrality. At the same time, the mediator’s assuming a “neutral” stance toward the violence would be interpreted as the mediator’s condoning the violence. These tendencies can have a crucial effect on the mediator’s ability to maintain equality of bargaining power between the participants.

As evidenced by this example, neutrality is a value-laden concept and “will tend to reflect the prevailing norms and values of the surrounding society, which themselves have been shaped by society’s powerful groups.” Obviously, women will not benefit from the type of “neutrality” mediators bring to the process. Since the process is private and not subject to external scrutiny, gender bias or victim bias is less likely to be detected.

4. Confidentiality

Confidentiality in mediation is deemed essential in order to encourage full and open disclosure. Mediators may resist testifying and avoid disclosing mediation records, although the protection afforded statements made and documents submitted during mediation may be limited at best. Victims of domestic abuse may need to go to court to obtain orders for protection from violence or to enforce existing orders. A battered woman is already hampered from an evidentiary perspective in attempting to prove domestic violence which occurred in the home. Without witnesses, she will be further disadvantaged by her inability to use any admissions about violence made by her batterer during mediation. Although the fact that mediation takes place “behind closed doors” is attractive to some high profile disputants, battered women may be further victimized by the continued privatization of the violence perpetrated against them.

Professionals, including attorneys and psychotherapists, may be compelled to waive confidentiality and to contact law enforcement officials or to warn identifiable victims when threats of violence are made. When a disputant makes a threat

46. Shaffer, supra note 44, at 185.
47. One way to provide the victim with a record of the abuse if mediation cannot be avoided is the inclusion of a statement describing the violence in a preface to the mediation agreement. The victim can use the agreement if needed in subsequent proceedings to show a pattern of violence. Lerman, supra note 17, at 106-107.
48. See John R. Murphy, Note, In the Wake of Tarasoff: Mediation and the Duty
in the presence of the mediator in an individual caucus or joint session, the mediator has a similar duty to warn and protect the victim. The mediator should clearly state at the beginning of the mediation process that threats of violence will result in waiver of confidentiality and termination of mediation since safety must be the highest priority.49

IV. SUBJECT MATTER OF MEDIATION

Vigorous critique about the mediation process by women's advocates has been directed toward its use in domestic abuse matters; however, it is clear there are problems with mediation in other areas of family law as well. The difficulties may be readily apparent in jurisdictions which require mediation of certain aspects of a family law matter such as custody and visitation. As one commentator noted:

The division of property at the dissolution of a marriage is inextricably intertwined with the level of child support, spouse support, and custody issues. Mediation of one of these issues without the others improperly limits the decisionmaking process and reduces the parties' ability to bargain.50

Particularly in the financial area, the payor and the recipient may view the varied sources of funds as fungible.51 In addition,

49. Only the Center for Dispute Resolution's Code of Professional Conduct makes specific reference to the mediator's obligation to waive confidentiality in the event of "child abuse or probable crimes which may result in serious psychological or physical harm to another person." CENTER FOR DISPUTE RESOLUTION, CODE OF PROFESSIONAL CONDUCT § 2.

50. Lefcourt, supra, note 8, at 268.

51. "It is important to realize that while the law treats property division, alimony, and child support as separate doctrinal threads, they are largely substitutable. . . . All can be reduced to present value and all are merely different labels for essentially one item: money." IRA MARK ELLMAN ET AL., FAMILY LAW 675 (1986).

Even mediation enthusiasts believe isolating the custody issue is a mixed blessing, as evidenced by the statements of one commentator:

Separating parent/child issues from financial and property issues may allow children to be treated as distinct issues and lessens the potential for using them as pawns in the negotiation of property and finances. On the other hand, the isolation of these issues artificially segments a divorce agreement when property, finances and children are indeed related and decisions in one area affect decisions made in other areas.

Milne, supra note 43, at 68.
selecting one aspect of a polycentric domestic relations dispute for referral to mediation potentially alters the entire agreement scheme. It is also problematic if the particular issue, i.e. child custody, is one of greatest concern to women.

A. CUSTODY

Child custody was the initial legal issue referred to mediation for resolution. Attorneys and judges seemed eager to abdicate responsibility for decisionmaking in the complex and emotionally-charged area of custody. In the legal process, greater reliance was placed on input from psychologists and social workers, while "bright-line" rules gave way to vaguer standards in custody determinations and "joint custody" preferences.

The well-being of the children is a consistent theme promoted by mediation advocates. The use of a particular dispute resolution process, however, has no apparent impact on the children's ability to cope with the aftermath of divorce. Despite the lack of evidence linking mediation with post-divorce adjustment or "best interests" of the children, which is the standard used in most jurisdictions for custody decisionmaking, some states impose mandatory mediation in custody cases.

For mediators who emphasize the win-win viewpoint, para-

52. Shaffer, supra note 44, at 189. See generally Saposnek, supra note 2; Blades, supra note 3, at 27-31. It is not clear whether mediators have any independent, rather than derivative, obligation to third parties, including children who are not present. Some mediators encourage the participation of children in custody decisions, provided they are old enough to comprehend the process. Coogler, supra note 3, at 21.

53. Pearson & Thoennes, supra note 40, at 474-76. Based on the results of objective tests administered to children, researchers found no consistent or significant differences in post-divorce adjustment according to exposure to mediation versus more traditional adjudicatory processes. Id.

54. Although there is a dearth of empirical data concerning post-divorce adjustment of children and dispute resolution mechanisms, the findings of Pearson and Thoennes suggest that "the child's adjustment is more a product of family dynamics and overall environment than a result of having parents who do not contest custody, mediate custody or pursue the issue through the courts." Id. at 476.

Parental cooperation is an element of family dynamics. "Mediation cannot produce cooperative couples, but the process is less damaging intervention than a traditional courtroom proceeding." Id. at 471. This Pearson and Thoennes research on spousal cooperation did not compare mediation with attorney-assisted negotiation.

ents will often appear equally suited to have custody of their children. Given these assumptions about parental fitness, most mediated custody agreements result in the participants each having equal "rights" of custody, or joint legal custody, though mothers generally receive primary physical custody. The Child and Family Divorce Counseling Service in San Francisco, for example, gives both parents "wins" by generally treating both as fit. Equal blame for conflict is placed on the participants, with mediators "emphasizing that it 'takes two to fight' but only one to 'unhook.'"

In proposing the use of mediation to resolve custody matters, its advocates assume: 1) parents act in the "best interests" of their children; 2) the "best interests" of the child includes extensive contact with each parent; and 3) parents should be the primary decisionmakers since they are most familiar with the previous family structure and have the greatest stake in its future structure. Parents may be unable, however, to focus on the children's best interests due to their own emotional states or their mistrust of one another as a result of the trauma associated with the break-up of the marriage. Even if parents try to focus on the "best interests" of the children, there is no clear consensus of the meaning of the term and it is difficult to predict future behavior and circumstances.

56. The following excerpt represents the failure to recognize the negative impact of parental behavior, particularly violence, on the children but rather emphasizes a "win-win" approach:

[A husband who repeatedly refers to his wife as crazy or a wife who refers to her husband as violent throughout the mediation sessions may each be attempting to invalidate the other as a person worthy of regard. Within the arena of custody negotiations, these labels function as an attempt to enlighten the mediator about the unfitness of the other spouse for parenting abilities. . . . However, while a marital relationship may certainly evoke violent or crazy behavior between spouses, there is no necessary or direct connection between such behavior and each spouse's relationships with the caregiving to the children.]

Saposnek, supra note 2, at 143.


1. Joint Custody

"Joint custody" seems to represent the mediation ideal since the goal of the process is agreement and promotion of "win-win" results rather than a determination of the "best interests" of the children. True joint custody in the sense of shared decisionmaking and caretaking is rare. The typical joint custody situation looks like the traditional single custodian with non-custodial visitation arrangement with one crucial difference: in joint custody, the non-custodial parent has an important veto right over the parent who provides daily care and guidance.

A higher rate of joint custody agreements results from mediation than from other prevalent means of dispute resolution, including adjudication and attorney-assisted negotiation. Most "functional plans" developed in mediation leave the majority of the mundane responsibilities of child-rearing with the parent who has usually fulfilled them - the mother. The only thing that has changed is the authority of mothers to make decisions. Mediation material generally avoids discussion of the "primary caretaker" standard for custody.

In general, women have a greater commitment to childrearing and may be more fearful about the possibility of losing custody. Fathers may be less "risk averse" and request custody to gain leverage on other issues. If custody is mediated without consideration of financial issues, there are no other bargaining chips and the mother is the only one with rights to forego.

59. Lefcourt, supra note 8, at 269.
61. Ray, supra note 57, at 6. Mediator-negotiated agreements result in a substantially greater number of joint custody awards, some with no child support provisions, and with proportionally less actual equal sharing of child caretaking responsibilities within three to nine months after divorce. Id.
65. Lefcourt, supra note 8, at 269.
After years of experimentation, the legislative trend toward joint custody is slowing. Attorney-assisted and judicially-assisted settlements result in joint custody less frequently than mediation. As a result, the continued use of mediation in the custody area may represent a real backlash to women’s progress.

**B. Property Division**

Mediators recognize the need for outside assistance when the financial picture presented by the parties is complex. Even in relatively simple cases, issues may develop concerning: 1) disclosure of financial information; 2) definition and valuation of assets; 3) dissipation of assets; 4) distribution of debt; 5) enforcement of litigant’s rights; and 6) tax and welfare consequences.

The financially dominant partner, usually the husband, may urge mediation with strict instructions to avoid consulting legal counsel. Under these circumstances there can be no doubt that “mediation in divorce is boon to the strong and bane to the weak.”

1. **Financial Disclosure**

Honesty and openness are essential elements of mediation. Full revelation of assets including separate property is a critical prerequisite to division of marital property. Withholding information may be endemic, however, in matrimonial matters, and a mediator has no means to compel financial disclosure. Although there is no absolute guarantee of full disclosure even in adjudication, the legal system offers various, albeit imperfect, means of obtaining disclosure, including depositions under oath, subpoenaing of records, and coercive sanctions for noncompliance or

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66. In 1988, California, the pioneer in codifying the concept of “joint custody,” amended its statutory scheme to reflect the legislature’s position that there is no preference or presumption for or against any particular custody arrangement. The widest discretion is allowed to the Court and family to choose a parenting plan in the best interests of the child or children. Cal. Civ. Code § 4600(d) (West Supp. 1993).
68. COOGLER, supra note 3, at 41-62.
false representations. Since husbands control the assets in many marriages, women may be particularly vulnerable if mechanisms are not available to force disclosure.

2. Definition and Valuation of Assets

The issue of identifying and valuing property for inclusion in the marital pot is a complicated one in both equitable distribution and community property states. Recent decisions and legislation have expanded the definition of marital property to include vested pensions, professional licenses, degrees and practices, life insurance, and deferred employment benefits. Non-paid contributions of homemakers to the acquisition of marital assets is explicitly recognized in some states. Since the law in this area is in flux, diligence is required, even for legally trained persons, in keeping abreast of the most recent developments.

In addition, matters routinely performed by attorneys for matrimonial clients may be lost in the mediation process. For example, if a pension is divided, the pension fund manager and the employer should be notified in writing of the non-employee spouse’s interest in the funds, especially if distribution is deferred.

The services of financial experts may also be required for appraisal and valuation of assets. Women may be particularly disadvantaged by attempts to define and value assets based on inadequate information, especially if the husband controlled and managed the assets during marriage.

70. Lefcourt, supra note 8, at 268. See also Jessica Pearson, The Equity of Mediated Divorce Agreements, 9 MEDIATION Q. 179, 194-95 (1990), in which the author reports, after conducting structured telephone interviews with 302 former divorce mediated participants, that sizable proportions of women believe their ex-spouse was dishonest about his financial situation and withheld information during mediation. Pearson also discovered that only 8% and 13% of public and private sector mediation programs, respectively, reported using independent appraisers for marital property valuations. Id. at 194.


3. **Dissipation of Assets**

In most jurisdictions, injunctive relief is available to prevent dissipation of assets. Mediation, however, provides no such safeguard. Through the use of discovery mechanisms, information may be obtained regarding sale, exchange, barter, or destruction of property which occurred before and after the separation of the parties. The spouse without domination or control over disposed assets may be allowed a "credit" when other property is divided. Since mediation is a "future oriented" process, there may be a greater tendency on the part of mediators to exclude previously dissipated assets from consideration in the distribution of property.

4. **Distribution of Debt**

In many divorce matters, allocation of property is less significant than the determination of responsibility for outstanding obligations to creditors. Mediators may be inclined to equally divide the debts or to assess responsibility for payment to the party who retains possession of a particular item such as a motor vehicle. This approach ignores certain realities such as disparity in income of the parties or the actual ability to make payments. Mediated agreements may fail to provide "indemnification and hold harmless" provisions which may be necessary to provide the basis for a cross-claim if the former spouses are sued by a third party.

It may be more difficult to draft an agreement which provides protection in the event a bankruptcy action is initiated by one party. There is a great likelihood that an "innocent" female spouse, who may be struggling to establish a good credit rating in her own name, will be compelled to try to satisfy joint obligations arising out of the marriage in order to protect her future financial position. In most situations, the protection of a carefully drafted property settlement agreement with advice of counsel is needed.

5. **Enforcement of Litigant's Rights**

The mediated agreement is not always, but should be, incor-
porated into a formal separation agreement or final divorce de­
cree to allow subsequent enforcement. Under most circum­
stances, it is much easier to force compliance with concrete
terms of an agreement such as the payment of specified sums
from one party to the other. In the event of nonpayment, the
recipient can request a wage garnishment or sequestration of
assets.

Creative problem solving is encouraged in the mediation
context. As a result, the mediator may encourage exchanges of
goods or services between spouses rather than payment of
money. Unfortunately, the only sanction available to compel
specific performance may be incarceration for contempt, which
is rarely employed.

6. Tax and Public Entitlement Consequences

In order to effectively address property issues, mediators
and advocates must understand the tax ramifications of the sale
or exchange of property. The impact of certain intraspouse
transfers on eligibility for public entitlement programs, i.e.,
AFDC (Aid to Families with Dependent Children) and SSI
(Supplemental Security Income), must be considered as well.
Mediators may be particularly unfamiliar with the effects of
property division on poor persons since the administrative poli­
cies and regulations are complex, interdependent, and subject to
change.74

C. INTERSPOUSAL TORT CLAIMS

If one spouse has abused the other, there may be a basis for
a tort action to recover damages.75 In some jurisdictions, this ac-

74. For more information about public entitlement issues, see CENTER FOR LAW AND
SOCIAL POLICY, PUBLIC BENEFITS ISSUES IN DIVORCE CASES: A MANUAL FOR MEDIATORS
[hereinafter, PUBLIC BENEFITS ISSUES].
75. See Laurie Woods & Myra Sun, Remedies for Battered Women, in WOMEN AND
THE LAW, supra note 62, at 9.1. See also Douglas D. Scherer, Tort Remedies for Victims
of Domestic Abuse, 43 S.C. L. REV. 543 (1992), which provides an excellent overview of
various tort remedies available to domestic abuse victims. The article also notes that in
New Jersey, for example, joinder of tort claims in the divorce action based on violence
during the marriage and prior to separation is required under the “single controversy”
doctrine, citing Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979), while a tort claim which oc-
tion must be pleaded as a part of the divorce petition. The impact of inclusion of settlement terms in a mediated agreement is unclear. The inclusion of the claim in the mediated agreement only may not be sufficient to reduce the matter to judgment for enforcement purposes.

D. SPOUSAL MAINTENANCE

The extent to which spousal maintenance is addressed in mediation is unknown. It is possible that spousal maintenance may be “traded-off” for higher child support payments.

In many marriages, the greatest asset is the earning power of the supporting spouse, which includes the homemaker’s contribution: “[T]he only possible distribution of this asset is via alimony-maintenance.” Courts are beginning to recognize the economic consequences of divorce on men and women, and to acknowledge disparities in potential earning power based on gender. The formal legal system may be better equipped to evaluate the homemaker’s contribution and translate it into a maintenance award.

E. CHILD SUPPORT

Increased public attention has been focused on inadequate child support awards, the failure of fathers to pay even the minimal amounts ordered, and the subsequent lack of effective enforcement. The previous absence of specific, explicit codified

68. This nuance might easily escape notice by someone lacking specialized training or experience in matrimonial law.

76. The structured mediation model provides specific guidelines for identifying the dependent spouse and determining the proper amount of support. COOGLER, supra note 3, at 16-17.

77. There seems to be a pattern that maintenance is awarded to women most often in attorney-negotiated and mediated samples when fathers get sole custody of children. This may indicate the converse is also true. Ray, supra note 57, at 11.


79. Lenore J. Weitzman & Ruth B. Dixon, Child Custody Awards: Legal Standards
standards in the child support area may have fueled the mediation industry. Congressional authorization for income tax refund intercepts in 1982 and passage of the 1984 Child Support Amendments have reduced the need for alternative dispute resolution since court access and enforcement are improving.

A real question exists as to whether child support should be mediated at all outside the presence of a third party who represents the child's economic interests. Research results indicate that joint custody mediated agreements provide for the support of children significantly less often than either attorney-negotiated or judicially-assisted settlements. If disparities in earning power exist, payment of child support by the parent who is better situated financially is appropriate even in split custody or joint physical custody arrangements. Future education cost issues should be addressed even though children are young. Also, if the father agrees to name the children as beneficiaries on his life insurance, inclusion in the agreement may not be sufficient to protect their interests if the beneficiary selection is revocable. A copy of the agreement should be sent to the insurance company requesting notification be provided to the mother in the event the beneficiary is changed or the policy lapses.

If mediation is employed, it is imperative that neither mediators nor the process "exploits or feeds into the culturally induced tendency of women to be conciliatory and to trade away


81. Child support statutes in every state set forth explicit guidelines which the court must follow in awarding support. This allows a clearer legal baseline against which to measure the terms of a mediated or negotiated agreement.

82. Cassetty, supra note 80, at 3.

83. Ray, supra note 57, at 7. The mediated samples in three selected heterogenous counties in New York provide for child support proportionally less frequently than the other mechanisms in all custody arrangements, except where the father has physical custody. Id.

84. Carol H. Lefcort & Judith M. Reichler, Child Support, in Women and the Law, supra note 62, at 5.09. Statutory child support guidelines may not provide for non-traditional custody or visitation arrangements. However, alternative arrangements alone should not "cause the court to vary from the guidelines unless it has been determined that there is sharing of physical custody to the extent that the primary custodial parent's expenses are substantially reduced as a result." Id.
substantive benefits in return for affective and symbolic ‘benefits,’ especially those that are unlikely to be reaped.”

F. Ancillary Issues

Other complications may also exist in a domestic relations case. Immigrant spouses who have been in the United States less than two years may have only “conditional” status under federal immigration laws, and this fact becomes an underlying concern no matter what is at issue. Low-income parents who receive public assistance may become ineligible for various types of benefits if they agree to certain types of joint physical custody. In biracial or bicultural families, parents who disagree about custody may be concerned with preserving cultural or religious values through given custody arrangements.

The participants may have emotional or mental health problems which block resolution of clearly identified legal issues. Depending on their levels of sophistication, participants and mediators may be able to identify none, some, or all of these issues. Mediators who are mental health professionals should be most sensitive to these matters. Gaps, however, may remain.

Even relatively simple matters could conceivably fall through the cracks in the mediation process. For example, a wife who assumed her husband’s surname at the time of the marriage may wish to request resumption of the use of her birth name. Failure to do so at the time of divorce might require her to institute a subsequent name change action, resulting in unnecessary expense and delay.

85. Cassetty, supra note 80, at 6. The author provides the example of a mother who thinks the father may be more willing to pay for the children’s college education if he doesn’t have to pay “too much” child support while they’re young. Id. See also Pearson, supra note 70 at 195, in which the author observes that an unmet need in many public sector mediation programs, as well as in attorney negotiations, is the payment of college education costs.

86. INS Regulations on Conditional Residence Finalized, 9 THE WOMEN’S ADVOCATE 4 (October 1988).

87. See generally Public Benefits Issues, supra note 74.

88. See Palmore v. Sidoti, 466 U.S. 429 (1984) (Supreme Court reverses a Florida District Court of Appeals decision divesting mother of the custody of her infant child because of her remarriage to a person of a different race).

89. See Suzanne M. Retzinger, Mental Illness and Labeling in Mediation, 8 MEDIATION Q. 151 (1990).
G. INTERRELATIONSHIP OF ISSUES

In civil cases, discussions about discrete legal issues can raise related concerns, many of them financial. For example, there are tax ramifications to treating given assets as property, to characterizing them as "marital" or "separate," or to transferring them at a given time, in a given settlement. The definition of "income" affects spousal and child support levels. Custody arrangements may affect child support and domicile in the marital residence. Due to the interrelationship of the various issues in domestic relations matters, it seems disadvantageous to participants to try to isolate certain issues like child custody and to discuss them in a vacuum, apart from concomitant concerns.

V. MEDIATION AND THE ROLE OF THE LAWYER ADVOCATE

An advocate's reluctance to sanction mediation is sometimes characterized as resulting from mediation's interference with the "lawyer's philosophical road map." Attorney advocates may, however, be justifiably concerned about the use of mediation since the process can be harmful to clients.

Lawyers can function as "gatekeepers" by performing appropriate advice and screening functions when clients are involved in mediation. Attorneys can also offer any combination of the following services: 1) educating the client; 2) drafting the agreement; and/or 3) reviewing the agreement. If the client chooses to mediate, the most thorough and ethical approach to mediation requires the involvement of attorneys throughout the process. In mandatory mediation jurisdictions, attorneys should be vigilant and use appropriate strategies to protect client interests. In particular types of matters, e.g., those involving domestic abuse, the attorney may make strong arguments that mediation is unethical.

90. One commentator notes that the "lawyer's philosophical road map" consists of two basic assumptions: adversariness of parties and rule-solubility of disputes. "When mediation is appropriate, these assumptions do not fit." Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29, 45 (1982).
91. BLADES, supra note 3, at 55.
92. For a more detailed argument that mediation in domestic abuse cases is unethical based on existing guidelines for mediators, see Myra Sun & Laurie Woods, A Media-
The attorney's tasks will differ depending on whether the client is already involved in mediation. It may be imperative for the advocate to act quickly and take the necessary steps to protect the client's interests through the legal process.

A. WHEN THE CLIENT HAS NOT STARTED MEDIATION

Under the best of circumstances, a client will consult an attorney before undergoing mediation. Before the client agrees to mediation, the attorney should have a preliminary in-depth discussion with the client early in the process.

1. Duty to Describe the Process

The mediation option may be part of a generalized discussion of the alternatives available to the client. The attorney's perspective and, accordingly, his or her description of the mediation process in relation to adjudication should be fundamentally different from that of the mediator. In addition, the attorney should participate in setting the ground rules for mediation. The "relevant considerations" for a client considering mediation are numerous, including a description of the way in which the process is conducted, the role of each participant, and when termination may occur. The scope of the description of the mediation process, at minimum, should clarify confidentiality issues and also distinguish mediation from therapy on the one hand and from litigation on the other.

The differences in the perspectives of the attorney and the mediator will be apparent as the issues are considered. The mediator may neutrally address the issues of a timetable; the attorney must discuss this issue in light of the potential prejudice

93. M. Dee Samuels & Joel A. Shawn, The Role of the Lawyer Outside the Mediation Process, 1 Mediation Q. 13, 14 (1983). See also Robert H. Aronson et al., The Bounds of Advocacy, 9 J. Am Acad. Matrimonial Law. 8 (1992) [hereinafter, The Bounds of Advocacy]. Standard of Conduct 1.4 of The Bounds of Advocacy states: "An attorney should be knowledgeable about alternative ways to resolve matrimonial disputes." The comments suggest "a negotiated resolution is desirable in most family law disputes." The Bounds of Advocacy state further that "an attorney should encourage the settlement of marital disputes through negotiation, mediation or arbitration." Standard of Conduct 2.15, id. at 22. Neither the standards nor the comments prioritized among these options, rather the focus is on cooperation.
from delay, or the need to plan discovery or obtain temporary relief. The mediator should raise issues to be discussed in mediation with the participants and is obligated to scrutinize the facts of the case for their complexity. The attorney must help the client determine the issues from the perspective of the client's interests. The mediator should advise the client of the need for independent review of agreements drafted by the mediator. The attorney must emphasize that the client refrain from executing any documents without the attorney's prior review and approval.

2. How to Describe the Process

The attorney should clearly explain the process of mediation to the client in plain language. The attorney can also give the client a written explanation.

In the explanation, the attorney should: 1) clarify the differences among the various dispute and conflict resolution mechanisms; 2) stress the lack of confidentiality in the mediation process, along with difficulties which may be encountered if subsequent attempts are made to subpoena records or to compel mediator testimony; 3) tell the client that the mediator is neutral and is not an advocate for either party; 4) review the advantages and disadvantages of the private nature of mediation; and 5) warn the client that the mediator lacks the power to compel disclosure of information by participants or to sanction participants for any reason.

The client may have second thoughts after hearing the description. The attorney should not attempt to convince the client to try mediation if this is the case.

3. Duty to Screen the Case and the Client

The attorney advocate must assume responsibility for the

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94. See Appendix B (Advocate's Client Information Sheet on Mediation - a sample description of the mediation process for use in discussion with clients). A good available resource to provide to the battered woman client is the booklet MEDIATION AND YOU, supra note 19. This booklet contains valuable general information as well as a user's checklist for mediation. The attorney and client should also thoroughly discuss the process.
client's position. Even mediation proponents recognize that a lawyer's assessment of the client's capability to assume the responsibility of self-determination is a crucial factor in the lawyer's decision to make a mediation referral. Swift temporary relief and gradual movement toward a final resolution of the case may serve a client's interests better than the attempt to mediate the dispute while the client is vulnerable. Additionally, even if there is no doubt as to whether mediation is appropriate in the abstract, counsel should consider whether the added cost of attorney time in ensuring an equitable resolution may exceed the cost of an attorney-negotiated settlement, defeating one of the alleged benefits of mediation.

Successful, efficient, low-cost mediation requires mutual belief in the good faith of each party and equality of bargaining power. The attorney's initial consideration is identifying those cases where either of these crucial elements is missing. If the mediator's ultimate goal is agreement, the mediator may not necessarily be concerned with the client's vulnerability.

An attorney representing a client in a matrimonial action should make every effort to ensure that the client's decisions are made only after the client has been informed of all relevant considerations. The attorney assists the client in "determining the course of future conduct and relationship" or "explains a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This may not obligate an attorney to raise the mediation option with the client. However, discussion of the mediation option may arise in the attorney's capacity as a legal advisor.

On the other hand, if mediation is proposed by the other party, an attorney may not agree to mediate without the client's consent. Safety, confidentiality, and delay issues are among the problems which arise in mediation. The decision to mediate,

95. Samuels & Shawn, supra note 93, at 181.
96. In an article concerning mediation and post-separation domestic abuse, the author suggests that the mediation agreement itself is the major outcome or effectiveness variable. Ellis, supra note 8, at 327, n.63.
97. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1979).
98. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1989).
99. But see Bounds of Advocacy, supra note 93, at 8, which suggests that attorneys discuss this option.
therefore, has the potential for affecting the merits of the case or substantially prejudicing the rights of a client.

Together, these ethical guidelines suggest that an attorney advocate must, no less than the attorney mediator, evaluate the complexity of the case and the client's bargaining ability, temperament, and motives, and advise the client concerning the appropriateness of mediation. The attorney's duty to represent the client zealously and diligently warrants making the discussion about mediation part of a larger dialogue regarding the client's goals in the matrimonial action.

In the course of this discussion, it "furthers the interest of (the) client" for the attorney to convey a "professional opinion as to what . . . would likely be the ultimate decision of the courts on the matter," and the "practical effect" of the decision.\(^\text{100}\) When the client is weighing whether to undergo mediation, the attorney's reasoned prediction of probable court action is particularly important and is a unique function that only an attorney can lawfully perform. The attorney's opinion helps the client: 1) compare the merits of each forum; 2) determine whether mediation will have a more or less favorable result than adjudication; and 3) determine the probable temporal, emotional or financial costs of the various dispute resolution mechanisms.\(^\text{101}\) The attorney's prediction about the action a court is likely to take may nonetheless result in the client deciding to pursue a course of action contrary to the attorney's advice. Ultimately, the authority to decide whether to mediate belongs to the client.\(^\text{102}\)

Under any circumstances, one ethical restriction on the at-

\(^{100}\) Model Code of Professional Responsibility EC 7-5 (1979).

\(^{101}\) For a discussion which questions whether mediation reduces expense, is more efficient, results in greater client satisfaction, and allows greater access to the justice system, see Mary Pat Treuthart, Mediation, in Women and the Law, supra note 62 at 7A-8 to 7A-11. But see, Pearson, supra note 70, at 179-180, in which the author acknowledges that empirical studies reach contradictory conclusions about these issues. As a result of her empirical research involving participants in four public sector programs and ten private sector programs located in ten different states, she determines that although mediation does not appear to do a better job than other dispute resolution processes in protecting women from prolonged and severe financial dislocations following divorce, mediation does not exacerbate their financial woes. Id. at 193. She also concludes that mediation users experience higher levels of satisfaction and greater cost savings. Id.

torney in following through on a client's mediation proposal may be governed by a provision which advises that an attorney may not, in the course of representing a client, "delay a trial, or take other action on behalf of his client when [the attorney] knows or when it is obvious that such action would serve merely to harass or maliciously injure another." The comparable provision in the Model Rules provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Depending on the point at which the client decides to pursue the mediation option, if this course of action would delay trial without cause, then proposing mediation would be inappropriate. This may be true even if it is not entirely clear to the attorney that the mediation proposal is intended to "harass or maliciously injure" the client's spouse. Under these circumstances, it appears that the attorney may "exercise his professional judgment to waive or fail to assert" the client's mediation request. The attorney may even withdraw from a representation if, in the attorney's view, the proposal for mediation would constitute taking a "frivolous legal position."

A different set of issues arises if a client wishes to mediate and the attorney balks because mediation, rather than being a mere delaying tactic, would actually be contrary to the client's best interests. Such a situation is presented when a client wishes to mediate even though it is manifest that the client lacks the ability or knowledge to bargain effectively. The attorney may advise the client against mediation, but "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client," not the attorney. The attorney can refuse to represent the client initially if there is a difference of opinion regarding mediation. Later, the attorney can withdraw as long as the attorney adheres to the applicable ethics code provisions. The attorney should communicate with the client in writing and state clearly why mediation is contrain-

4. Screening Considerations

The screening and assessment functions performed by an attorney are crucial, regardless of the ultimate dispute resolution mechanism which is employed. The first function of the screening process is to assess the amenability of the case to a specific dispute resolution process. Attorneys may have a clear advantage over non-legally trained mediators in assessing case suitability. Attorneys, as a result of their training, should have knowledge superior to that of non-legally trained mediators about legal issues.¹⁰⁹

The second function of the screening process is to evaluate the compatibility of the client with a particular dispute resolution mechanism. Due to the nature of a family law practice, attorneys may be better able than mediators to evaluate client amenability as well. A family law attorney generally spends a significant amount of time with a client during the initial intake interview gathering information about the client, the opposing party, any involved children, and the nature of the issues to be resolved. During this time, the attorney has an opportunity to make necessary inquiries, answer client questions, and provide reassurance to the client. The client may be interested in merely obtaining advice at this point. If not, the attorney will suggest possible courses of action and may make some preliminary decision, in conjunction with the client, about an interim plan. This may involve sending correspondence to the opposing party to provide notice that an attorney has been contacted with a suggestion to seek independent legal advice. Subsequently, the client will be asked to provide detailed financial and other relevant information. Within a short period of time, a client may have several contacts with the attorney by telephone, through written correspondence, and in person. The attorney will be privy to many intimate details of the client’s life and a relationship is

¹⁰⁹. Attorneys are also permitted to give legal advice, i.e., they can predict the outcome of a case or controversy in a way that a non-attorney mediator cannot do since that action would constitute unauthorized practice of law. There may be a “fine line” between providing legal information which mediators can do and dispensing legal advice, a proscribed activity for non-attorney mediators. Even attorney mediators must be cautious about the legal advice issue since there is the potential for conflicts of interest.
formed with the client. Under most circumstances, the attorney has greater opportunity to conduct an assessment of the case and the client, including the client's emotional state, in a more deliberate fashion as a result of dealing with the client on an ongoing basis over a period of time.\textsuperscript{110}

Despite constraints imposed by judicial case management concerns and court rules pertaining to discovery, the attorney has latitude in determining the movement of the domestic relations action. Some of the timing and sequence issues may occur as the result of ongoing discussions with opposing counsel. Since members of the matrimonial bar may deal with one another frequently, there is ample opportunity, without breaching client confidences, to indicate to opposing counsel, for example, that a settlement conference might yield much more productive results if it were delayed in order to allow the client to assess available options. With the possibility of mediation being the initial interaction between parties in a matrimonial dispute, the attorney's duty to screen becomes more immediate.

Certain clients at some point in the proceedings may wish to obtain a swift resolution to the case, without regard to the equity of any given settlement proposal.\textsuperscript{111} Regardless of their bargaining skills, these clients are likely to be particularly vulnerable in mediation. If the client merely "wants out," an emotional tendency toward early, wholesale capitulation to the other side's request is very likely, even where the scope of the discussion is technically only focused on temporary orders.

There is awareness in the therapeutic community that most

\textsuperscript{110} Although the popular culture stereotypes of matrimonial attorneys may conjure up images of clones of Arnie Becker in \textit{L.A. Law} who seem bent on engaging in aggressive, "hard-ball" tactics most of the time, the typical family law practitioner belies that media-imposed stereotype and may more typically resemble Sidney Guilford and Charlie Howell in the television program \textit{Civil Wars}.

The most apt analogy may be that of lawyer as "friend." Although engaged in appropriate role differentiated behavior which necessitates setting boundaries, the attorney has "special care for those accepted as clients," just as friends, family members, and the attorney as an individual may have a very general claim to this special concern. See Charles Fried, \textit{The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship}, 85 \textit{Yale L.J.} 1060 (1976).

\textsuperscript{111} Client desire to expedite the process may be the result of a variety of factors, including the desire to re-marry, to limit financial exposure, or to extricate oneself from a violent relationship.
persons pass through similar stages in the process of divorce.\textsuperscript{112} However, this recognition has had little effect on the structure, timing, and process of mediation.

Due to the nature of the mediation referral process, it is doubtful whether a mediator, even one with a therapeutic background, is in a better position than an attorney to identify and deal with persons going through the various stages of the divorce process. No specific background in psychology is required for matrimonial attorneys; however, as the result of formal education or on-the-job learning, many attorneys are quite savvy in evaluating their client’s readiness to proceed with the resolution

\textsuperscript{112} There have been numerous comparisons to the stages of dying identified by Kubler-Ross: 1) denial, 2) anger, 3), bargaining, 4) depression, and 5) acceptance. Elizabeth Kubler-Ross, \textit{On Death and Dying} 38-137 (1969). Without setting forth stages in a linear manner, Peter Bohannon outlines six stations of divorce, each with concomitant segments or tasks to be completed:

1. Emotional divorce: The couple must deal with the deteriorating marriage. The spouses feel hurt, angry, and unable to share their feelings with each other constructively.
2. Legal divorce: This specifically creates remarriageability. The spouses may feel bewildered, as if they have lost control.
3. Economic divorce: The couple must deal with the details of the property settlement. Each spouse may feel cheated by the other and by circumstances.
5. Community divorce: The couple must often deal with changes in friends and community. The spouses feel anger at the situation and each other; they also feel despair at the infidelity of friendships.
6. Psychic divorce: Each spouse must become autonomous. This is usually the most difficult and scary aspect of divorce. Each spouse feels very afraid and lonely.

Peter Bohannon, \textit{The Six Stations of Divorce, in Divorce and After} 33-62 (Peter Bohannon ed. 1971) cited in Sarah Childs Grebe, \textit{Mediation at Different Stages of the Divorce Process in Divorce and Family Mediation} (James C. Hanson ed. and Sarah Childs Grebe vol. ed) 12 \textit{The Family Therapy Collections} 34, 35-38 (1985) [hereinafter, \textit{Family Therapy Collections}]. Grebe examines several different models which have been developed as variations on the Kubler-Ross approach and provides advice to mediators about ways in which to proceed, depending on the emotional adjustment of the mediation participants. She is reluctant to conclude that mediation is contraindicated under most circumstances but she does state that “concerns about mediation in cases involving spouse abuse are valid and need further exploration.” \textit{Id.} at 46.

Mediation has been critiqued for its failure to allow the full expression of emotions, including anger, during the process. Trina Grillo, \textit{The Mediation Alternative: Process Dangers for Women}, 100 \textit{Yale L.J.} 1545, 1572 (1991). Suppression of anger seems particularly ironic since it is acknowledged as a natural, legitimate stage of divorce.
of outstanding issues. This may be due in part to the tempera-
ment and interests of persons attracted to a family law practice.
Mediators recognize that mediation is not therapy. However, at-
torneys may be more readily inclined to refer clients for couns­
eling or therapeutic intervention to resolve emotional difficulties
with divorce and family issues, since some mediators believe
emotional issues are adequately dealt with in the mediation pro­
cess. Under the ABA standards, attorneys may have heightened
ethical obligations to make such referrals as well.113 In addition,
as discussed previously, attorneys generally have extensive con­
tact with clients who have non-emergent family law matters,
while mediator involvement may be brief and task-oriented.114

Trained mental health professionals would seem to be bet­
ter situated to make appropriate assessments and delay or dis­
courage mediation altogether if a client presents emotional
problems which might have an impact on the integrity of the
mediation process. The mediation literature belies this assump­
tion. Despite the use of some qualifying statements to the con­
trary, many mediation proponents apparently think that skilled
mediators can address and rectify most issues. This is true even
when those issues concern power imbalances, poor communica­
skills, and other emotional dynamics which would seem to
weigh against the use of mediation, perhaps completely as in the
case of the presence of domestic abuse, or certainly in the ab­
sence of some intense pre-mediation work and the passage of
time.115 Although attorneys may engage in so-called protection-

113. Standard 2.11 of the Bounds of Advocacy states: “When the client’s decision-
making ability is affected by emotional problems, substance abuse or other impairment,
an attorney should recommend counseling or treatment.” The Bounds of Advocacy,
supra note 93, at 18. The comments to the standard acknowledge the economic and emo­
tional turmoil caused by marital disputes and also recognize the possibility that the
trauma may lessen or eliminate some clients’ ability to make rational decisions.
114. One study which examined three research sites in the Divorce Mediation Re­
search Project (Los Angeles, Minneapolis, and the statewide system of Connecticut) de­
termined that mediation of custody issues averaged slightly over two sessions. Milne,
supra note 43, at 64. It is not clear, however, whether intake and orientation are included
within the statistical measure.
115. See, e.g., Leonard Marlow & S. Richard Sauber, The Handbook of Divorce
Mediation 103 (1990) (power imbalances became such a large issue in mediation because
the critics made it one which was unwittingly reinforced by certain mental health profes­
sionals); Elizabeth A. Beck and Charles E. Beck, Improving Communication in Divorce
Mediation, 8 J. OF DIVORCE 167 (1985) (not all couples are “ideal candidates for medi­
tion, but a basic understanding of communication climates would prepare a couple for
mediation”); Emily M. Brown, Emotional Dynamics of Couples in Mediation, in FAMILY
ist behavior which mediators decry as disempowering to clients, one legal scholar has noted that “the words ‘Don’t call me, call my lawyer’ are sometimes the most empowering words imaginable.”

Apart from their emotional state, participants will often demonstrate other characteristics that impair either their willingness or their ability to mediate, including: (1) mental deficiencies, or psychological problems, particularly those that affect a partner's learning ability or comprehension; (2) lack of specialized knowledge or expertise needed to examine complex issues; or (3) language barriers preventing one partner from communicating with the mediator as effectively as the other partner.

One participant may not be as capable as the other of comprehending some legal concepts, or the importance of certain issues. Evidence of potential inequities in this area may include differences in the parties' ages, educational levels, or the amount and nature of their job experience outside the home.

One party may have considerably greater knowledge and understanding of some issues because of the way the parties divided the household responsibilities. For example, one party may have customarily deferred to the other on financial decisions. These patterns of spousal interaction are not likely to change after a short period of separation. Even after a lengthy period, one spouse may still lack sufficient knowledge to deal confidently with the other.

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In some cases, the participant may be suffering from a psychological or psychiatric illness which may or may not be controllable through medication or therapy. In other situations, a participant may allege that the other has a substance dependency. A belief that one party is incapacitated by such a condition should preclude mediation.

One participant may be less comfortable than the other with English (or any other language in which mediation is to be conducted). Even a client with an everyday working knowledge of English, for example, may not have the capacity to grasp the meaning of terms that may be pertinent to a resolution of the case. Cultural factors may also interfere with the client's understanding of the meanings of certain terms. In some Asian languages, for example, there are no comparable terms distinguishing “custody” from “visitation.” Bilingual mediation is likely to be more time-consuming and therefore more costly, and the need for translation makes mediated agreements more susceptible to misunderstandings.

Language factors may also subtly affect the balance of power. If the mediator does not speak the primary language of one of the participants, the party's views are far less likely to be clearly articulated. On the other hand, the ability to communicate more clearly and more easily with the mediator may give an unfair advantage to the party who speaks the mediator's language. This may also affect the mediator's ability to be impartial. If the mediator seeks to redress the balance, this may create frustration on the part of the participant with the superior language skills; if not, however, the client who is less articulate will feel dissatisfied.

Immigration status is important to explore as well. One party may be dependent on the other for their temporary or permanent residency status. This fact, particularly if unknown to the mediator, can skew the process.

5. How to Screen Specifically for Domestic Abuse

Since the entire mediation process is skewed when one disputant has abused the other, it is imperative to screen for domestic abuse. Assessment through the screening process for do-
mestic abuse, although essential, is generally difficult because of the abuse victim's shame, embarrassment, and tendency to deny the existence of violence that may have continued over an extended period of time. Counsel should question the client about repeated injuries (particularly those injuries that are difficult to account for as accidental), the client's isolation from friends or family, and euphemistic references to the partner's "anger" or "temper." A checklist of questions for use in identifying domestic violence appears in Appendix A (Domestic Abuse Victim Screening Guide).

Attorneys should be particularly conscious of the potential for renewed violence, even though the last reported incident of violence may not be recent or severe. Since batterers use violence as a means of control, they may escalate or renew it when the victim takes steps to escape from the relationship. Almost three-fourths of domestic assaults occur while victims are separated or divorced from their assailants. Evidence of past battering should be used to obtain relief that will protect the client from physical harm.

B. WHEN THE CLIENT DECIDES TO PARTICIPATE IN MEDIATION

1. Setting the Ground Rules

If the client believes mediation may be appropriate after considering available options and the attorney has screened the case to determine if there is equal bargaining power, voluntary consent, and good faith, and has ruled out insurmountable barriers, like domestic abuse, the attorney and client should discuss and take notes on proposed approaches, as well as pertinent points to bring up or avoid in mediation. It is imperative that the attorney instruct the client not to sign any documents regardless of assurances provided by the mediator or the other spouse, unless counsel is consulted first.

If the client wishes to proceed with mediation, the attorney should file a formal matrimonial action before mediation begins. This will ensure that discovery requests needed to facilitate settlement, in or out of mediation, may be enforced by the court.

117. The Data, supra note 23, at 21.
and permits obtaining temporary relief, such as temporary sup­port, pending the mediation process.

The attorney should discuss the responsibility for payment of mediation costs. A written agreement should be drafted which sets forth the issues to be addressed in mediation, signed by at­torneys and clients, and forwarded to the mediator. A time schedule for mediation with specific deadlines should be established.

The attorney should also request to be present with the par­ticipants and opposing counsel at the initial mediation orienta­tion session. At that meeting counsel, the mediator, and the par­ties should discuss the law and legal standards pertaining to the issues, what issues will be mediated, review confidentiality is­sues, set up a schedule for mediation meetings, discuss the litiga­tion timetable, and remind the parties not to sign an agree­ment without first consulting their respective attorneys. By scheduling a joint meeting, subsequent misunderstandings concern­ing interpretation of the law and procedure or predictions about judicial decision making might be avoided.

The attorney should also make clear how frequently the at­torney wants to communicate with the client once mediation be­gins. At a minimum, meetings should occur if: 1) the other party proposes, or discovery suggests, the need for a change in the scope of the mediation; 2) the clients have reached a tentative agreement; or 3) either client terminates mediation.

2. Selecting a Mediator

The attorney who wishes to make a mediation referral should be familiar with reputable mediators in the community. Since there are few, if any, certification requirements for mediators in many jurisdictions, the attorney should explore the biases, views, training, education, and experience of the available mediators.\(^{118}\)

\(^{118}\) The regulation, or lack thereof, of mediators is a particularly problematic area. For a more detailed discussion of the current mediation training and education needs as well as the debate over increased regulation, see Folberg & Taylor, supra note 4, at 233-41 and 260-63. Although this section is entitled “selecting a mediator,” the possibility of choosing to mediate using a gender-balanced lawyer-therapist team might be con-
If the client or client's spouse has selected a mediator, the attorney should request the proposed mediator's resume or qualifications which may clarify the depth of the mediator's experience. Depending on the issues and the scope of the mediation, the resume can help determine if the mediator has specialized qualifications in certain areas to be mediated, such as taxation, accounting, or the valuation of specified items of property. The attorney should inquire whether outside expertise is available in relevant areas.

The attorney should also determine the mediator's orientation (therapeutic or goal-orientated) and discuss the differences with the client. The mediator should be asked about specific training in mediation, the number of mediation sessions conducted previously, and the degrees or licenses held. The attorney should inquire whether the mediator will allow previous mediation participants to speak to the attorney and client. If a mediation program is court-connected, it may be easier for the attorney to obtain background information about the mediator but more difficult for the attorney to exempt the client from mediation or from mediation with a particular mediator.

Since successful mediation depends so heavily on the parties' belief in the mediator's objectivity, there should be no question of the mediator's ability to be impartial. To confirm that no conflict of interest exists, and that the mediator will be unbiased about the client's proposed solutions, the attorney should inquire, in writing if necessary, whether: 1) the mediator knows any of the family members personally, including the other spouse and, if so, the nature of the relationship (professional, personal, or psychotherapeutic counseling); 2) the mediator has worked with counsel for the other spouse, and on how many occasions, if available. I thank Kathryn Landreth, a Reno, Nevada, attorney who co-mediates, with Martin Gutride, a male psychotherapist, family matters involving voluntary participants, for bringing this to my attention. This approach does not solve all of the problems I perceive as inherent in the mediation process but may alleviate some concerns. See also Lois Gold, Lawyer and Therapist Team Mediation, in DIVORCE MEDIATION: THEORY AND PRACTICE 209 (Jay Folberg and Ann Milne, eds. 1988) (team mediation is used to address a number of issues, including gender bias, neutrality, power balancing, and the interface of legal and emotional issues that are germane to the mediation process).

casions; 3) the mediator usually resolves custody disputes with joint custody or with sole custody agreements;\textsuperscript{120} 4) the mediator refers out problem aspects of a matter to other professionals; 5) the mediator believes certain types of matters are inappropriate for mediation; and 6) the mediator will agree to conduct mediation in accordance with the client's proposed rules.\textsuperscript{121} These rules should be sent to the mediator as soon as possible after the attorney learns the mediator's identity.

If the answers to any of these questions are unsatisfactory, the attorney and client should reject the mediator.

3. \textit{Duty to Zealously and Diligently Represent the Client}

The formal role of the attorney advocate is basically unaffected by the fact that the client is involved in mediation. Attorneys representing these clients still must keep in mind the applicable ethics codes.\textsuperscript{122}

However, the mediation option may create a new dimension in the attorney-client relationship. The aforementioned screening process must contain a detailed discussion of the goals of representation, as the attorney evaluates the client's needs and abilities. Thorough pre-mediation scrutiny of the client's ability to bargain effectively alone and an assessment of the client's safety are essential.

4. \textit{Duty to Assure Informed Agreements}

For the attorney, the duty to assure informed agreements in mediation means the attorney must articulate the need for thorough, timely, truthful discovery, and the advice of an attorney before the client executes any documents. The fact that the parties may be in mediation should not excuse the client from having to answer, or preclude the client from making, lawful discov-

\textsuperscript{120} With respect to custody, where the parties have stated a preference for, or have rejected, the joint custody option, a mediator who always reaches or always rejects this type of agreement may be inappropriate.

\textsuperscript{121} See Appendix B.

\textsuperscript{122} See \textit{Model Code of Professional Responsibility Canon 7} (1979) (zealous representation provision); \textit{Model Rules of Professional Conduct Rule 1.3} (1989) (diligence requirement).
However, the only way to obtain compliance is to make formal requests in the context of a matrimonial proceeding. This is a primary reason the client should not enter mediation unless an appropriate domestic relations proceeding has been initiated.

5. Discovery, Settlement, and Enforcement in Mediation

The attorney must consider the timing of mediation and how it fits in as part of the overall timetable for resolving the case. The attorney should not be precluded by mediation from engaging in the usual discovery procedures on the client's behalf after an action has been initiated. These discovery mechanisms may include deposing the other spouse, obtaining answers to interrogatories, subpoenaing necessary records, and using coercive sanctions for noncompliance or false representation. The attorney should not hesitate to take the necessary steps to protect the client's interests even if the parties have decided to mediate. The attorney may be compelled to file documents regarding disclosure of financial assets or a party's intention to seek custody within a specified period. Additional discovery efforts are essential if one spouse has totally controlled the family investments while the other is unaware of their amount and location.

Generally, discovery should be used to determine the issues in controversy and to obtain information needed for decision-making. Since these objectives also serve mediation efforts, mediation should only begin when the information necessary to resolve the issues is obtained. If the mediation process occurs simultaneously with litigation, both attorneys should keep the clients and the mediator well-informed about the subject matter, sequence, and filing dates for motions or pre-trial discovery. Mediation efforts and attorney-assisted negotiations may be jeopardized if the opposing party is unexpectedly served with papers during attempts to reach agreement.

The duty to assure an informed agreement essentially requires the attorney to obtain all necessary discovery. A significant aspect of the description of mediation should be to advise any client not to sign any mediated agreement until consulting

123. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1989).
with counsel. Depending on the issues, the client should be advised to consult with the attorney periodically throughout the mediation process, and to communicate discovery plans to the mediator.

In some jurisdictions, before or after completion of discovery, the parties and their attorneys may be referred to judicial hearing officers, early settlement panels, court commissioners, or masters to attempt resolution of the case. Whether or not counsel believes the parties may actually settle their differences as a result of these court-related processes, ideally mediation should not occur until the other preliminary proceedings have concluded. Even if the case is not actually settled, counsel will have the opportunity to watch the clients interact, to determine whether the client is able to bargain effectively alone, and ultimately to decide if the case is suitable for mediation.

Once reviewed and approved by counsel, mediated agreements may be incorporated into separation agreements or final decrees of divorce. The process of mediation itself does not encompass this step, but it is an essential one since it is the only way to ensure that the agreement is binding on both parties and enforceable by the court.

C. WHEN THE CLIENT IS CURRENTLY INVOLVED IN MEDIATION

Reputable mediators should advise participants to seek legal counsel before mediation begins. At the very least, ethical guidelines for mediators may require that the mediator advise participants to obtain legal review prior to reaching an agreement.124 Nevertheless, a client may be involved in the mediation process prior to consulting an attorney. A client may have sought out a mediator first or may have initiated a divorce or custody action on a pro se basis and received an automatic referral to mediation as a prerequisite to litigation, particularly in a

124. See American Bar Association Standards of Practice for Lawyer Mediators in Family Disputes, Standard VI; Association of Family and Conciliation Courts Model Standards of Practice for Family and Divorce Mediation, Standard VII. See also supra note 43, at 61, in which the author opines that “[i]n order to protect individual interests and help insulate a mediated settlement agreement from later attack all mediated agreements should be reviewed by independent counsel for each party before the agreement is finalized.” Id. at 71.
mandatory mediation jurisdiction.

The attorney should describe the mediation process and screen the client by employing the same approach used when the client has not mediated. A client may have pursued mediation to obtain a separation agreement without first filing for a divorce action or seeking temporary relief. If grounds exist, the attorney should file the separation or divorce action. Nothing is lost by filing and much can be gained (e.g., discovery, temporary relief). Settlement efforts — in or out of mediation — may actually be revitalized. After filing an action the attorney's duties of zealous and diligent representation and the duty to assure informed agreements are the same as those outlined in the appropriate sections above when the client decides to mediate.

When mediation has stalled or failed, the attorney should move quickly. Although mediation may still play a role in achieving a settlement, it should not initially preclude normal, vigorous advocacy on the client's behalf. Such advocacy may be particularly important at the earliest stages of a case. In the custody context, any temporary decision may have an irrevocable effect on the client's relationship with the child and the future custody decision. In the property context, it is essential to prevent the dissipation of marital assets as soon as possible and the attorney advocate should ensure that orders dealing with these matters are entered as soon as possible. If the actual orders are negotiated, the ease or difficulty with which the parties achieve and comply with the terms may be a good measure of the parties' potential for success in subsequent mediation.

D. WHEN THE CLIENT HAS ALREADY MEDIATED

The client who has previously mediated may come to the attorney after having reached a mediated agreement. Although not unique to the mediation context, the reviewing role is not a

125. See supra notes 94-117 and accompanying text.
126. See supra note 122 and accompanying text.
127. See supra note 123 and accompanying text.
128. Haasken v. Haasken, 396 N.W.2d 253 (Minn. Ct. App. 1986) (ex-wife appealed after a 10-month delay resulting from mediation failure; court refused to give her the benefit of an increase in the value of marital property which had accrued during the delay).
comfortable one for most attorneys.\textsuperscript{129} It may be difficult for the attorney to assess the fairness of the agreement. The attorney may also be concerned about the potential exposure to liability for malpractice if a client subsequently challenges the agreement. The attorney should make an individual decision about whether to accept the reviewing role. The attorney may wish to contact the mediator to suggest that early referrals to legal counsel generally benefit the clients.

After deciding to proceed, the reviewing attorney should assess the agreement's merits or flaws from the viewpoint of the client's advocate, and should compare the provisions of the agreement to an attorney-assisted negotiated settlement or a judicial determination. If the agreement is the result of overreaching, or if its terms are manifestly unfair, the attorney should consider recommending that the client seek changes through a return to court rather than through further mediation.\textsuperscript{130}

VI. LEGAL CHALLENGES TO MANDATORY MEDIATION IN CASES INVOLVING BATTERED WOMEN

Voluntary participation is usually identified as one of the primary elements of mediation, along with equality of bargaining power, neutrality of the mediator, and confidentiality of the exchanged information. Therefore, mandatory mediation which compels participation seems to be a concept with an inherent contradiction.

Mandatory mediation in custody cases exists by statute in several jurisdictions.\textsuperscript{131} Statewide court rules, local rules, or judi-

\begin{footnotesize}\begin{enumerate}
\item[129.] In her empirical study comparing outcomes of agreements reached through various processes, Jessica Pearson notes that relatively few mediated agreements are changed as a result of attorney feedback:

\begin{quote}
Perhaps, as several attorneys who were interviewed have noted, lawyers lack the incentive to "break up" an agreement once it has been agreed to by their client. As one California attorney noted, "If the women says 'I agree' after the fact, the lawyer will not break it up. The lawyer won't have the incentive [financial or otherwise] to do this."
\end{quote}

Pearson, supra note 70, at 195.
\item[130.] See also notes 143-146, infra, and accompanying text.
\end{enumerate}\end{footnotesize}
cial fiat have imposed mandatory mediation on domestic relations litigants in many other jurisdictions.

Supporters of mediation recognize that its mandatory imposition may be problematic, which necessitates the development of a framework for assessing the controversy and the participants. Assessment of the mediator's skill should factor into the equation as well. Battered women's advocates and attorneys may employ various strategies to avoid mandatory mediation when domestic abuse is an issue.

A. WHEN THERE IS AN EXEMPTION

Attorneys should take appropriate action to allow the client to waive or exempt out of mediation. There may be a state statute which provides a specific waiver for victims of domestic abuse. There also may be general language which requires the court to consider various factors in selecting an appropriate dispute resolution process. An attorney must follow existing established procedures to obtain an exemption for battered women which may include making formal pre-trial motions. Form pleadings may be developed by concerned advocates and routinely filed in each case slated for mediation which involves a battered woman. If the motion is denied, the attorney must preserve the right to appeal and determine, in conjunction with the client, whether the appellate process should be used.

Eleven states provide an exemption by statute of some or all battered women from their regular scheme of mediation in most

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132. One commentator has suggested that "mediation should only be mandated first, for the appropriate types of controversies; second, only when power imbalances are insignificant or when they can be remedied; and third, only when the mandate is designed to overcome certain barriers to the use of mediation." Andreas Nelle, Making Mediation Mandatory, 7 J. ON DISP. RES. 287, 296 (1992). The author identifies six specific barriers to mediation, including: 1) differences in information and in the assessment of the situation, 2) lack of interest in the speedy resolution of the dispute, 3) a lack of communication between the parties, 4) skepticism about mediation, 5) lawyer's self-interest in an adversarial process, and 6) fear that suggesting mediation signals weakness. Id. at 294-95. Nelle surmises that mandatory mediation may overcome these barriers if the other criteria (type of controversy, power imbalance) are satisfied. Id. at 299.

133. See Appendix C.


135. A sample motion to dismiss respondent's petition for mediation is available from NCOWFL, supra note 19.
civil cases. Other jurisdictions may provide an exemption by court rule.

B. WHEN THE EXEMPTION OPTION IS INEFFECTIVE

Advocates report that not all exemption laws and rules are effective. For example, Minnesota has been widely acclaimed for its refusal to allow mediation in cases involving domestic violence. A recent study, however, challenged the effectiveness of the relevant statute which bars mediation and showed that, in fact, many abuse cases are sent to mediators.

The study was conducted through the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota, at the request of Southern Minnesota Regional Legal Services, and included interviews with judges, court services personnel, mediators, and battered women. The study found that, despite the statute, divorce cases involving domestic violence were being sent to mediators and further sometimes judges ordered mediation in clear violation of the law. In other cases, couples were pressed into "voluntary" participation in mediation. Mediation may also appear in different guises, such as custody investigations or counseling.

136. See Appendix C.
137. The Minnesota statute originally read: "If the court determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by the other party, the court shall not require mediation." Minn. Stat. Ann. § 518.619 subd. 2 (1990). This law reflects the legislature's concern about the use of mediation in domestic violence cases, due to the unequal power between an abuser and a victim.
138. Sue Illg et al., Mediation and Battered Women in the Minnesota Court System 1-22 (1990) (unpublished manuscript, on file with Golden Gate University Law Review). The study, questions used in the study, and new statute are available from NCOFL, supra note 19.
139. Id. Interviews with court services workers revealed that "all of [them] admitted that they frequently deal with domestic abuse cases with both the court's knowledge and its consent." Id. at 3.

Furthermore, mediators reported it was frequently left up to them to determine whether abuse had occurred and the best way to handle the situation. Id. The mediators shared the belief that mediation is the best means of dispute resolution in many cases, including cases involving abuse, and felt it might be empowering for the victim. Id. at 4.

Interviews with judges revealed a complete lack of screening devices to detect domestic violence cases. Contrary to the spirit of the statute, "the judges seem to place the burden for dealing with domestic violence issues primarily on the victim," and make no effort to determine its existence. Id. at 7. The ineffectiveness of the statute is exemplified by the fact that "in response to a question regarding when negotiated settlement may
The Minnesota statute was recently revised, and now reads: "If the court determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by the other party, the court shall not require or refer the parties to mediation or any other process that requires to meet and confer without counsel, if any, present." Hopefully, this new statute will reduce the pressure on abuse victims to enter mediation. It remains to be seen, however, whether these legislative efforts will be sufficient to overcome the preference for mediation held by many judges and the mediation community.

It is likely that screening mechanisms fail in other jurisdictions as well. Therefore, it is important for attorneys to monitor the waiver and exemption process to ensure appropriate referrals are made.

C. When an Available Exemption Has Not Been Used

Attorneys may wish to challenge a mediated agreement signed by a \textit{pro se} client who entered mediation despite an available exemption. The success of any motion to set aside a mediated agreement may depend on the precise language of the statute and breadth of the available exemption.\footnote{\textit{In Vogt v. Vogt, 455 N.W.2d 471 (Minn. 1990), a \textit{pro se} petitioner in a domestic abuse proceeding was referred to Court Services for the purpose of developing a visitation plan. Petitioner argued that she was coerced into signing a written agreement which allowed unsupervised visitation in violation of the provisions of Minnesota law which not be appropriate, none of the judges gave battering as a reason why mediation would not be an acceptable means of reaching a settlement." It seems that the judges either are not familiar with the statute or choose to ignore it. \textit{Id.} at 8.}

The battered women who were interviewed expressed extreme dislike of the mediation system. These battered women thought they had no alternative to mediation, and once in mediation they all felt pressure to agree to a settlement. They found that mediators were insensitive to their history of abuse and the inequality it caused between the parties. Mediation was required despite protective orders prohibiting any contact between the parties, and was a forum for threats by the abusive partner. In addition, one woman "likened the mediation process to further abuse, abuse by the legal system." \textit{Id.} at 10. Overall, the women felt that mediation had an extremely negative effect on them and their children.

The authors of the study had considerable difficulty finding women who had gone through the mediation process and were willing to discuss their experiences. They concluded by saying that "a much larger group of women needs to be interviewed before any significant conclusions can be drawn." \textit{Id.} at 11.


\footnote{\textit{Id.} at 11.}
issues may be raised in this context: the appropriateness of the screening devices used to detect domestic abuse, and the nature of the waiver signed by the client. If the statute prohibits mediation of domestic abuse cases, the argument should be advanced that it is the court’s duty to monitor the screening of those cases if the court makes the referral. As revealed in the Minnesota study, many judges place the burden on the battered woman and make no effort to determine its existence.\(^{142}\)

An attorney should also explore the relevant state law with respect to voluntariness, unconscionability, waiver, and knowing and intelligent consent, as well as the principles of the relevant mediation associations (including neutrality).\(^{143}\) The attorney might analogize to separation agreements which generally are valid and enforceable provided they are (1) fair, reasonable, and just, (2) untainted by fraud, duress or undue influence, and (3) entered into by competent parties with full knowledge of their

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\(^{142}\) Ilg. et al., supra note 138, at 8. Battered women should not be required to self-identify when a statutory exemption is provided, but rather appropriate screening devices should be employed by the courts and the mediation services.

\(^{143}\) When a victim of domestic abuse waives an available exemption, the standard for reviewing the validity of the waiver should be stringent. The standard should be “knowing, intelligent, and voluntary.” The battered woman should be aware of the full range of options for resolving the dispute and she should be aware of the availability of community legal services, particularly if ability to pay is in issue. Vogt v. Vogt, 455 N.W.2d 471 (Minn. 1990).
rights and all the material circumstances.\textsuperscript{144}

If there has been no involvement by attorney advocates during mediation, it may be possible to set aside a mediated agreement based on a party's lack of knowledge of legal rights and alternatives. The willingness of courts to disregard a spousal agreement may depend on the nature of the provisions which are challenged. The Uniform Marriage and Divorce Act\textsuperscript{145} allows greater latitude for court intervention concerning custody, visitation, and child support. Under the UMDA, other provisions of the separation agreement are binding on the court unless unconscionable.\textsuperscript{146}

D. WHERE EXEMPTION IS UNAVAILABLE

The attorney may wish to challenge an agreement signed by a battered woman in mediation, or even the referral to mediation, despite the lack of an exemption scheme or if an exemption is denied when requested. Four types of challenges could be developed in response to mandatory and court-ordered mediation: 1) improper delegation of judicial power to a non-judicial entity; 2) denial of due process and access to the courts; 3) a due process and confidentiality challenge regarding the testimony and recommendations of mediators in court; and 4) a denial of equal protection. While this section briefly outlines these challenges and emerging case law, it is important to remember that the validity of each of these potential challenges will turn on the particular statutes and court rules in a given jurisdiction as well as the facts of the case.

1. \textit{Improper Delegation of Judicial Powers to a Non-Judicial Entity}

Since alternative dispute resolution mechanisms remove case resolution from the purview of the judiciary, mandatory mediation may be susceptible to challenges based on improper delegation of judicial power or usurpation of judicial functions.

\textsuperscript{144} See Alexander Lindey & Louis I. Parley, Lindey on Separation Agreements and Ante-Nuptial Contracts, Part I, Section 3 (1980).

\textsuperscript{145} Uniform Marriage and Divorce Act Sec. 306(b), U.L.A. 135 (1992).

\textsuperscript{146} \textit{Id.}; see also Clark, supra note 1, at 772-76.
The basic underlying issue is whether the mediator, a “non-judicial entity,” is acting in a judicial capacity. To date, delegation of powers challenges in state courts have been unsuccessful for the most part.\textsuperscript{147} Nevertheless, a creative litigator may wish to consider this approach in an appropriate case.

The earlier cases addressing improper delegation arose in areas of civil litigation including wage disputes\textsuperscript{148} and medical malpractice claims.\textsuperscript{149} More recent cases have confronted the issue in the family law context. The Florida Fourth District Court of Appeal in \textit{Kurtz v. Kurtz}\textsuperscript{160} (involving post-judgment visitation) and the Wisconsin Court of Appeal in \textit{Biel v. Biel}\textsuperscript{161} (con-
cerning an initial custody and visitation matter) examined the delegation issue and rejected the petitioners' challenges. The result in these cases comports with the reasoning employed by other state courts "that as long as the process does not have a binding result, it does not constitute the exercise of judicial power and therefore presents no serious delegation issue."152

However, a second issue addressed by Biel was whether a court may order mediation of family law issues as a "standing procedure," absent a legislative enactment or local administrative order mandating the mediation of particular issues prior to scheduling a hearing. The Court of Appeals held that mediation could be ordered by the Court pursuant to two statutes which provided that courts "[have] the authority to do all acts and things necessary and proper"153 and that "the family court commissioner shall require [the parties] to participate in counseling,"154 and counseling was interpreted to include mediation. The court pointed out that while a court has broad discretion in determining what is "necessary" and "proper," particularly in custody disputes, the court must exercise discretion in determining whether ordering mediation is necessary. Since the court order to mediate was entered pursuant to a "standing procedure," which provided no determination of necessity on an individual case-by-case basis, the Court of Appeals concluded that the court abused its discretion when ordering mediation.155

In jurisdictions that do not have mandatory mediation provisions but whose court orders for mediation are "discretionary," a Biel challenge might succeed on the grounds of improper use of authority or abuse of discretion if it is a "standing procedure." However, proving abuse of discretion is generally a high standard to meet, may be dependent on specific statutory language, and only addresses the problem in piecemeal fashion by raising the issue in individual cases.

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Finally, a delegation of judicial authority challenge would be possible if a court referred the case to mediation and issued an order placing the determination of custody and/or visitation, or control over the extent and terms of visitation, in the mediator’s authority. This type of challenge might also be applicable in a jurisdiction such as California where mediators are acting as advocates for the child’s best interests in custody and visitation disputes, yet remain neutral as to the parents. In such a capacity, the mediator is supposed to determine the best interests of the child and encourage the parties to make an agreement consonant with those interests as assessed by the mediator. If the parties are unable to reach an agreeable settlement, the mediator can be required to testify in court as to the children’s best interests and make a recommendation to the court as to the custody and/or visitation of the children. In this situation, an argument, albeit a weak one, for an improper delegation of judicial authority is possible, particularly if the court has a “standing procedure” of adopting the mediator’s assessment of the children’s best interests. This “standing procedure” in essence allows the mediator to determine best interests, and adopts the mediator’s recommendations as to the resolution of the dispute. These duties or activities are very similar to the role of a general or special master. Unless pervasive “rubber-stamping” by the trial court could be statistically demonstrated, it is probable that an appellate court would determine that mediators’ recommendations are subject to a similar independent decisionmaking authority, and, thus, do not constitute an exercise of judicial power by a non-judicial entity.

156. See Deacon v. Deacon, 297 N.W.2d 757 (Neb. 1980), where the court effectively placed the determination of visitation in a psychologist’s authority, and In re Rada W. v. Department of Public Social Svcs., 252 Cal. Rptr. 189 (Cal. Ct. App. 1988) (unpublished), where the court allowed the Department of Social Services to determine whether or not a parent could have overnight visitation with her child.


158. See Kurtz, 538 So. 2d at 895, where the Florida court was very specific about distinguishing between the roles of a mediator and a master. Note, however, the Minnesota decision in Young v. Young, 370 N.W.2d 57 (Minn. 1985), where a similar challenge was made in a visitation case involving a “court expert.” In Young, the court expert, a psychiatrist, gave testimony and recommendations as to a mother’s visitation with her children. The court held that the lower court did not improperly delegate judicial authority to the expert when the expert’s recommendation was subject to the court’s supervision and independent decisionmaking authority. See also In re Marriage of Rosson, 224 Cal. Rptr. 250 (Cal. Ct. App. 1986), where the court held that, although mediators make recommendations, it is the court’s responsibility to determine custody.
2. Denial of Due Process and Access to the Courts

Alternative dispute resolution processes may raise issues of compliance with due process clause provisions of the Federal and state constitutions. The due process clause of the Fifth Amendment of the U.S. Constitution, which is made applicable to the states through the Fourteenth Amendment, protects "life, liberty, and property interests" from government deprivation. Most forms of civil dispute resolution implicate liberty and property interests. State constitutional guarantees regarding access to the courts should be scrutinized carefully since these provisions may provide more expansive rights of access than those which are available under the due process clause of the U.S. Constitution and relevant case interpretations.

Two cases, Kurtz and Goldberg v. Goldberg, specifically challenge orders to mediate on the grounds that such orders deny clients their constitutional right of access to the courts. In Kurtz, the Florida Court of Appeals held that an order referring a case to mediation did not, in effect, deny the moving party access to the courts. The Court of Appeals held that the lower court order “did not divest the husband of his right to be heard in court on his two pending motions.” The court emphasized that “the order merely defers a hearing . . . until after family mediation . . . [which] does not rise to the level of a denial of a constitutional right.”

159. Golann, supra note 147, at 531-32, states that “mandatory mediation in divorce, for example, custody cases, potentially affects the liberty interests of both children and parents.” Id. at n. 192. See Lassiter v. Department of Social Svcs., 452 U.S. 18, 37 (1981) (termination of parental rights affects liberty interest); Michael H. v. Gerard D., 491 U.S. 110 (1989) (liberty interest implicated in unitary family relationships).

160. See, e.g., ILL. CONST. art. 1, sec. 12 (“Every person shall find a certain remedy in the laws for all injuries and wrongs . . . . He shall obtain justice by law, freely, completely and promptly.”).


162. 691 S.W.2d 312 (Mo. Ct. App. 1985).

163. The father in Kurtz filed two post-judgment motions concerning his visitation rights, and since the local court had adopted administrative orders mandating that all post-judgment custody and visitation disputes be mediated prior to scheduling a hearing, the lower court stayed these motions pending mediation of the dispute. Kurtz, 538 So. 2d at 893.

164. Id. at 894.

165. Id.
Goldberg involved a divorce decree requiring the parties to mediate disputes (except custody, which was awarded jointly to the parents) involving their children. The mother contended that the provision of the decree requiring the parties to mediate was unconstitutional because it imposed restrictions on their access to the judicial system. The court held that neither party's access was impeded by the mediation order and emphasized the language of the provision stating that the "mediator lacks the status of an arbitrator."166

Thus, in both of these cases, the respective courts found that neither a pre-trial mediation requirement nor a divorce decree provision stipulating mediation of parental responsibility issues constituted a denial of court access. While the Goldberg court denied that mediation impaired the right to access at all, Kurtz emphasized that an order to mediate is at most a "temporary delay of court proceedings in the interest of a mediated settlement."167 Given the outcome of these two decisions and the fact that mediation is a non-binding process where the parties can seek a court hearing should mediation fail, a denial of access challenge, while possible, is weak. There is some possibility of a successful challenge in a state with a constitutional access guarantee which the court is willing to interpret literally.168

3. Due Process Challenges Based on Confidentiality of the Mediation Session

The mandatory mediation statute in California has a provision whereby the mediator may make a recommendation to the court regarding the custody or visitation of the children if the parties have not reached an agreement, and if the court has adopted rules allowing mediator recommendations.169 As a result

166. Goldberg, 691 S.W.2d at 316.
167. 538 So. 2d at 894.
168. Golann, supra note 147, at 546-48, citing People ex rel. Christianson v. Connell, 118 N.E.2d 262 (1954), in which the Illinois Supreme Court determined that the access guarantee of the Illinois Constitution prohibited imposing any delay on the filing of an existing cause of action, in this instance a judicially-supervised conciliation conference in a divorce case. 118 N.W. 2d at 267. Although the author notes other states (including Missouri, Ohio, and Arizona) have "struck down other preconditions to suit on similar theories," he concludes by stating most states have not interpreted access claims so narrowly. Id. at 548.
169. CAL. CIV. CODE § 4607(e).
of this provision, due process challenges have been raised re­
garding a party's opportunity to cross-examine the mediator.\textsuperscript{170} If there is no opportunity for cross-examination, then a due pro­
cess claim may be successful.

4. \textit{Denial of Equal Protection}

Under the Fourteenth Amendment equal protection clause or under parallel state constitutional provisions,\textsuperscript{171} it may be possible to argue that impermissible classification schemes are created by statutes which mandate mediation for certain types of cases. Classification schemes are created when certain types of cases such as those involving custody are singled out for resolu­
tion by mediation while other types of cases proceed through the formal court process uninterrupted, thereby triggering equal
protection guarantees.

\textsuperscript{170} \textit{CAL. CIV. CODE} \textsection{4607(e). There is a tension between the desire to retain confi­
dentiality for information revealed to the mediator and due process models which estab­
lish a right of confrontation. In McLaughlin v. Superior Court, 189 Cal. Rptr. 479 (Cal.
Ct. App. 1983), the First District Court of Appeals found that, while the requirement of pre-hearing mediation on child custody and visitation is allowed pursuant to subdivision \(e\) of Section 4607, the mediator cannot make recommendations to the court unless the parties are allowed to cross-examine the mediator-witness as to the basis for his or her decision, or unless the parties have waived their rights to cross-examine the mediator. According to the court, preventing cross-examination of a mediator-witness constituted a violation of the parties' due process rights.

In another First District California Court of Appeals decision, \textit{In re Marriage of Rosson}, 224 Cal. Rptr. 250 (Cal. Ct. App. 1986), the mother argued that the court should not allow the mediator to testify at all on the grounds that the testimony was based on confiden­tial information. The court pointed out, however, that subdivision \(e\) of Section 4607 allowed for mediator testimony as an exception to the confidentiality rule provided that a local court had adopted rules permitting mediator recommendations and the testim­ony was consistent with the \textit{McLaughlin} rule in allowing cross-examination of the me­diator. Accordingly, the mediating parties could not claim a confidentiality privilege to bar the mediator's testimony.

It is significant to note that the relevant provision, \textit{CAL. CIV. CODE} \textsection{4607(c), does allow an "official information privilege to be invoked by the public entity or its author­ized representative" (see \textit{CAL. EVID. CODE} \textsection{1040), which gives the mediator or court
personnel the privilege, in the public interest, of withholding information under a confi­
dentiality privilege. This privilege is not, however, similarly held by the mediating par­ties. The question arises as to whether or not mediators could avail themselves of this privilege so as to avoid revealing the basis of his/her recommendation in court. If this were the case, a mediator could be compelled by the court to make a recommendation as to a settlement between the parties, and yet, withhold information as to the basis of that recommendation on cross-examination under the "official information privilege" of Section 4607, subdivision \(c\), rendering the \textit{McLaughlin} rule useless.

\textsuperscript{171} \textit{U.S. CONST. Amend. XIV} \textsection{1 states in pertinent part: "No State shall . . . deny
to any person within its jurisdiction the equal protection of the laws."

\textsuperscript{56} http://digitalcommons.law.ggu.edu/ggulrev/vol23/iss3/2
The level of scrutiny applied in equal protection cases depends on the type of classification created. If a suspect class or fundamental right is involved, the level of scrutiny is "strict," and the classification will be upheld only if there is a compelling governmental interest and the classification is necessary, or narrowly tailored to achieve the governmental interest.\textsuperscript{172} Classifications which do not implicate fundamental rights or suspect classes must have only a "rational basis" to satisfy the equal protection clause.\textsuperscript{173}

Since mediation statutes do not target "suspect" classes, strict scrutiny will be used as the standard of review only if "fundamental rights" are involved. Although marriage\textsuperscript{174} and family relationships\textsuperscript{175} implicate fundamental rights of privacy and liberty, it seems unlikely that a cognizable equal protection violation would result from a mediation scheme with subsequent\textit{de novo} court review.\textsuperscript{176}

\section{E. Challenges To Private Mediation}

There may be a cause of action for clients under a state statute covering unfair or deceptive acts and practices if mediators misrepresent their services, abilities, or the scope of mediation. For example, types of situations which might be actionable under a consumer protection statute prohibiting fraud and misrepresentation include: 1) a case where a client relies on the advertisements and assurances of a family mediator that mediating the divorce will be much less expensive than going to court and/or will offer the client a better settlement that she could get under the law, or 2) a case where a wife and a husband "negotiate" a settlement in which the wife gets considerably fewer marital assets, less alimony, and lower child support than she would in court, after a mediator assures her it was a "fair"


\textsuperscript{174} Zablocki v. Redhail, 434 U.S. 374 (1978) (Wisconsin statute invalidated which prevented marriage unless prior child support obligations met.)

\textsuperscript{175} Stanley v. Illinois, 405 U.S. 645 (1992) (biological father entitled to fitness hearing before his children born out of wedlock were placed in state custody.)

\textsuperscript{176} The Supreme Court has consistently rejected equal protection challenges to federal and state statutes which impose non-binding preconditions in civil suits such as posting bonds; however, the Supreme Court has not ruled directly on classification schemes created by mandatory mediation statutes. Golann, \textit{supra} note 147, at 552-53.
It is necessary to examine the scope of the acts, as well as the exceptions covered, under the statutes of any given state. In some states consumer protection statutes may not apply to television and radio broadcasters, or publishers of advertisements. Also, attorneys, medical personnel, and other professionals may be excluded from coverage. No statute explicitly includes or excludes mediators or mediator services, and since there is no precedent on this type of challenge, it will be important to analogize mediators with other "professionals" and service providers included in a statute. Again, to date, this type of challenge has not been raised successfully, but with the appropriate case in a state with a pro-consumer statutory scheme, a favorable result might be reached.

F. OTHER REMEDIES

It is important to remember that parties who choose private mediation still retain rights of action under breach of contract and the tort of malpractice. These actions are dependent upon the ability to demonstrate that a specific agreement existed between the parties and was breached, or that there was blatant misconduct or negligence during the mediation process. It seems that the viability of these challenges are fact specific, and, thus, each should be explored. 178

177. In New York, for instance, Section 349(a) of the General Business Law provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service ... is hereby declared unlawful," and sub-section (h) provides that "any person who has been injured by reason of any violation of this section may bring an action in [their] own name to enjoin such unlawful act or practice, an action to recover [their] actual damages or fifty dollars, whichever is greater, or both such actions." N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988). Under this statute such a case might stand, and the party might be able to recover her damages including fees paid to the mediator as well as possible loss of income.

178. See Gasper v. Lighthouse, 533 A.2d 1358 (Md. Ct. Spec. App. 1987), cert. denied, 537 A.2d 272 (Md. 1988), where a husband sued a marriage counselor for breach of contract and malpractice for the counselor's "cuckolding" activities with his wife. The case was dismissed, but the court said in dicta that breach of contract and traditional damages for breach might have been recoverable, and that a malpractice claim might lie for a counselor who fails to exercise reasonable care in performance of his/her duties (which, apparently, excludes cuckolding).
VII. WHEN CHALLENGES ARE UNSUCCESSFUL

A. Individual Strategies Concerning Mandatory Mediation

Other strategies may be employed if the above-mentioned approaches are not successful. First, individual mediators might be convinced to refuse to mediate cases where domestic abuse is involved. This assumes that the mediator is aware of the existence of domestic abuse. Mediators should conduct their own screening in a separate orientation with each disputant. Attorneys must encourage clients to share this information with the mediator. Mediators may also learn about violence between the disputants by reviewing the court file. Under any circumstances, the attorney should take all reasonable steps to make sure that the mediator knows that the attorney's client has been abused.

Second, when the abused client is compelled to mediate, the attorney could insist that a shuttle or caucus format is used. In this type of mediation, the disputants are physically separated so that direct communication is purposefully restricted and the mediator moves back and forth between the two locations.

Third, the attorney can insist upon being present during the mediation. Some statutory schemes do not allow the mediator to exclude attorneys. Other statutes provide that only the parties may attend. In other jurisdictions, the mediator has discretionary authority to exclude counsel.

Fourth, the attorney may wish to control the timing and the sequence of the mediation. The attorney might insist that any mediation session occur only after temporary relief is obtained or after appropriate passage of time which may allow the client to become more empowered. The attorney may also require that certain conditions are met prior to the occurrence of mandatory

179. See Sun & Woods, supra note 19, at 17 (Screening Guide for Mediators).
180. One example of a way to use the caucus technique effectively is presented in Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflicts 263-71 (1986).
mediation, i.e., the disposition of pending criminal charges against the batterer or the abuser's successful completion of an anger management program or individual therapeutic counseling.

Fifth, mandatory mediation compels attendance, not participation, and certainly not agreement. When a client is forced to be involved in mediation, the attorney should make certain that the client understands that she is required to appear - period. Although some attorneys may feel uncomfortable suggesting this approach, it may be a last resort option. The case should be referred back from mediation for attorney-assisted settlement followed by court disposition, if necessary.

B. COMMUNITY-WIDE STRATEGIES CONCERNING MANDATORY MEDIATION

If mandatory mediation is not firmly entrenched in a particular jurisdiction, a coalition of interested persons, including battered women's advocates, matrimonial attorneys, and concerned mediators, can work in a variety of ways to limit mediation to appropriate cases involving equally empowered disputants by: (1) widely disseminating to mediators and judges the available information about the harm to battered women in mediation;

184. It has been noted that the relevant statute in California, CAL. CIV. CODE §4607(a) (West Supp. 1993), requires only that the parents participate in mediation. Joshua Rosenberg, In Defense of Mediation, 33 ARIZ. L. REV. 467, 474-75 (1991). The author further states that "[the] mediation process requires the parties to meet one time and they may meet more frequently if the results of that initial session seem positive. Mandatory mediation does not prevent a party from interposing her attorney at all other times." Id. at 501 n.128. See also, Graham v. Baker, 447 N.W.2d 397 (Iowa 1989), holding that an Iowa farm mediation statute that requires the creditor of a farm debtor to "participate" in a mediation session was satisfied by the attorney's attendance at one mediation session and the attorney's statement that the creditor's position was not negotiable.

185. In addition to the information in this article, other sources include Desmond Ellis, Marital Conflict Mediation and Post-Separation Wife Abuse, 8 LAW & INQ. 317 (1990); Andree Gagnon, Ending Mandatory Mediation for Battered Women, 15 HARV. WOMEN'S L.J. 272 (1992); Robert Geffner & Mildred Daley Pagelow, Mediation and Child Custody in Abusive Relationships, 8 BEHAVIORAL SCI. & L. 151 (1990); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991); Lisa Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 HARV. WOMEN'S L.J. 57 (1984); Joanne Schulman & Laurie Woods, Legal Advocacy vs. Mediation in Family Law, THE WOMEN'S ADVOCATE 3 (July 1983); Martha Shaffer, Divorce Mediation: A Feminist Perspective, 46 U. TORONTO
and (2) educating mediators and attorneys that mandatory mediation involving battered women is unethical. 186

The guidelines for mediators promulgated by various alternative dispute resolution organizations may not bind mediators in the same way ethical codes obligate attorneys; nevertheless, nearly all the established mediator guidelines have provisions which state that the mediator has a responsibility: 1) to conduct an orientation session; 2) to obtain informed consent; 3) to ensure the voluntary participation of the parties; 4) to equalize bargaining power between the parties; 5) to remain neutral and impartial; and 6) to discuss the issue of confidentiality with the disputants. The specific dictates of these guidelines demonstrate that domestic abuse inflicted by one participant on the other has a direct, integral, and negative impact on the integrity of the mediation process. Thus, mediators should be encouraged to refuse to mediate these cases.

VIII. CONCLUSION

Many women's advocates view the trend toward the use of family mediation with justified skepticism and suspicion. The skepticism is derived, in part, from mediation's failure to deliver on its promise of allowing self-determination between so-called equally empowered participants, and is exacerbated by the fact that, in most jurisdictions, mediation processes are not monitored and mediators are not licensed. The skepticism also results from the reluctance of some mediators, judges, legislators, and attorneys: 1) to acknowledge mandatory mediation is a contradiction in terms which affects the integrity of the mediation process itself; 2) to recognize that certain clients and types of cases, particularly those involving domestic abuse, are ill-suited for resolution through informal processes; and 3) to screen effectively at every stage of the process to avoid inappropriate referrals to mediation.

186. See discussion of attorney ethical duties, supra, notes 95-108 and accompanying text, and the section on the ethical duties of mediators in A MEDIATOR'S GUIDE TO DOMESTIC ABUSE, supra note 19, at 47.
The suspicion arises from valid concerns about the renewed privatization of family law issues at a time when women have made some significant progress in the legislatures and the courts. Without the force of legal power, many women disputants are at risk. Attorneys must remain vigilant in protecting their client's interests throughout the course of a matrimonial action in which mediation occurs.

The primary purpose of this article was to provide practical information to attorneys about their role in the mediation process and to underscore the importance of an attorney's obligation to remain vigilant in protecting client interests throughout the course of a matrimonial action. There must be recognition, however, that systemic changes are needed to protect and empower clients who are attempting to resolve issues of great significance in their lives. Accordingly, an attorney's role must also include working in collaboration with others toward effectuating change in the mediation process on a more pervasive basis.
DOMESTIC ABUSE VICTIM SCREENING GUIDE

by Myra Sun and Laurie Woods

INTRODUCTION

This is a screening guide to determine whether domestic abuse has occurred. If domestic abuse exists, the attorney should actively discourage mediation and attempt to obtain a waiver for the client if the mediation is court-ordered.

A. GOALS OF SCREENING

Mediators and attorneys should NOT screen to evaluate the seriousness or frequency of domestic abuse, holding out the possibility that “minor” cases can be resolved by mediation. Screening exists to:

1) IDENTIFY domestic abuse, whether the victim applies that term to herself or not; and

2) ASSURE that the consequences of domestic abuse for family members—whether for the victim or the children—are addressed by a court, with the appropriate assistance of mental health professionals.

Few abusers will make this task easy and admit misconduct. Nor will all victims present the image of a bruised and passive wife, allowing immediate identification as domestic abuse victims.
B. VICTIM DEMEANOR

The victim, by contrast, may be unprepared to discuss matters in a businesslike way, or to immediately move toward compromise. She may not appear to be very articulate or intelligent because her answers may be vague; she may be passive to the point of silence. She may seem less reasonable because she is highly emotional, particularly if she has begun to talk about the domestic abuse. In a criminal case, this may translate into a preference for prosecution; in a custody case, this may translate into opposition to shared care for the children, or even to visitation. The attorney should be patient in eliciting responses from the victim since domestic abuse is difficult to acknowledge and discuss.

It may facilitate matters for the client to remember past incidents by attempting to “visualize” the circumstances in which the abuse occurred. Frequently, domestic abuse happens on holidays or at special events and mention of this may jog the client’s memory. Some gentle prompting from the attorney may help the victim to be more responsive.

C. CHECKLIST

Inquire:

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

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

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

d) Has he ever taken the children and refused to let her see them? For how long? Where did he take them?

e) Has he broken things? Her things? The children’s
things? How has he done it?

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

   g) What happened during the worst incident?

   h) What happened during the most recent?

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

   j) Does he have access to weapons? What kinds of weapons?

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

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

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

   n) Has he ever destroyed things that she or the children specifically care about - her clothes, the children's toys, household pets?

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

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

   q) Has she wanted to change her routine in any way—get a job outside the home; go to, or back to school; learn to drive? How has he responded?

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

   s) Does she have friends of her own, or family members of her own, that she sees regularly? How does he behave around them?
t) Has she ever been to an abused women’s shelter?

u) Has she ever asked for a restraining order or order of protection?

v) Has she, or anyone else, ever called the police about her abuser? What happened if these calls were made?

w) How is her health? Has she had any emergency room visits? For what purpose?

D. Possible Victim Response

• Providing limited or sketchy information about specific incidents of domestic abuse, including acts that were the basis of previous criminal charges or restraining orders. (It would not be uncommon for her to forget the specific dates of arguments, to tell the story in a way that suggests she was “just as responsible” for what happened as he was, and to lack “evidence,” such as medical records or a police report).
• Providing vague hints about discord (“we just couldn’t get along,” he “was always getting mad at me”).
• If arguments “got bad,” she left (may have gone to an abused women’s shelter or gotten a restraining order).
• If she did not do something to his satisfaction such as have dinner ready, or clean the house properly, he withheld “rewards” from her refusing to let her eat or sleep, or prevented her from seeing friends.
• If he disliked her friends or family, he always made a big scene when she saw them or else she stopped seeing them in order to avoid a big scene.
• If he did not like her having a particular job, she either quit or lost it because of his behavior to her or her co-workers, or because of his constantly contacting her there (variation: similar pressure on her to drop out of school or to stop engaging in other activities, such as hobbies).
• If they disagreed about how to handle money, it wound up with his having control over it, her getting an allowance from him, and his denying her request for a separate account.
• If they disagreed about his having weapons in the house, he continued to have them there.
• If, once they’ve separated, he has come to her separate residence when she did not want him there.
• If she didn’t want to have sex, he made her engage in sexual activity, and she felt uncomfortable about it.

E. Conclusion

If domestic abuse is identified, then mediation is contraindicated and should be avoided. The attorney should take the necessary steps to protect the client’s interests. If there is uncertainty about whether domestic abuse has occurred, all doubts should be resolved in favor of determining that mediation is inappropriate.
APPENDIX-B

ADVOCATE'S CLIENT INFORMATION SHEET ON MEDIATION

by Myra Sun and Laurie Woods

CLIENT INFORMATION SHEET ON MEDIATION

You have expressed an interest in mediating your case. This is intended to give you a description of the process. After you have read it thoroughly, we will talk in more detail.

A. What Mediation Is

MEDIATION IS a dispute resolution process. In mediation, you and your spouse discuss all or part of the issues in your case with a third party. The third party won’t be me (I represent you) or your spouse’s lawyer. The mediator may or may not be an attorney. If the three of you agree on how to settle some or all of the things you discuss, the mediator sends me an informal written record of the terms of your agreement. You won’t have to sign the written record; it is not a legal document; it can’t be treated like an order you get from the court. In fact, you should not sign it. I will review the written record, and so will your spouse’s lawyer. We (you, me, your spouse and your spouse’s lawyer) will use the written agreement in developing a formal separation agreement or court order. The formal agreement or order will have the same effect as if you had gone to court to get it.

MEDIATION WILL NOT necessarily be cheaper. It may reduce some of the time I spend on your case as your attorney, which may reduce your overall fees. However, you must also pay the mediator. This may make your overall fees as high or higher than they would have been without mediation.
MEDIATION CAN be stopped at any time. You still have the option of going before a judge for a trial to resolve your dispute, or of letting the attorneys negotiate your case.

MEDIATION REQUIRES that everyone involved observe a number of rules (see BASIC RULES, below).

B. WHAT MEDIATION Is NOT

MEDIATION IS NOT legal negotiation between your spouse’s lawyer and me, with each of us acting on your behalf. In this kind of negotiation, you decide whether or not you wish to be present. In mediation, you and your spouse directly negotiate an agreement, the lawyers review it and change it as necessary to be sure that your interests are protected.

MEDIATION IS NOT arbitration. To arbitrate, we would prepare your case as though we were going to court, but we would choose an arbitrator—not a judge, though he or she may be a former judge who would decide your case.

MEDIATION IS NOT marriage counseling. Mediation is for couples who have decided that they want to end their relationship and want to resolve issues relating to the property they own, support that one should pay the other, or their children. If you feel that you may want to talk about a reconciliation, or if you think your spouse wants to get back together with you and you don’t, mediation is not for you.

MEDIATION IS NOT treatment for mental health problems. If you know or feel that you or your spouse has any kind of mental health problem or a substance abuse problem, mediation is not for you.

MEDIATION IS NOT a mental health evaluation of your fitness to have custody. If you and your spouse have a dispute about custody, it may be necessary to have such an evaluation done by a psychologist or counselor. Your mediator may, in fact, be a psychologist or counselor. But in mediation, the mediator will not give you any psychological tests or discuss your marriage with you. The mediator will be trying to help you resolve your custody dispute.
C. Basic Rules

If you decide you want to mediate, there are certain basic rules we will follow. These are set because they are so important in making sure that mediation is fair. The mediator will get a copy of these rules. The rules are as follows:

1. A formal case must be filed. If you or your spouse have not done so already, one of you will file a formal court proceeding, so I can get all the necessary information needed to resolve your case. If you only mediate, there is no way to guarantee that your spouse will provide all of the information necessary.

2. We must decide who will pay the mediation costs, or in what proportion costs will be shared, initially. This will eliminate payment of the fees as a matter to be bargained about as a part of the regular agreement.

3. We must set and abide by a written agreement on what issues in your case will be mediated. If you want to mediate, you and I will have to discuss this, and so will your spouse and your spouse's lawyer. When we (you, me, your spouse, your spouse's lawyer) have agreed which issues in your case are to be mediated, we will make a written agreement about it, and give it to the mediator. That written agreement is not to be changed unless all of us, and the mediator, agree to it.

4. You each will meet with the mediator once before you agree to start mediation. Both of you will be present. This will allow you to decide if you are comfortable with him or her, or if you want to choose someone else.

5. The mediator cannot talk about the case to one of you without the other's being present. This will make sure that the same information is shared all around. Naturally, conversations to set or to cancel appointments aren't included. This rule can be expanded, if you wish, to limit communication of all kinds (social meetings, for example) if you think that would be fairer.

6. We must have a deadline for finishing mediation. If we decide to change the deadline, either by stopping before or going beyond it, we can. However, a schedule will move us along.

7. NO confidentiality is assumed. You have no legal guarantee that what you say to the mediator can be kept confidential (be-
between the two of you) or that it can be kept out of court, if we go to court. At the same time, the mediator will probably not be willing to testify voluntarily on behalf of you or your spouse, even if the mediator could help you to prove something important to your case, i.e., that you were abused by your spouse or that full disclosure of assets was not provided.

Your discussions with me are generally confidential. If there are things that you don’t want to discuss in mediation, we should talk about them beforehand. It will help us determine what things may be discussed in mediation, and what may not.

8. The mediator is neutral. Your mediator will not look out for your interests nor defend your positions. I will do that, by helping you decide what to discuss in mediation, obtaining the information needed to resolve your case, advising you of your options, and reviewing any proposed agreements.

If you feel the mediator isn’t being neutral, you and I should discuss it so that we can make necessary changes.

9. You should never sign anything during mediation. As I described, the mediator will write up a record of anything you agree to, and you and I will both go over it. This is not a legal document. You should not sign it before I see it even if you are assured that it would be all right because I will have a chance to look at it later.
## APPENDIX C

### STATE LAWS EXEMPTING BATTERED WOMEN FROM MEDIATION

<table>
<thead>
<tr>
<th>State</th>
<th>Legal Category</th>
<th>Mandatory Mediation</th>
<th>Voluntary or Discretionary Mediation</th>
<th>Exception</th>
<th>Discretionary Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>COLORADO</td>
<td>Courts and court procedure</td>
<td></td>
<td>Any court may refer any case for mediation.</td>
<td>Court shall not refer if party claims to be victim of physical or psychological abuse by other party and states unwillingness to enter mediation.</td>
<td></td>
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<tr>
<td>FLORIDA</td>
<td>Court-ordered mediation</td>
<td>In circuits where program established and upon finding of dispute, court shall refer custody or visitation issues.</td>
<td>A court may refer to mediation all or any part of a filed civil action.</td>
<td>A court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse which would compromise the mediation process.</td>
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<tr>
<td>FLA. STAT. ANN. § 44.102 (West Supp. 1992)</td>
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<tr>
<td>ILLINOIS</td>
<td>Enforcement of visitation</td>
<td></td>
<td>Court may order counseling or mediation.</td>
<td>Court cannot order mediation where there is evidence of domestic violence.</td>
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<tr>
<td>ILL. ANN. STAT. ch. 40, para. 607.1(c)(4) (Smith-Hurd Supp. 1992)</td>
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<tr>
<td>MAINE</td>
<td>Protection from abuse under Domestic Relations Law</td>
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<td></td>
<td>The court may not mandate mediation in actions brought under this chapter.</td>
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</tr>
<tr>
<td>MARYLAND</td>
<td>Custody and visitation</td>
<td>Court may enter an order requiring the parties to mediate.</td>
<td></td>
<td>Court may not order mediation if counsel represents that a genuine issue of physical or sexual abuse of a party or child exists</td>
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</tr>
<tr>
<td>MINNESOTA</td>
<td>Custody and visitation</td>
<td>Custody or visitation matters may be set for mediation.</td>
<td></td>
<td>Court shall not refer or require mediation or any other process where parties would confer without counsel if there is probable cause that a party or child of the party has been physically or sexually abused by the other party.</td>
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</table>
### General Rule

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<tr>
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<tr>
<td>NEW HAMPSHIRE</td>
<td>Annulment, divorce and separation</td>
<td></td>
<td>Court to suspend proceedings if both parties state that voluntary marital mediation will be attempted.</td>
<td>If either party asserts, or it appears to the court or mediator that &quot;abuse&quot; as defined by § 169-C (child abuse) or § 173-B (domestic violence) has occurred, the court shall not allow or shall suspend mediation, unless the victim of domestic violence requests mediation and the mediator is made aware of the alleged abuse.</td>
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</tbody>
</table>
| NEW YORK             | “Probation services” appears in many areas of family court proceedings, including support | If the assistance of probation is requested by either party, efforts at adjustment shall commence in 15 days. | Rules of court may authorize probation service to attempt through conciliation and agreement to adjust suitable cases. Anyone (but not those receiving support or paternity under § 111-g-SSL) seeking to file a petition for support under Article 4 of FCA may first be referred to probation service re: advisability of filing a petition. | Probation service may not prevent any person who wishes to file a petition under this article from having access to the court. If assistance of probation service is not requested or is declined, the person seeking to file for support is entitled to have access to the court. Probation service may not be authorized to compel any person to appear at any conference, produce any papers, or visit any place. | }
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<tr>
<td>NORTH CAROLINA</td>
<td>Custody and visitation</td>
<td>If it appears that a contested issue of custody or visitation exists, the matter shall be set for mediation.</td>
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<tr>
<td>NORTH DAKOTA</td>
<td>Custody, visitation and child support</td>
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<td>Court may order mediation if custody or visitation is contested.</td>
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<tr>
<td>OREGON</td>
<td>Joint custody</td>
<td>The court shall direct the parties to participate in mediation where one party requests joint custody and the other party objects to the request for joint custody.</td>
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<td>OR. REV. STAT. § 107.179 (1990)</td>
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EXCEPTION

- Court may waive mediation on party's or court's motion alleging child abuse or neglect or spousal abuse.
- Court may not order mediation if issue involves or may involve physical or sexual abuse of any party or the child of any party.
- A party can move the court to waive mediation on grounds that participation will subject the party to severe emotional distress. After a hearing on the motion, the court may waive mediation.
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<td>WASHINGTON</td>
<td>Dissolution of marriage; also issues involving “disruption of household”</td>
<td>Permanent parenting plans shall include a non-court dispute resolution process to resolve future parenting plan disputes, unless precluded or limited by § 26.09.187 or § 26.09.191.</td>
<td>Any proceedings under Domestic Relations chapter may be set for mediation.</td>
<td></td>
</tr>
<tr>
<td>Wash. Rev. Code Ann. § 26.09.015 (West Supp. 1992)</td>
<td>§ 26.09.187(1) directs the courts to consider various factors in designating an appropriate dispute resolution process for the establishment of parenting plans, including (a) differences between the parents that would substantially inhibit their effective participation in any designated process; (b) the parents' wishes or agreements, and, if the parents have entered into any agreements, whether the agreements were made knowingly and voluntarily; (c) differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.</td>
<td>Permanent parenting plans shall not require mediation if a parent has emotionally, physically or sexually abused a child, abandoned or refused to perform parenting functions, or has a history of domestic violence, or has committed assault/sexual assault causing bodily harm or fear of such harm.</td>
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<tr>
<td>WISCONSIN</td>
<td>Custody and visitation</td>
<td>In any actions affecting the family, where it appears legal custody or physical placement is contested, the court shall refer the parties to mediation. Parties must attend one session. If both parties wish to have joint legal custody and one party requests mediation, the court shall refer.</td>
<td>When a person who is awarded periods of physical placement, or has visitation rights, or has physical custody, or is the child of a person awarded physical placement, notifies the court of any problems, the court may refer the matter to the director of court counseling.</td>
<td>Court has discretion to not require initial session of mediation if the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties. The court shall consider evidence of child abuse and/or domestic abuse. Mediator may also terminate if evidence of domestic or child abuse.</td>
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