

## **Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence**

by  
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### **I. Introduction**

One of the family law practitioner's most important roles is that of protector. Clients come to us emotionally shaken—facing the breakdown of their families and uncertain futures. The domestic relations lawyer is thus tasked with guiding her clients through the maze of the family court systems while shielding them from harm. Unlike in most areas of law, family law clients trust their attorneys to protect not only their rights, but also their financial solvency, their children, and in some cases, even their physical safety.

To this end, many states now require parties in family disputes to attempt at least one mediation session before proceeding to trial. The policy behind mandatory mediation deserves praise; studies demonstrate that mediation often does an excellent job of alleviating the angst of family litigation. Indeed, mediation has proven to be a powerful tool for lawyers to protect their clients from financial strains and emotional trauma. As mediators assist divorcing parties to communicate and act civilly with one another, the process empowers the parties by allowing them to determine the outcome of their dispute.

However, in some cases involving intimate partner violence, mediation would be at best destructive and at worst deadly. If a state allows survivors of domestic violence to be excused from mandatory mediation, an attorney must make a critical judgment

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about whether mediation would benefit his client or put her<sup>1</sup> in further danger. This question depends on the type of violence and must be determined on a case-by-case basis. In making this judgment, it is vital that family law practitioners carefully screen each client for signs of domestic violence and come to a keen understanding of the dynamics at play in each client's relationship. Only then can they assess the propriety of mediation in a particular case.

Part II of this Comment examines the policy behind mandatory mediation laws and demonstrates the efficacy of mediation in resolving most family disputes. Part III explores the varying approaches taken by the states in exempting domestic violence survivors from mandatory mediation. Part IV discusses the importance of screening clients for signs of intimate partner violence throughout the representation and provides tips regarding how to craft effective screens. Finally, Part V describes the typologies of domestic violence, how the dynamics of power and control can interfere with the mediation process, and the prospects of using technology to alleviate these concerns in the future.

## **II. Policies Supporting Mandatory Mediation in Most Family Law Disputes**

Alternative dispute resolution is the future of divorce. Throughout the nation, legislatures and courts subscribe to the policy favoring out-of-court resolution of family law matters. Contested dissolutions of marriage and child custody battles are now routinely referred to mediation by court order and numerous states have enacted statutes or court rules mandating mediation in child custody cases.<sup>2</sup> A few states even require that mediation be attempted in every type of domestic relations mat-

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<sup>1</sup> While acknowledging that both women and men can be survivors of domestic violence, the author has chosen to use the feminine pronoun for the survivor and the masculine pronoun for the perpetrator for clarity and consistency.

<sup>2</sup> CAL. FAM. CODE § 3170(a) (West 2013); KAN. R. 21 Dist 2.04; ME. REV. STAT. ANN. tit. 19-A, § 251 (West 2016); MO. CT. R. 68.16(A)(13th Cir.); NEV. ST 2 DIST. CT. R. 53(a); OR. R. Multnomah R. 12.015; S.D. CODIFIED LAWS § 24-4-56 (2015).

ter.<sup>3</sup> These rules demonstrate a substantial likelihood that family mediation will eventually become mandatory nationwide. Therefore, the domestic relations practitioner must be aware of the advantages and disadvantages of mediating family law disputes, as well as the exceptions to mandatory mediation put in place to protect vulnerable clients.

Compelled mediation for child custody has its virtues and drawbacks, but mediated settlements are often more constructive than court-imposed arrangements. First, “the law, so far as specific individual relationships are concerned, is a relatively crude instrument.”<sup>4</sup> Every family is unique; it is difficult to analyze personal relationships and parenting models using black letter law. For example, “the vague ‘best interests’ legal standard gives little guidance to judges who are expected to label one parent as better than the other.”<sup>5</sup> Court formalities and rules of evidence also make it difficult for judges to get a complete picture of the family before rendering a decision. Further, efficiency is central to the mediation process.<sup>6</sup> Assuming that a settlement or partial settlement can be reached, mediation is much less costly and time consuming than litigation. Some estimate that parties save approximately 9.6 million dollars in court costs and 88.6 million dollars in legal fees by staying out of court.<sup>7</sup> This is because mediation can be accomplished with no need for a lengthy discovery process, which is often the most costly and time-consuming part of divorce litigation.

The goal of mediation is to solve problems by tailoring solutions to the needs of the parties and the children.<sup>8</sup> Numerous divorce attorneys contend that when parties go to battle in court

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<sup>3</sup> UTAH CODE ANN. § 30-3-39(2) (West 2005); VA. CODE ANN. § 20-124.44 (West 2015).

<sup>4</sup> JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 49 (1973).

<sup>5</sup> Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 168 (2003).

<sup>6</sup> Robert Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 23 (2005).

<sup>7</sup> Yelena Ayrapetova, *HB 004: Mandatory Divorce Mediation Program Passed in Utah*, 7 J.L. & FAM. STUD. 417, 418-19 (2005).

<sup>8</sup> SARAH R. COLE ET AL., 1 *MEDIATION: LAW, POLICY AND PRACTICE* § 5.3 (Nov. 2015).

for custody of their children, their focus on the fight does more harm than good.<sup>9</sup> The adversarial system further denigrates the relationship between parties, makes it more difficult for parents to co-parent, and shifts the focus toward personal vindication rather than the child's best interest.<sup>10</sup> However, "[t]he focus on the needs of the children is a hallmark of the mediation process."<sup>11</sup> While the adversary system can promote conflict by driving a wedge between feuding parents, parties in mediation collaborate to brainstorm workable solutions. In this way, mediation can be much more constructive. "Everyone wants to participate in decisions that affect them."<sup>12</sup> The litigation track requires a third party to make a determination based on an incomplete picture of the family dynamics; whereas, parties can bring anything and everything to the table at mediation.<sup>13</sup> They are free to discuss all issues, legal and extra-legal, while working together to resolve their differences. The mandatory mediation rules are rooted in the policy of self-determination—allowing the parties to control the outcomes of their cases without court intervention.<sup>14</sup> People feel empowered when they are able to make their own decisions, solve their own problems, and plan their futures as they see fit.<sup>15</sup> Further, because mediation is a private, confidential process, parties are likely to be more open and honest than they might be in a public courtroom.

Mediation teaches divorcing parents new ways to communicate with one another and work together as a united front regarding their children. For this reason, studies show that parties are more satisfied with the mediation process as opposed to the

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<sup>9</sup> Thomas D. Vu, Note, *Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with Their Clients*, 47 FAM. CT. REV. 586, 587 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> Ver Steegh, *supra* note 5, at 178.

<sup>12</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING WITHOUT GIVING IN* xii (Bruce Patten ed., 2d ed. 1991).

<sup>13</sup> Pauline Tesler, *Collaboration and Keeping Disputes out of Court*, <https://www.youtube.com/watch?v=NPLxdjhz0bc>.

<sup>14</sup> Christy L. Hendricks, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 LOUISVILLE J. FAM. L. 491, 495 (1994).

<sup>15</sup> Dane A. Gaschen, *Mandatory Custody Mediation: The Debate over Its Usefulness Continues*, 10 OHIO ST. J. ON DISPUTE RESOLUTION 469, 482 (1995).

litigation track,<sup>16</sup> and are thus more likely to adhere to a parenting plan/custody arrangement that they created.<sup>17</sup> When asked what they liked about mediation, parties stated that they learned to cooperate as co-parents, that their emotions were appreciated, and that the atmosphere was not confrontational.<sup>18</sup> Rules of procedure, limited resources, and time constraints make the litigation process unable to foster education. The atmosphere in court is hostile and the goal is to win, rather than to work together.<sup>19</sup> Furthermore, in the wake of bitter warfare, the parties still must deal with one another as parents for years to come. Instead of fostering conflict, mediation helps divorcing parents to share their children in a business-like manner, which requires dealing with conflict constructively. “A good working relationship is one that can cope with differences.”<sup>20</sup>

Because mediation proves to be constructive and successful in resolving child custody disputes, the policy behind making it mandatory is compelling. However, practitioners should not be too quick to view mediation as the ultimate panacea. For some parties, the prospect of mutual cooperation is futile, and for others, being in the same place together could be downright dangerous. This Comment focuses on the latter set of circumstances, because those are the only cases that should sometimes not be mediated. Even in the most high-conflict cases, where the parties want vindication and are hell-bent on going to trial, mediation can be educational. These parties may not ultimately settle anything at mediation, but attempting to impart communication and parenting skills to two people who must raise children together is hardly ever a complete waste of time. Child custody mediation is mandatory in many states, and it should be mandatory in all states. However, in cases where domestic violence or abuse in any form is present, mediation must be approached with trepidation, if at all.

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<sup>16</sup> Ver Steegh, *supra* note 5, at 176.

<sup>17</sup> Gaschen, *supra* note 15, at 487.

<sup>18</sup> Emery, et al., *supra* note 6, at 28.

<sup>19</sup> *Id.*

<sup>20</sup> FISHER & URY, *supra* note 12, at 157.

### III. State Law Variations Regarding Mediation and Domestic Violence

To protect clients from being harmed by the alternative dispute resolution process, practitioners must know whether their jurisdictions allow domestic violence survivors to be exempted from mandatory mediation. Further, they must understand the procedures and evidentiary standards required for a client to take advantage of the exemption. Some jurisdictions directly exempt survivors from their mandatory mediation rules through statute, court rule, or common law. Among these states, some have in place an outright ban on mediating cases involving domestic violence. Others allow the survivor to decide whether she wants to mediate or grant the courts discretion to order mediation on a case-by-case basis. Still others place this discretion in the hands of the mediator to screen cases for signs of family violence; a few have no specific domestic violence exemptions. Although they vary greatly, these recent rules demonstrate that lawmakers have begun to realize that mandatory mediation is sometimes destructive in cases involving family violence. Each of these rules are based on unique policy justifications and reflect the differing views regarding domestic violence<sup>21</sup> and its impact on a survivor's ability to effectively negotiate.

The outright bans and "victim's choice" policies<sup>22</sup> are rooted in the protective function of family law. Proponents argue that domestic relations laws should protect vulnerable parties from harm and undue influence. The concern about physical safety could not be more real in domestic violence cases. Nearly one-third of all female homicides are perpetrated by current or former intimate partners, adding up to nearly two thousand domestic violence deaths per year in the United States.<sup>23</sup> Further, because the lethality rate skyrockets when the survivor attempts to leave the relationship,<sup>24</sup> there is a legitimate concern that putting the survivor in the same room or building as her abuser could easily put her safety in jeopardy. Some commentators fur-

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<sup>21</sup> Ver Steegh, *supra* note 5, at 152.

<sup>22</sup> *Id.* at 192.

<sup>23</sup> LUNDY BANCROFT, *WHY DOES HE DO THAT?: INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN* 7 (2002).

<sup>24</sup> *Id.* at 212-13.

ther argue that confidential mediation hinders the policy of holding an abuser accountable for his actions.<sup>25</sup> They claim that because mediations are confidential, this keeps abuse hidden from the public and may immunize abusers from criminal prosecution.<sup>26</sup>

In many cases, domestic violence involves exerting power and control over a partner,<sup>27</sup> a dynamic inimical to constructive mediation. To mediate effectively, both parties must be able to negotiate at arms' length and stand up for their interests. This is a difficult task for survivors. Even if the survivor is not totally dominated by the perpetrator, abuse in any form is usually a traumatic experience; it makes the survivor fear the perpetrator, which clouds her judgment regarding her rights in the relationship. Survivors often suffer from mental health disorders resulting from the abuse. Particularly prevalent is post-traumatic stress disorder "with accompanying flashbacks, anxiety, and depression."<sup>28</sup> An abuser uses intimidation and threats to obliterate the survivor's self-esteem, conditioning her to believe that she cannot function without him and that she is destitute of any independent self-worth.<sup>29</sup> These survivors often fear their abusers to such a degree that they will accept any agreement, even one that is inimical to their best interest or the interests of their children to avoid retaliation. All they want is for the abuse to stop, and they will go to any length to simply resolve conflict.<sup>30</sup> Lundy Bancroft, a psychologist specializing in domestic violence notes that "lurking beneath the surface of most women's experience of abuse is fear: fear of what he will do if you stand up to him; fear of how he will react; . . . fear of how he may retaliate if you try to leave."<sup>31</sup> This exemplifies how power imbalances between the parties can frustrate the aims of mediation.

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<sup>25</sup> Ver Steegh, *supra* note 5, at 181.

<sup>26</sup> *Id.* at 180.

<sup>27</sup> *Id.* at 123-24.

<sup>28</sup> *Id.* at 153.

<sup>29</sup> Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 533, 571 (1995).

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

<sup>31</sup> BANCROFT, *supra* note 23, at 291.

### A. *Outright Bans on Mediation when Domestic Violence Is Present*

Most outright ban statutes specifically state that “the court shall not order” mediation when domestic violence is present. Some provide clearer guidance than others in terms of their practical applications. The North Dakota Supreme Court Rule exemplifies the clearest type of rule: “The court may not order mediation if the custody, support, or visitation *issue involves or may involve physical or sexual abuse of any party or the child of any party to the proceeding.*”<sup>32</sup> Under this rule, any indication of physical or sexual abuse would trigger the exemption. Similarly, the Colorado legislature adopted a specific statewide prohibition statute on court-ordered mediation in cases involving any claims of domestic violence. However, it goes further than the North Dakota rule in that it exempts emotional abuse as well as physical violence. “The court shall not refer the case to mediation services . . . where one of the parties *claims that it has been the victim of physical or psychological abuse by the other party.*”<sup>33</sup> In these jurisdictions, it can be inferred from the statutes that all a survivor must do is make a claim of a certain type of abuse in a pleading, in an affidavit, or in open court to be excused from mandatory mediation.

The most comprehensive ban on mandatory mediation in cases involving domestic violence was promulgated by the Montana state legislature in 1993; in 2011, it was strictly construed by the courts to disallow mediation where there is any “reason to suspect” emotional or physical abuse.<sup>34</sup> Before the *Hendershott v. Westphal* opinion was issued in 2011, the Montana statute read: “The Court may not *authorize* or permit continuation of mediated negotiations *if the court has reason to suspect* that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.”<sup>35</sup> In *Hendershott*, the wife appealed from the parenting plan executed as part of the

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<sup>32</sup> N.D. CENT. CODE § 14-09.1-02, N.D. 14-09.1-02 (emphasis added).

<sup>33</sup> COLO. REV. STAT. § 13-22-311 (1992) (emphasis added).

<sup>34</sup> Eduardo R.C. Capulong & Karen Alley, *The Hendershott Ruling: When Mediation Runs into Domestic Violence*, 36 MONT. LAW. 9 (July 2011).

<sup>35</sup> *Hendershott v. Westphal*, 253 P.3d 806, 810 (Mont. 2011) (emphasis added).

parties' judgment of dissolution.<sup>36</sup> She contended that the mandatory mediation provision in the parenting plan was improper because the evidence at trial should have given the court "reason to suspect" physical or emotional abuse.<sup>37</sup> This evidence included the wife's affidavit alleging increased domestic violence and the testimony of two psychologists that the wife exhibited many characteristics of abuse victims.<sup>38</sup> The Supreme Court of Montana reversed; it ruled that the legislature intended "an absolute bar" to mediation when there is "reason to suspect" domestic violence because it is difficult to facilitate negotiations when one party is intimidated by the other.<sup>39</sup> Unlike the North Dakota and Colorado rules, which provide that the court "shall not order," the Montana rule, thus construed, arguably mandated that the courts could neither require mediation nor even allow survivors to attempt mediation on their own volition.<sup>40</sup>

#### B. "Victim's Choice" Rules

Opponents of the outright bans contend that efforts to ensure the survivor's safety at the expense of her ability to make her own decisions, although well-intentioned, only serve to further disempower abused women.<sup>41</sup> In sum, they are paternalistic. Nancy Ver Steegh, a lawyer and law professor who has represented several abuse survivors in mediation,<sup>42</sup> remarks that "Women often find mediation to be empowering . . . [P]articipation in mediation enhances their ability to stand up for themselves, assume responsibility for themselves, solve problems, and express their views."<sup>43</sup> Perhaps the most compelling justification of the "victim's choice" rules is that women's own predictions regarding future violence by their abusive partner are far more accurate than assessments based on any other factor.<sup>44</sup> Adhering to this

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<sup>36</sup> *Id.* at 807.

<sup>37</sup> *Id.* at 810.

<sup>38</sup> Capulong & Alley, *supra* note 34, at 9.

<sup>39</sup> *Hendershott*, 253 P.3d at 811.

<sup>40</sup> Capulong & Alley, *supra* note 34, at 10.

<sup>41</sup> Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 35 (2009).

<sup>42</sup> Ver Steegh, *supra* note 5, at 146 n. a1.

<sup>43</sup> *Id.* at 183.

<sup>44</sup> BANCROFT, *supra* note 23, at 225.

principle, many states and localities have enacted “victim’s choice” rules. In these jurisdictions, the survivor is allowed to mediate if she so desires, but can opt-out of a face-to-face conference with her batterer.<sup>45</sup>

Alabama enacted a prime example of a “victim’s choice” statute. The rule provides: “In a proceeding concerning the custody or visitation of a child, *if an order of protection is in effect or if the court finds that domestic violence has occurred*, the court shall not order mediation.”<sup>46</sup> However, it goes on to say: “Where evidence of domestic violence exists mediation shall occur only if: [m]ediation is *requested by the victim* of the alleged domestic or family violence . . . [and] *the victim is permitted to have in attendance at mediation a supporting person* of his or her choice.”<sup>47</sup> This rule establishes safeguards to protect the abuse survivor, while allowing the survivor to decide for herself whether to opt out or attempt mediation. Delaware promulgated a similar rule:

Family Court mediation conferences shall be prohibited in any child custody . . . proceeding in which 1 of the parties has been *found by a court*, whether in that proceeding or in some other proceeding, to have committed an *act of domestic violence against the other party* or if either party has been ordered to stay away or have no contact with the other party, unless a victim of domestic violence who is *represented by counsel requests such mediation*.<sup>48</sup>

The “victim’s choice” rules seem to place a higher burden on survivors to demonstrate that they are victims of domestic abuse in addition to the requirement that they request the mediation. As shown above, Alabama and Delaware require that the court make a finding of abuse, by reference to a protective order or other judgment, as contrasted by the outright ban jurisdictions, which only require a claim by the survivor or reason to suspect a history of abuse. The Kentucky law requires a further finding that “the victim’s request is voluntary and not the result of coercion, and that mediation is a realistic and viable alternative to . . . the issuance of an order sought by the victim.”<sup>49</sup> In these states, a survivor likely must gather evidence and obtain a judgment in

<sup>45</sup> Ver Steegh, *supra* note 5, at 192.

<sup>46</sup> ALA. CODE 1975 § 6-6-20(e) (1996) (emphasis added).

<sup>47</sup> *Id.* § 6-6-20(f)(1-3) (emphasis added).

<sup>48</sup> DEL. CODE ANN. tit. 13 § 711A (2014) (emphasis added).

<sup>49</sup> KY. REV. STAT. ANN. § 403.036 (1996).

the form of an order of protection or other order that there has been a history of abuse to take advantage of the exemption to mandatory mediation.<sup>50</sup>

### C. Case-by-Case Basis Rules

Since domestic violence can be used to describe such a broad array of behaviors, many states have found that a universal rule regarding mediation of abuse cases is inappropriate. Current research shows that although Lenore Walker's "learned helplessness" theory is apt in some abuse cases, it is too narrow a construction to be used as a general rule.<sup>51</sup> Not all abuse survivors are "rendered . . . passive shadow[s] of [their] former sel[ves], unable to bargain in any meaningful way."<sup>52</sup> Each case of family violence falls somewhere along a continuum of severity, ranging from regular, episodic battering to occasional angry outbursts.<sup>53</sup> The rationale behind assessing the propriety of mediation on a case-by-case basis is the idea that "[t]here is no such thing as a 'typical' victim of domestic violence or a 'typical' response."<sup>54</sup> However, much like the outright bans, these statutes take the power away from the survivor to decide whether she should mediate or not.

In practical application, case-by-case basis rules generally provide some type of catch-all exemption to a mandatory mediation statute and then leave the determination as to whether mediation is appropriate in a particular case to a neutral third party. Utah's exemption provides a classic example. Although the Utah legislature mandates mediation in all domestic relations cases, the statute provides: "The director of dispute resolution programs for the courts, the court, or the mediator may excuse either party from the requirement to mediate *for good cause*."<sup>55</sup> This rule seems to acknowledge that although mediation should

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<sup>50</sup> Interview with Diana L. Skaggs, Partner, Diana L. Skaggs + Partners, PLLC, Past President of the Kentucky Chapter of American Academy of Matrimonial Lawyers (Feb. 1, 2016).

<sup>51</sup> Ver Steegh, *supra* note 5, at 153.

<sup>52</sup> *Id.* at 159.

<sup>53</sup> *Id.*

<sup>54</sup> Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback*, 8 CARDOZO J. CONFLICT RESOL. 253, 260 (2007).

<sup>55</sup> UTAH CODE ANN. § 30-3-39(5) (West 2005) (emphasis added).

be attempted in most family disputes, there are some disputes that should not be mediated. It delegates the assessment of which cases should be exempted from mediation to either the trial court or the mediator/mediation program.

Some states delegate the decision-making authority to a specific third party—either to the mediator or to the trial court. Some Missouri circuits, for example, require that mediation be attempted in all child custody cases.<sup>56</sup> However, various localities in Missouri have authorized mediators to screen for domestic violence and terminate the mediation if it appears necessary to protect the survivor. For example, pursuant to court rule 68.16(F), the Thirteenth Circuit Court of Missouri vests the discretion in the mediator. It reads:

Some cases may be inappropriate for mediation. *The mediator* shall complete a thorough screening for domestic violence. If the case is deemed inappropriate for mediation due to domestic violence, or for any other reason *determined by the mediator*, the mediator shall immediately file the Notice of Mandatory Mediation Compliance Form with the Court.<sup>57</sup>

In jurisdictions where mediators have the discretion to terminate the mediation due to power imbalances, special rules are often enacted regarding the structure of the mediation.<sup>58</sup> California, for example, does not provide an exemption for cases with a history of domestic violence.<sup>59</sup> However, California statutes require that mediators perform shuttle-mediation—meet with each party in separate rooms and at separate times when there is a history of family violence.<sup>60</sup> Moreover, California mandates that family mediators complete a training program in domestic violence, which must cover certain topics, including “the social and family dynamics of domestic violence,” “the legal rights of and remedies available to victims,” and safety planning.<sup>61</sup> Fortunately, most states now require that family mediators complete ongoing training about the dynamics of intimate partner violence

<sup>56</sup> See, e.g., Mo. Ct. R. 68.16(F)(13th Cir.).

<sup>57</sup> *Id.*

<sup>58</sup> Ver Steegh, *supra* note 5, at 187.

<sup>59</sup> Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 449-40 (2011).

<sup>60</sup> CAL. FAM. CODE § 3181 (2007).

<sup>61</sup> CAL. FAM. CODE § 1816 (2007).

and how to respond to these dynamics in a mediation-like setting.<sup>62</sup>

By contrast, some jurisdictions like the Sixteenth Circuit Court of Missouri place the decision in the hands of the trial court. Rule 68.12 states: “All adult parties to any proceeding governed by this rule in which there is a dispute as to custody and visitation shall participate in a minimum of two (2) hours of mediation, *unless waived by court order* upon a showing of good cause.”<sup>63</sup> Many rules throughout the country allow the court to exempt parties from mediation “*for good cause.*”<sup>64</sup> Although this phrase does not specify family violence, in examining the legislative history of the Utah statute, it appears that “domestic abuse is certainly a strong showing of ‘good cause.’”<sup>65</sup> However, a provision specifically adding domestic violence as an exemption was proposed in that Utah legislative session and failed to pass.<sup>66</sup>

#### IV. Attorneys Must Screen for Intimate Partner Violence

The wide variety of rules regarding family violence and mediation makes it even more imperative for practitioners to screen their clients for signs of abuse. Due to the trend toward mandatory mediation in all domestic cases nationwide, it is likely that if domestic violence is not identified early, a client’s dissolution will land in mediation. Regardless of whether the judge, the mediator, or the survivor gets to decide about the ultimate propriety of mediation, it is the lawyer’s job to bring the issue forward, advise the client about the mediation process, and make a judgment as to whether a particular client’s case should be mediated.

To do this effectively, many important questions must be answered at intake and throughout the representation. First, and most obvious: Is your client a survivor of abuse? If your client is

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<sup>62</sup> Kristine Paronica, *The Implications of Intimate Partner Violence on Ethical Mediation Practice*, 88 N.D. L. REV. 907, 915 (2012).

<sup>63</sup> Mo. Ct. R. 68.12(3)(16th Cir.) (emphasis added).

<sup>64</sup> See, e.g., ARK. CODE ANN. § 9-12-322(d) (West 1999); NEB. REV. STAT. ANN. § 42-364(1)(a) (West 2013); UTAH CODE ANN. § 30-3-39(5) (West 2005).

<sup>65</sup> Ayrapetova, *supra* note 7, at 424.

<sup>66</sup> *Id.* at 426.

a survivor, would mediation have constructive potential, or would it further perpetuate the abuse? If the law requires the survivor to attempt mediation, what types of safeguards could be implemented in order to protect the client's safety? These questions require a keen understanding of the client's relationship with his/her partner. Some factors to be considered include how often the violence occurs, the seriousness of the violence, and the mental capabilities of the parties.<sup>67</sup> These issues can only be addressed after a thorough and well-devised screening procedure. In some cases, where the survivor fails to see herself as having been abused, it may take time for the practitioner to tease out the underlying dynamics of the relationship.

A person is a perpetrator of domestic violence if he successfully uses words, actions, and gestures to maintain power and control over his partner.<sup>68</sup> This can be accomplished using a variety of tactics which include emotional abuse, isolation, financial abuse, physical assault, and sexual coercion, among other things.<sup>69</sup> The definition of abuse is breathtakingly broad, which in some cases makes the signs difficult to discover for lawyers, psychologists, and often even the survivor herself.

For various reasons, many survivors do not originally self-identify as victims of abuse. They often love their partners, but fear for their lives, and justifiably so. The abusive man is a master manipulator. He convinces his partner that she is to blame for his anger, that she is incompetent at everything she does, and that she is never right. If she has a complaint about how he treats her, he turns the situation around on her. She is always at fault for what bothers him or is upsetting to her.<sup>70</sup> "The assaults that an abuser makes on the woman's self-opinion, his undermining of her progress in life, the wedges he drives between her and other people, the psychological effects left on her when he turns

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<sup>67</sup> BARBARA GLESNER-FINES, *ETHICAL ISSUES IN FAMILY REPRESENTATION* 231 (2010) (quoting Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 *FAM. L.Q.* 659, 665-66 (2008)).

<sup>68</sup> Ver Steegh, *supra* note 5, at 151.

<sup>69</sup> MICHAEL P. JOHNSON, *A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE* 8 (2008).

<sup>70</sup> BANCROFT, *supra* note 23, at 144-45.

scary—all can combine to make her need him.”<sup>71</sup> After being constantly put down, intimidated, and isolated, many survivors believe they need their abuser to survive. This is especially true if the woman has children and no control over the family’s finances.<sup>72</sup> Many women report feeling confused about their partner’s behavior. Hardly any survivors experience the dark side of their abuser in the early part of the relationship. They fell in love with men who were kind and charming. There may still be times when the abuser shows that side of himself. Even after he has abused her for years, an abuser may show deep remorse and apologize after every physical attack.<sup>73</sup> Thus, even if the survivor does not feel that she is at fault or somehow deserving of the mistreatment, she may view her partner as a good man that is deeply disturbed—maybe he needs her help to change.<sup>74</sup>

Another reason a survivor might have difficulty sharing the details of her abuse is the ongoing social stigma attached to domestic violence. Everybody has a picture (usually misinformed) of a typical battered woman. In popular culture, she is generally poor, uneducated, and has a submissive or mousey demeanor. This woman is married to a psychopathic monster who beats her constantly. The batterer is brutal and unfeeling all the time and shows no redeeming qualities. He is a poor, uneducated, blue collar man who wears a muscle t-shirt, also known as a “wife beater,” and drinks copious amounts of alcohol.<sup>75</sup> Nobody wants to be viewed with these connotations. For that reason, the survivor may feel embarrassed or see herself as weak for putting up with the degradation she has suffered.<sup>76</sup> She knows all too well that most people upon hearing her story would ponder the perennial question: “Why doesn’t she just leave?” But she also real-

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<sup>71</sup> *Id.* at 220.

<sup>72</sup> JOHNSON, *supra* note 69, at 7-9.

<sup>73</sup> BANCROFT, *supra* note 23, at 220.

<sup>74</sup> Leslie Morgan Steiner, *Why Domestic Violence Victims Don’t Leave*, <https://www.youtube.com/watch?v=V1yW5IsnSjo>.

<sup>75</sup> For some examples of these stereotypical images in popular culture, see *The Burning Bed* (movie), *Sleeping with the Enemy* (movie), *Enough* (movie), *The Gift* (movie), *The Godfather Part I* (movie), *Little Shop of Horrors* (movie/Broadway musical), and “Goodbye Earl” (Song and Music Video by the Dixie Chicks).

<sup>76</sup> BANCROFT, *supra* note 23, at xxii.

izes how easy that is to say from an outsider's perspective, and how hard it is to actually accomplish.

Despite the popular misconception, intimate partner violence occurs in families of every race, ethnicity, and income group.<sup>77</sup> Survivors of higher-income households suffer a great deal from these stereotypes. Lundy Bancroft, who has conducted group counselling sessions for abusers across more than two decades notes that his clients have included businesspeople, many doctors and attorneys, as well as college professors, radio broadcasters, religious ministers, and professional athletes.<sup>78</sup> Leslie Morgan Steiner, a prominent survivor and spokeswoman for domestic violence awareness remarked, "I don't look like a typical domestic violence survivor. I have a B.A. in English from Harvard College and an M.B.A. in marketing from Wharton Business School. I spent most of my career working for Fortune 500 companies . . . I would have told you myself that I was the last person on Earth who would stay with a man who beats me."<sup>79</sup> Survivors from higher-income communities are often more difficult to identify in initial consultations, because they are less likely to come forward about the abuse they are experiencing. Educated and upscale women often feel shame about being deprived of access to money; they are more likely to see that they are being treated differently from other women in their communities.<sup>80</sup> Furthermore, affluent women rarely escape to shelters or call the police when they become afraid of their partners,<sup>81</sup> and they are much more likely to use divorce as a means to end the abuse.<sup>82</sup> Therefore, the first professional these women may seek out to help them escape an abusive situation likely will be an attorney. Attorneys who represent higher-income clients must take care to avoid subscribing to popular myths about domestic violence; they too have a duty to thoroughly screen each client for signs of abuse.<sup>83</sup>

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<sup>77</sup> Steiner, *supra* note 74.

<sup>78</sup> BANCROFT, *supra* note 23, at 69.

<sup>79</sup> Steiner, *supra* note 74.

<sup>80</sup> Kara Bellew, *Silently Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 WOMEN'S RTS. L. REP. 39, 43 (2005).

<sup>81</sup> *Id.* at 40-41.

<sup>82</sup> *Id.* at 40.

<sup>83</sup> *Id.*

### A. Screening and Counselling Techniques

Since survivors of domestic violence are likely to feel guilt, shame, and confusion when they first reach out for help, they will often minimize and downplay the nature of their abuse. Their definition of abuse may not comport with the legal definition in the jurisdiction,<sup>84</sup> and they may have been threatened with punishment if they tell anyone about what happens in the relationship.<sup>85</sup> Perhaps, they are like Leslie Morgan Steiner, who did not even know she was being abused. “Even though he held those loaded guns to my head, pushed me down stairs, threatened to kill our dog, pulled the key out of the car ignition while I drove down the highway, and poured coffee grinds on my head as I dressed for a job interview, I never once thought of myself as a battered wife.”<sup>86</sup> Often, survivors meet with an attorney not to get an immediate protective order, start the divorce process, or press charges against their partner. Even if they know these options exist, they may simply be curious regarding what rights they would have if they decided to leave or what the process entails. Perhaps, they just want a listening ear.<sup>87</sup> If an attorney simply asks, “Have you experienced domestic violence?” or “Do you feel that you are a victim of abuse?” many survivors will simply say “no.”

Screening clients for domestic violence cannot be effectively accomplished by just asking the question and taking the answer at face value. The first step in the process should be to encourage the client to speak, and actively listen to her. In the initial interview, pay special attention not only to the facts and circumstances, but also to her body language, vocal tones, facial expressions, and emotions.<sup>88</sup> If the client denies abuse, the attorney should not press the client by asking checklist questions (i.e. Has your partner ever threatened you, hit you, choked you, etc.?), but should ask open-ended information-gathering questions to ascertain the dynamics of the relationship.<sup>89</sup> You may

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<sup>84</sup> Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges*, 39 FAM. L.Q. 53, 58 (2005).

<sup>85</sup> Bellew, *supra* note 80, at 50.

<sup>86</sup> Steiner, *supra* note 74.

<sup>87</sup> GLESNER-FINES, *supra* note 67, at 56.

<sup>88</sup> *Id.* at 55-56.

<sup>89</sup> *Id.* at 56.

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start off the interview by saying simply, “Tell me about your family.” Later on in the interview, some good examples of screening questions may include, “How do you and your partner usually make decisions about important matters such as finances or your children?” or “If you and your husband disagree with each other, how do you handle the disagreement?”<sup>90</sup> Let her talk. By allowing her to tell her story, the attorney gets a more complete picture of the situation and the client’s viewpoint. Further, it helps to build rapport—clients feel more comfortable and open up more readily when the consultation feels conversational, as opposed to inquisitional.<sup>91</sup>

Providing verbal feedback is critical to active listening.<sup>92</sup> When the client finishes answering a question, it may be helpful to paraphrase your understanding of the information she has relayed and check your perception of her emotions. For example, “So what I’m hearing you say is that you feel your husband does not take your views into consideration when making decisions about the children.” Or “I’m sensing that your partner’s angry outbursts are frightening to you.” Then allow her to confirm or deny your understanding.<sup>93</sup> Remember that in family representation, emotions and feelings are just as important if not more so to a client than are the facts of her case. Thus, the ability to make a client feel comfortable and understood is one of the attorney’s most valuable skills.

Sometimes, topics routinely discussed during an intake interview can be used to screen for abuse. As a practical matter, each time a lawyer consults with a potential client, he should first assure her that anything she discusses in his office will be kept confidential. Not only is confidentiality an attorney’s highly regarded ethical duty, but it also provides one way to screen for domestic violence. First, it makes the client feel more comfortable sharing important details about her relationship. Second, her concerns about confidentiality may indicate an underlying fear that her partner will find out about the meeting. Inquire about whether it would be appropriate to send mail to the client’s home or leave

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<sup>90</sup> William W. Downes, *Confidential Intake Survey* (copy on file with author).

<sup>91</sup> GLESNER-FINES, *supra* note 67, at 56.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

messages on her phone. If she hesitates or looks frightened, that could indicate a dynamic of fear in the relationship.

When a survivor musters the courage to tell an attorney about the abuse she is experiencing, the worst thing the lawyer can do is ask her “why don’t you leave?” This happens all too often, and demonstrates that society is woefully uninformed about the dynamics and realities surrounding domestic violence. Although this question may seem reasonable, it sends the message to the survivor that the abuse is her fault.<sup>94</sup> Attorneys should take care to avoid sounding judgmental.<sup>95</sup> They should reinforce the point that a survivor is never to blame for her abuse, and that no one deserves to be mistreated. If a woman believes that her batterer will likely find her and kill her if she leaves the relationship, she may choose not to go through with a divorce. The attorney must support her in that decision.<sup>96</sup> She might be right. Unfortunately, more than seventy percent of domestic violence murders happen after the victim has ended the relationship.<sup>97</sup> The lawyer certainly should discuss a safety plan with the client and discuss the potential repercussions of staying in the relationship, but the lawyer should neither dictate nor judge her course of action. Experiencing domestic violence is incredibly disempowering; the attorney should strive to empower the survivor by allowing her to drive the representation.

#### B. *Screening as an Ongoing Process*

Emotions and families are incredibly fluid. At an initial consultation, a survivor of intimate partner violence may be frightened or embarrassed; some event in the future may be needed to spur her to be more forthcoming about how she has been mistreated. Often survivors require the intervention of a friend or family member to take action, or if the batterer begins to harm their children, they may realize the need to protect them.<sup>98</sup> In Leslie Morgan Steiner’s case, it took “one final sadistic beating

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<sup>94</sup> Steiner, *supra* note 74.

<sup>95</sup> Mary Kay Kisthardt & Barbara Handschu, *Domestic Violence: Strategies for Advising and Assisting a Client Who May Be a Victim*, 20 *MATRIM. STRATEGIST* 4 (May 2002).

<sup>96</sup> *Id.*

<sup>97</sup> Steiner, *supra* note 74.

<sup>98</sup> Kisthardt & Handschu, *supra* note 95.

to break through [her] denial.”<sup>99</sup> She realized that her life was in grave danger—her husband was going to kill her if she did not find a way out.

The signs of domestic violence could appear at any time during the representation of a client. An emotional abuser who discovers that his partner is thinking about leaving could become physical. “The very fact that the battered spouse has seen an attorney may trigger an abusive episode.”<sup>100</sup> In fact, the survivor may be in such denial that the first time an attorney will notice the power disparity will be when the client and her partner are in the same room together. After the attorney has been retained by a client, he can continue screening during subsequent meetings or phone conversations. Some good questions might be, “Has your partner contacted you since we last spoke?” or “How does your spouse seem to feel about the divorce?” “Have you and the kids been doing okay?” “Is the temporary parenting plan working for the time being?” Even the most comprehensive screens are not accurate one hundred percent of the time.<sup>101</sup> For this reason, family law attorneys must constantly watch for signs of abuse. “Screening for domestic violence is not a one-step process.”<sup>102</sup>

## V. Consideration of Relationship Dynamics in Each Case

Deciding whether mediation is ever appropriate in cases involving domestic violence is complicated by the fact that more than one type of violence can occur between intimate partners.<sup>103</sup> Each case is different—every relationship has its own history and unique dynamic. Although in general, cases of intimate partner violence can be placed in broad categories, the survivor is usually in the best position to assess how dangerous or overreaching her batterer is likely to become in a mediation-like setting.<sup>104</sup> How-

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<sup>99</sup> Steiner, *supra* note 74.

<sup>100</sup> Kisthardt & Handschu, *supra* note 95.

<sup>101</sup> Dafna Lavi, *Till Death Do Us Part?: Online Mediation as an Answer to Divorce Cases Involving Domestic Violence*, 16 N.C. J.L. & TECH. 253, 261 (2015).

<sup>102</sup> Murphy & Rubinson, *supra* note 84, at 65.

<sup>103</sup> JOHNSON, *supra* note 69, at 2.

<sup>104</sup> BANCROFT, *supra* note 23, at 225.

ever, with a thorough understanding of domestic violence and the rules surrounding family mediation in the jurisdiction, attorneys can become well-equipped to advise clients about whether mediation is appropriate in their situations.<sup>105</sup> Although no two cases of domestic violence are alike, typologies can be useful in determining the level of coercion and danger involved, which should be considered when determining whether mediation is appropriate.

#### A. *Situational Couple Violence*

Despite the popular image of “the battered wife” and the brutal wife-beater, the majority of family violence is situational, as opposed to systematic.<sup>106</sup> Research indicates that each year, about one in every six married couples encounter a conflict that drives them to violence.<sup>107</sup> Situational couple violence is as likely to be perpetrated by a woman as by a man, and violence “is not usually central to the relationship.”<sup>108</sup> The outbursts can be serious or even deadly,<sup>109</sup> but they are not aimed at exerting power and control over the other partner. Rather, the violence stems from a particular conflict in the relationship.<sup>110</sup> Usually, the violence is minor and infrequent; however, in some cases, it can be chronic and escalating.<sup>111</sup> About one-quarter of situational couple violence victims experience physical injury necessitating medical attention. Thirty-seven percent of victims present signs of post-traumatic psychological issues.<sup>112</sup> Many couples report only experiencing one of these violent episodes during their relationship, where the perpetrator was remorseful, apologetic, and made good on his/her promise to never attack again.<sup>113</sup>

The types of conflicts that spur couples to situational violence are those issues most often disputed in divorce and custody litigation. Married couples expect to be able to cooperate with

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<sup>105</sup> Murphy & Rubinson, *supra* note 84, at 65-66.

<sup>106</sup> JOHNSON, *supra* note 69, at 60.

<sup>107</sup> *Id.* at 60.

<sup>108</sup> *Id.* at 61.

<sup>109</sup> *Id.* at 69.

<sup>110</sup> *Id.* at 60.

<sup>111</sup> *Id.* at 62.

<sup>112</sup> *Id.* at 69.

<sup>113</sup> *Id.* at 61.

one another regarding their children, money, and division of labor in the relationship;<sup>114</sup> when they reach an impasse regarding these issues, the deadlock can be especially distressing. Differences regarding parenting styles is the number one cause of situational couple violence.<sup>115</sup> However, this issue is also one of the most common in custody fights, and one that mediation can effectively resolve. Another common conflict in situational couple violence is one partner's objection to another's use of alcohol or drugs. Mediation can be effective in reaching an agreement regarding how to deal with substance abuse and children in a divorce.<sup>116</sup> Maybe the using party will agree to go to treatment or the mediator can facilitate an agreement regarding drug testing before custody exchanges.

The common theme in situational couple violence is poor conflict resolution skills.<sup>117</sup> Such violence can result when one partner feels that the other is not listening to her point of view, or if a partner resorts to personal attacks in order to win an argument instead of making counterpoints.<sup>118</sup> Facilitative mediation can be constructive in these cases, since it is designed to teach the parties to put themselves in each other's shoes, listen to one another, and communicate.<sup>119</sup> In cases of situational couple violence, mediation may provide a safe and educational environment for the couple to learn to work with one another in parenting their children. However, mediation should never be attempted if the victim is frightened of the other party or concerned for her safety. It is important to remember that she, having lived with the perpetrator, is in the best position to assess the risk of potential violence.<sup>120</sup>

If mediation is attempted in any case involving intimate partner violence, it must be conducted by a mediator who is well-trained in recognizing the signs and dynamics of domestic abuse. The parties and the mediator should agree to put safeguards in

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<sup>114</sup> *Id.* at 64-65.

<sup>115</sup> *Id.*

<sup>116</sup> Many parenting plans used in mediation address the issue. *See, e.g., American Academy of Matrimonial Lawyers, Model Parenting Plan* which can be accessed at [http://www.familylawfla.org/pdfs/AAML\\_Parenting\\_Plan.pdf](http://www.familylawfla.org/pdfs/AAML_Parenting_Plan.pdf).

<sup>117</sup> JOHNSON, *supra* note 69, at 66.

<sup>118</sup> *Id.*

<sup>119</sup> FISHER & URY, *supra* note 12, at 22-39.

<sup>120</sup> Ver Steegh, *supra* note 5, at 195.

place to ensure the victim's safety, and consider putting each party in a separate room and having the mediator shuttle between.<sup>121</sup> The mediation should terminate immediately if signs of a power disparity arise, if there are any threats, or if the victim becomes fearful of the other party. At that point, the parties should be moved into separate rooms and the mediator should ensure that the victim has a safety plan.<sup>122</sup> The parties should leave at separate times.

### B. *Intimate Terrorism*

While situational couple violence involves isolated, conflict-induced violence, intimate terrorism involves the type of abuse associated with battering—systematic and coercive violence aimed at exerting power and control over the victim. “The term *abuse* is about *power*; it means that a person is taking advantage of a power imbalance to exploit someone else.”<sup>123</sup> This dynamic of an abuser controlling the victim is ongoing and an integral part of the relationship.<sup>124</sup> If the perpetrator uses violence, he uses it as a means to force the victim to submit to his demands. His demands are the laws of the household; she has no right to defy his authority or disagree with him in any way. If she sticks up for herself or makes any demands of him, he feels entitled to punish her through threats, verbal abuse, and violent outbursts.<sup>125</sup> The intimate terrorist usually targets one or more important areas of the victim's life to further his dominion over her.<sup>126</sup> To keep the control, he uses verbal abuse, physical abuse, and sometimes sexual violence.<sup>127</sup>

The methods batterers use to control their partners are as confusing as they are frightening. Survivors often report frustration about the bipolar nature of their partner's behavior. The tactics abusers use to control their partners are numerous and vary greatly. He may isolate her by dictating where she goes, what she

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<sup>121</sup> *Id.* at 196.

<sup>122</sup> *Id.* at 200-601.

<sup>123</sup> BANCROFT, *supra* note 23, at 123.

<sup>124</sup> JOHNSON, *supra* note 69, at 6.

<sup>125</sup> BANCROFT, *supra* note 23, at 52.

<sup>126</sup> JOHNSON, *supra* note 69, at 7.

<sup>127</sup> *Id.* at 6.

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does, who her friends are, and what she wears.<sup>128</sup> In some cases, he may even move the family to a small, rural area to literally isolate her from any family or friends she may have. This way, he becomes her only source of information or support—by reminding her of how helpless, incompetent, worthless, or lazy he thinks she is, he may convince her that she is incapable of living without him.<sup>129</sup> When she dares to speak her mind or fails to live up to his expectations, he may threaten to harm or even kill her. Maybe he will punch a hole in the wall or kick the dog to show her what could happen if she does it again. If there are children, many abusers will constantly undermine their partners' parenting decisions or somehow turn the children against her. She will have no control over money. If she works, he will demand that she turn her earnings over to him. If she needs to go to the grocery store, he will give her an allowance and make her account for every penny. If he physically harms her, he will deny it and turn the situation back on her—she is the abusive one, not him. If she wasn't such a bad wife and mother, he would not have to keep her in line. It's her fault. She knows how to push his buttons. And of course, she's exaggerating—it never happened—she's crazy.<sup>130</sup>

However, despite his frequent and insidious control tactics, the intimate terrorist is usually not abusive all the time. In fact, he can be extremely kind and charming. Most abusive relationships begin happily—both partners truly believe that they have found their perfect match, and it can take months or years for the abuser's initial kindness to wane into selfishness and entitlement.<sup>131</sup> Once the abuse begins, it often becomes cyclical, yet hard to predict. "Life with an abuser can be a dizzying wave of exciting good times and painful periods of physical or sexual assault."<sup>132</sup> After an abusive episode, batterers are known to apologize profusely, bring gifts home, and discuss changing their ways. Although the batterer may or may not be truly remorseful, this period of happy times rekindles the victim's trust in her partner, reminds her of the kind man she fell in love with, and gives her hope that he may change.

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<sup>128</sup> BANCROFT, *supra* note 23, at 52.

<sup>129</sup> JOHNSON, *supra* note 69, at 8-9.

<sup>130</sup> BANCROFT, *supra* note 23, at 150.

<sup>131</sup> *Id.* at 110-11.

<sup>132</sup> *Id.* at 147.

### C. Abusive Dynamics in Litigation and Mediation

Because the behavior exhibited by intimate terrorists can be so perplexing, many survivors feel as though they are living with Dr. Jekyll and Mr. Hyde.<sup>133</sup> The abusive and controlling Mr. Hyde, however, will rarely show his face during any part of a legal proceeding. The batterer's need for power and control requires him to look good in public, and he is incredibly adept at putting on the charm when it benefits him.<sup>134</sup> In many cases, the survivor is the only one who has ever seen the abuser's frightening behavior; he appears likeable, kind, and friendly to everyone else.<sup>135</sup> Unlike the abuser, the survivor may have depleted self-esteem or mental health concerns due to the trauma of abuse. For this reason, the batterer often fares better than the survivor on psychological tests and custody evaluations.<sup>136</sup> Furthermore, the abuser is almost always better off financially<sup>137</sup> and more willing to discuss and accept a joint custody arrangement.<sup>138</sup> Abused women risk being labeled the "unfriendly parent" in custody disputes, or the parent less likely to facilitate contact with the other parent. The "unfriendly parent" factor and the presumptions in favor of joint custody can be tremendous obstacles for survivors in custody disputes. Here, the legal arena provides yet another opportunity for the batterer to say, "See, she is the unreasonable one."

The abuser knows he can out-litigate the survivor from a financial standpoint, but there is yet another tool he can use to further intimidate and control the survivor—mediation. After months or years of exerting control over his partner, the intimate terrorist has likely devised methods of intimidation that even the most well-trained mediator cannot spot. "The violent husband often is able to control the victim with a word, gesture, or cue known or understood solely by him and the victim as a coded signal or disguised threat of violence."<sup>139</sup> As one survivor remarked, "All he had to do was look at me that way, and I'd

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<sup>133</sup> *Id.* at 3.

<sup>134</sup> Lavi, *supra* note 101, at 265.

<sup>135</sup> BANCROFT, *supra* note 23, at 3.

<sup>136</sup> *Id.* at 263.

<sup>137</sup> Lavi, *supra* note 101, at 271.

<sup>138</sup> BANCROFT, *supra* note 23, at 265-66.

<sup>139</sup> Lavi, *supra* note 101, at 269-70.

jump.”<sup>140</sup> In facilitative mediation, which is preferred in family law cases, the parties often sit in the same room. If the abuser is dangerous, this alone could cause the victim great concern for her safety.<sup>141</sup> In cases where this is a concern, shuttle mediation may be helpful in preventing direct intimidation from the abuser, but if the power disparity between the parties is too great, or the survivor’s self-esteem has sunk to a level where she is unable to stand up for herself, she may be strong-armed to give in to the abuser’s demands.<sup>142</sup> In the vast majority of cases involving intimate terrorism, the risks of mediation are too great in terms of safety as well as overreaching. Despite its virtues, there are some cases for which mediation is simply inappropriate.

#### D. *The Emergence of Online Dispute Resolution*

Although online mediation is a relatively new innovation, conducting mediation remotely could potentially provide a safe and empowering alternative for domestic violence survivors. In 1996, the University of Maryland launched the first online ADR program called e-Mediation.<sup>143</sup> At that time, the parties emailed back and forth with a mediator who facilitated negotiations through written proposals. Today, new technologies have expanded the media for online dispute resolution, and the practice is quickly gaining popularity.<sup>144</sup> Unlike traditional mediation, which involves an in-person meeting, e-Mediation can be conducted from anywhere, even across the country, as long as the mediator and the parties are online at the same time.<sup>145</sup> This could provide the survivor with an empowering forum to assert her point of view and stand up to her abuser without fear for her safety.<sup>146</sup> Moreover, written communication lessens the danger of coercion through non-verbal cues; and because the entire mediation is documented, the abuser will likely be deterred from conveying threats (open or disguised) of violence.<sup>147</sup> The concern

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<sup>140</sup> JOHNSON, *supra* note 69, at 10.

<sup>141</sup> Lavi, *supra* note 101, at 264-65.

<sup>142</sup> Ver Steegh, *supra* note 5, at 185.

<sup>143</sup> Lavi, *supra* note 101, at 278.

<sup>144</sup> *Id.* at 279.

<sup>145</sup> *Id.* at 290-91.

<sup>146</sup> *Id.* at 293.

<sup>147</sup> *Id.* at 285-86.

about overreaching could also be lessened, because the survivor can take all the time she needs to review her partner's written proposals, meet with an attorney, and make her own decisions.

Although the success of e-Mediation in resolving cases with domestic violence has yet to be determined, it certainly shows promising potential. It may provide a fair and educational negotiation process for both abusers and survivors, while allowing them to negotiate at arms-length. In jurisdictions where survivors are not directly exempted from mandatory mediation, it may prove to be less dangerous than traditional mediation in cases of intimate terrorism. However, there may still be some cases where the survivor's fear or limited bargaining power may be too great for any type of mediation to work. Until further research is done, it seems wise to let the survivor decide with the advice of her attorney.

## **VI. Conclusion**

To be effective protectors, family law attorneys must become familiar with the signs and dynamics of domestic violence. There will likely come a day when all domestic relations matters will be referred to mediation, barring certain exceptions, and parties could be harmed if lawyers fail to detect the existence of abuse. Attorneys must thoroughly screen every client throughout the representation and utilize interviewing tools to discover abuse, even when the survivor does not identify as a victim. The practitioner should be familiar with the rule in his/her jurisdiction regarding whether survivors can be exempted from mandatory mediation and the process for taking advantage of the exemption. Since lawyers have direct and confidential contact with their clients on multiple occasions, they are in the best position to understand the unique nuances of a person's relationship, and weigh the advantages and risks of mediation in her case. Developing effective screening skills is vital to help clients stay safe and prevent abusers from using the legal system to perpetuate abuse.

