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DOMESTIC VIOLENCE AND MEDIATION

Donna Guion

Few studies exist regarding domestic violence, mediation, and how each affects the other. With that said, this paper explains how we may assist victims in successfully mediating a high-conflict divorce or custody matter. Through screening, educating, and counseling, high-conflict families, specifically those involving domestic violence, can gain the necessary skills to mediate in a safe and balanced environment.

Domestic violence affects the entire landscape of mediation, including but not limited to: addressing safety issues, power imbalances, the need for screenings, and education of each individual involved in the process. “Recent studies have estimated that spousal abuse is present in at least half of custody and visitation disputes referred to family court mediation programs.”¹ Due to this statistic alone, abusive relationships must be identified and safety concerns addressed whether the parties are involved in mediation or court proceedings.

In order to provide a safe environment for victims, mediators should recognize the potential risks in allowing a violent perpetrator access to their partner’s location at a specific time. If we fail to address safety issues in mediation we are only revictimizing an abused partner through our own ignorance. Therefore, we must require certain safety precautions when mediating domestic-violence cases. First, safety plans should be mandatory for victims attending mediation. Safety plans provide guidance to victims on maintaining a safe environment throughout the legal and separation process. Victims may obtain a safety plan through any domestic-violence facility and submit it to the mediator’s office prior to mediation. Following submission, mediators should review the safety plan and implement procedures to address any concerns. In addition to changing procedures, the circumstances may require modifications to the facility such as:

- “Spacious conference rooms that allow for easy and unencumbered escape
- Conference tables that provide a barrier to immediate contact
- Clearly marked exits
- Separate and safe waiting areas
- Metal detection devices.”²

Although existing studies discuss the safety of the victim, we must recognize the potential danger to others involved in the process. Mediators, attorneys, and staff may find themselves identified by the

1. Anita Vestal, *Domestic Violence and Mediation: Concerns and Recommendations*, MEDIATE.COM, May 2007, <http://www.mediate.com/articles/vestalA3.cfm#> [hereinafter Vestal].

2. *Id.*

abuser as individuals seeking to seize the control they hold over their family. Such an attitude may create a dangerous environment for those involved in the mediation process, thereby making safety precautions a required element to everyone involved.

Once safety concerns are addressed, mediators must turn their attention to obtaining a balance of power and removing the control of one party over the other. An inherent trait of an abusive partner is the desire and ability to control. In fact, batterers utilize a variety of tactics designed to achieve power and control over their families. Batterers do not need to physically abuse their partner everyday; the threat of violence is sufficient to maintain power and control. Additional power and control techniques consist of monopolizing speaking time, interruptions to stop any dispute, in-your-face methods of intimidation, making all decisions, isolation, and control of all aspects of their partner's lives. Abusive individuals also control their partners by threats of taking the children, leaving their partners homeless, and killing things their partner's love including the partner's pet.

Controlling behaviors are not left behind when an abuser participates in mediation; in fact, abusers maintain control through discrete actions without others understanding their significance. Abusers may prey upon the fact that the victim cherished their dog, which the abuser threatened to kill on numerous occasions. In order to maintain power and control during mediation, the dog becomes a pawn in the battle. The victim is aware of his or her intentions and considers this a threat that no one else understands. The balance of power disappears and the abuser is again in control.

Creating a safe environment and balancing power is possible in most cases; however, we must incorporate various techniques to achieve stability in mediation. The first and most important technique to utilize is pre-mediation screenings.³ Screenings allow professionals to identify cases involving domestic violence. Mediators may perform screenings; however, it is recommended that a neutral third party with domestic-violence skills and sensitivity assist in identifying cases of domestic violence. Several screening tools are available, but the Conflict Assessment Protocol (CAP) developed by Linda Girdner incorporates an individualized examination of the parties' relationship and will be discussed herein.⁴

Linda Girdner believes it is the responsibility of the mediator to attempt to identify which parties from abusive relationships can benefit from mediation and those that need to be excluded from mediation and referred to other resources. The CAP identifies the parties' patterns of decision-making, fighting and expressing anger, as well as their history of abusive behaviors. The mediator can use

3. *Id.*

4. *Id.*

this information to assess the dimensions of power and control in the relationship.⁵

Although Girdner specifically names mediators as the individual to identify parties in an abusive relationship, neutral third parties as described above are highly recommended.

“The CAP has four parts: (1) introduction, (2) questions about patterns of decision-making, conflict management and anger expression, and (3) questions about specific abusive behaviors, and (4) closure to the separate screening session.”⁶ Under CAP, the cases are then divided into three categories which range “from non-abusive and non-controlling relationships with equal power on one end to severely abusive, controlling, potentially lethal relationships on the other end.”⁷

Girdner agrees that those relationships within the first category that are non-abusive and non-controlling should be mediated.⁸ She also agrees that couples who may have experienced some abusive behaviors and acknowledged them as such, encouraged their partner to seek a protective order, attended anger management, and lack the characteristics in the third category may mediate with ground rules.⁹ The third category includes relationships that involve abusers who: exhibit controlling behaviors, demand compliance with the abuser’s desires, and fail to accept responsibility for the abuse.

Girdner also includes certain indicators of victims that may exclude the parties from mediation.¹⁰ For example, abused individuals may be excluded when they want to conceal the fact that they exposed the abuse and the victim views the abuser’s needs as primary and necessary to survival.¹¹ Other authors agree with Girdner’s screening technique but add ongoing abuse or the batterer’s use or threats to use weapons to the third category.¹²

Girdner’s CAP is a comprehensive screening tool; however, she fails to recognize the value of mediation in domestic-violence cases and the ability to mediate in ways other than the traditional mediation forms. In fact, mediation’s value to high-conflict families is generally underestimated. The Family Court Review found that alternative treatments may be correlated with different outcomes as follows: “54% of nonresidential parents in the adversary settlement group had not spoken with their children on the telephone in the last year, or had done so only once, in comparison to 12% in the mediation

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (citing P. Salem & A.L. Milen, *Making Mediation Work in a Domestic Violence Case*, 17 *FAM. ADVOC.* 34 (1995)).

group.”¹³ “In fact, when parents mediated rather than continuing with the legal action over their children, twelve years later the residential parent reported that the nonresidential parent was . . . significantly more likely to discuss problems with the residential parent.”¹⁴ The Family Court Review found “greater compliance with child support orders among nonresidential parents who mediated although noncompliance was quite high in both groups.”¹⁵ Additionally,

[30%] of nonresidential parents who mediated saw their children once a week or more twelve years after the initial dispute in comparison to only 9% of parents in the adversary group. At the opposite extreme, 39% of nonresidential parents in the adversary group had seen their children only once or not at all in the last year compared to 15% in the mediation group.¹⁶

Differences also exist for telephone contact. “In the mediation group, 54% of nonresidential parents . . . had not spoken with their children on the telephone in the last year, or had done so only once, in comparison to 12% in the mediation group.”¹⁷ On the average, five hours of mediation creates enormous differences in contact twelve years later.¹⁸ According to the Family Court Review, statistics automatically excluding high-conflict families can have drastic negative effects on the relationships years later.¹⁹

In summary, mediation can:

(1) settle a large percentage of cases otherwise headed for court; (2) possibly speed settlement, save money, and increase compliance with agreements; (3) clearly increase party satisfaction; and (4) most importantly, lead to remarkably improved relationships between nonresidential parents and children, as well as between divorced parents—even twelve years after dispute settlement.²⁰

Considering the short and long term advantages of mediation, those involved in the legal process should utilize mediation even if this requires a less traditional approach.

The key “active ingredients” of mediation are likely to include: (1) the call for parental cooperation over the long run of co-parenting beyond the crisis of separation, (2) the opportunity to address underlying emotional issues . . . (3) helping parents to establish a businesslike relationship, and (4) the avoidance of divisive negotiations at a critical time for family relationships.²¹

13. Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 *FAM. CT. REV.* 22, 31 (2005).

14. *Id.* at 31.

15. *Id.* at 27.

16. *Id.* at 30.

17. *Id.* at 31.

18. *Id.*

19. *See id.* at 30–31.

20. *Id.* at 22.

21. *Id.*

In order to foster cooperation, address emotional issues, obtain a businesslike relationship, and avoid divisive negotiations, the parties must be educated and counseled on these issues. After screening, as noted earlier, the parties will be divided into three categories. Those relationships involving domestic violence should be even further divided depending on past abuse, separation violence, risk of future violence, threats of homicide or suicide, and a lethality assessment. For example, if the abuse involved a single incident of physical abuse prior to separation without the threat of homicide or signs of lethality, the parties will be encouraged "to follow co-parenting rules rigidly . . . and communicate with each other briefly, only as necessary, and strictly about the children."²² In other words, the parties are encouraged to develop a businesslike relationship.²³ In the opposite extreme, parties who are involved in a continuous violent relationship, with threats of homicide and lethality factors, will require intense education and counseling. For parties in the latter example, we must assist them to avoid becoming adversaries while looking to the future. Transforming an abusive relationship into a cooperative endearing relationship in all likelihood will not take place. However, creating a situation where two individuals are able to communicate is more likely.

The parties involved in relationships from the latter group must be willing to attend classes and individual counseling to qualify for high-conflict mediation. Classes and therapy alike must concentrate on averting the parties' attention from their own emotional agenda and focus on meeting the needs of their children.²⁴ This approach has generally been referred to as "therapeutic mediation" and has been most highly developed as a method called "impasse-directed mediation" by researchers Janet Johnston and Linda Campbell.²⁵ This dispute resolution method involves both parents and their children in a relatively brief, confidential intervention, that can be adapted either to individual high-conflict families or to groups of such families. The strategy is two-pronged. First, both parents receive help in developing awareness or insight into their psychological impasse, or there is an intervention with the extended family and significant others, including professionals, that aim to avoid the impasse for those parents who are too disturbed to benefit from direct counseling.²⁶ Second, in addition to developing awareness or insight, parents are educated as to the effects of their conflict on their children and counseled on how to protect their children from the spousal disputes.²⁷ The professionals involved in this process will provide guidance to the attorneys and

22. *See id.* at 34.

23. *Id.*

24. JANET R. JOHNSTON & LINDA E. G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 198 (1998).

25. *Id.*

26. *Id.* at 200–01.

27. *Id.* at 203.

mediators as to whether the parties' safety may be compromised by mediation or if the balance of power is such that a fair-minded agreement may be reached.

In addition to educating and counseling the parties, mediators working with these high-conflict families must have special skills, sensitivity, and a network of resources. In fact, most will agree that circumstances necessitate training and education of all individuals involved in the family law process. "Emerging research shows that because of mediators' orientation and training, they do not know how to respond to the signs of violence or threats of violence; thus, they transform them into procedural issues with the consequences that victims' rights are delegitimized."²⁸

In 2007, the Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases (Standards) were created to: (1) "improve the quality of legal representation" in this specific group; (2) "enable lawyers to effectively, ethically, and holistically represent victims in civil protection order cases; and (3) to raise awareness about the need for high-quality representation for victims of domestic violence."²⁹ Mediators and professionals must agree with the goal of the Standards because such standards are necessary to respond to families involved in domestic violence situations. One provision in the Standards requires attorneys to maintain a certain level of knowledge in their field.³⁰ Mediators, like attorneys working with victims, should be required to acquire and maintain competent knowledge of domestic violence, sexual assault, and stalking. Competent knowledge means, at a minimum, an accurate understanding of the dynamics of domestic violence, in addition to understanding the statutes that protect victims against these types of violence.

In particular, mediators should recognize the potential risk of escalated violence and how the experience of domestic violence may affect their relationships within the process.³¹ In fact, the effects of domestic violence may impact a victim's ability to establish a rapport and provide specific information during mediation.³²

Knowledge about the dynamics of violence is necessary in order to assist the parties in crafting an appropriate agreement for their particular situation. Victims often exhibit a variety of characteristics that may affect the mediators approach and the final agreement. Abused partners may: demonstrate low self-esteem, accept responsibility for

28. Vestal, *supra* note 1.

29. ABA Comm. on Domestic Violence, Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases, History, *adopted* August 13, 2007, *available at* <http://www.abanet.org/domviol/docs/StandardsBlackLetter.pdf>.

30. *Id.* at III (A)(1).

31. *Id.* at III (B).

32. *Id.*

the batterer's actions, present a passive face to the world, and suffer from guilt. Considering these traits, mediators must be patient in order to encourage trust and full disclosure, thereby creating an appropriate agreement.

Experienced and knowledgeable mediators will understand the importance of changing the traditional forms of mediation in high-conflict domestic violence cases to correct the imbalance of power.³³ Alternative forms of mediation must be considered. Following a decision that both parties determine suitable for mediation, the mediator should consider various methods of mediation, such as private caucuses.³⁴ Caucuses allow victims to disagree with facts as presented by the abuser and decline offers presented for agreement.³⁵ While the parties caucus, the mediator utilizes the shuttle method of mediation.³⁶ Shuttle mediation occurs when the mediator shuttles between the parties, who are located in separate rooms.³⁷ If a victim's situation dictates concealing her location due to possible lethal consequences, the mediator may use telephonic mediation. Telephonic mediation utilizes a conference call technique that preserves a victim's physical safety.³⁸ Although a victim's physical safety is secure, the knowledge of the abuser's presence may compromise the balance of power. Therefore, an alternative form of the shuttle method through telephonic communications will allow the balance of power to remain in tact. This method allows each party to mediate on different telephone lines while the mediator shuttles between the parties.

Victims who require a secure location for mediation may consider sites found within most communities. Most communities maintain facilities that provide secure areas and individual rooms, thereby allowing the use of shuttle mediation. One such location within most communities is a courthouse. Courthouses contain a variety of conference rooms that may be on different floors and provide security for each individual involved in the process. This is particularly true in courthouses designated for family law cases. Courthouse security normally includes protection by county law enforcement and metal detectors. Few community facilities provide this type of security on a regular basis, thereby making courthouses an ideal location for mediations. In addition to the general safety of courthouses, experience dictates that most abusers inflict pain on their victim in private and out of site of authority figures.

Traditionally, mediators announce ground rules in the beginning of a mediation session. Providing appropriate ground rules to parties in-

33. See Vestal, *supra* note 1.

34. *Id.*

35. See *id.*

36. *Id.*

37. *Id.*

38. *Id.*

volved in domestic violence is an important component to a safe and balanced mediation. Ground rules may be used to restrict discussion topics and to preclude topics the batterers may want to negotiate, such as dropping the abuse charges or modification of protective orders.³⁹

This article does not claim to provide answers for all domestic-violence cases referred to mediation. The State of Texas recognizes that some cases may not be suitable for mediation; therefore, a party may at any time prior to the final mediation order file a written objection on the basis of domestic violence.⁴⁰ Once an objection is filed, “the suit may not be referred to mediation unless . . . a hearing is held and the court finds that a preponderance of the evidence does not support the objection.”⁴¹ Courts denying the objection “shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection.”⁴² Although the courts are required to order appropriate measures for victims, the legislature failed to define “appropriate measures.” However, the order must prohibit the parties from having “face-to-face contact” and require “that the parties be placed in separate rooms during mediation.”⁴³

Texas supports victims of domestic violence as evidenced by the above-mentioned statute. In fact, Texas legislatures further guard victims by maintaining statutory protections for victims who lacked the power or ability to make decisions in the best interest of themselves and their children. Specifically, Texas Family Code section 153.0071 provides that a court may decline to enter a judgment on a mediated settlement agreement if the court finds that circumstances impaired the victim’s ability to make decisions and the agreement is not in the child’s best interest.⁴⁴

The mental health of children caught in the middle of a high-conflict divorce or custody case may depend on the parents’ actions today. Mediation is too important to the short- and long-term relationship of the parties but even more so to the parent-child relationship. In order to mediate even the most contested cases, we must set a system in place. First, mediators or neutral third parties should screen all family law cases for domestic violence. If the parties are identified as victims and/or abusers, mediators should divide the parties further according to the severity of the abuse and control. If neither abuse nor control is an issue, the parties should mediate. If certain traits, as described herein, exist, the parties should mediate but with very specific ground rules. However, in a case of extreme abuse, certain precautions must be taken. Mediators should always consider

39. *Id.*

40. TEX. FAM. CODE ANN. § 6.602(d) (Vernon 2006).

41. *Id.*

42. *Id.*

43. *Id.*

44. TEX. FAM. CODE ANN. § 153.007 (e-1) (Vernon 2008).

safety issues and make changes accordingly. Parties must understand the consequences of their actions as they relate to finalization of all relationships, including the future with their children. Realization of these consequences may be achieved through education and counseling. Once the parties are prepared for mediation, alternative methods of mediation should be considered. As legal professionals, we owe our clients and their children a chance to improve their present and future relationships.