

# THE IMPLICATIONS OF INTIMATE PARTNER VIOLENCE ON ETHICAL MEDIATION PRACTICE

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## ABSTRACT

Ethical mediation practice requires that the parties to mediation are capable of exercising self-determination, of making decisions for themselves and their dependents, and are provided an opportunity to make decisions without threat of violence or coercion. In most mediation cases, these capacities are exhibited and honored. However, in cases where the parties have engaged in patterns of ongoing intimate partner violence, these capacities may be dimmed for one or both parties, and therefore, must be questioned. The process of questioning requires thoughtful, ethical consideration and response. This article discusses the effects violence can have on the parties' abilities to make decisions and the implications for the ethical practice of mediation. Current best practices in North Dakota and the field at large will be examined, and recommendations will be made for the future of family mediation practices in North Dakota.

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I.	INTRODUCTION	

Ethical mediation practice requires that the parties to mediation are capable of exercising self-determination, of making decisions for themselves and their dependents, and are provided an opportunity to make decisions without threat of violence or coercion. In most mediation cases, these capacities are exhibited and honored. However, in cases where the parties have engaged in patterns of ongoing intimate partner violence, these capacities must be questioned and require thoughtful, ethical responses. This essay discusses the effects violence can have on the parties' capabilities to make decisions and the implications for the ethical practice of mediation. Current best practices in North Dakota and the field at large will be examined, and recommendations will be made for the future of family mediation practices in North Dakota.

## II. MEDIATION

Defining the process of mediation and the phenomena of domestic violence or intimate partner violence<sup>1</sup> provides a critical foundation for understanding the interaction between these two concepts. In dispute resolution processes other than mediation, the implications of domestic violence would differ in significant ways; likewise, in situations involving other types of violence, the effects of that violence on a process can create a considerably divergent impact than that created by domestic violence.<sup>2</sup>

Mediation is a process for resolving conflict that has been used in many cultures and civilizations for over one hundred years, although, mediation in the United States legal system is only decades old.<sup>3</sup> It is defined using differing terminology, yet is distinguished primarily by its ethics. As a

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1. The author will use the terms "domestic" and "intimate partner" violence interchangeably in recognition that violence occurs in domestic, married, and intimate partner households alike.

2. CTR. FOR LAW & SOCIAL POL'Y, A SOCIOLOGIST'S PERSPECTIVE ON DOMESTIC VIOLENCE: A CONVERSATION WITH MICHAEL JOHNSON, PH.D. 3 (2006), available at [http://www.clasp.org/admin/site/publications\\_states/files/0314.pdf](http://www.clasp.org/admin/site/publications_states/files/0314.pdf).

3. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 8 (2005).

whole, the mediation field generally describes mediation as “an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement.”<sup>4</sup> Some other definitions include: (1) an informal process in which a neutral third party helps disputing parties try to reach a mutually satisfying outcome;<sup>5</sup> (2) a process where parties, with the help of a mediator, “isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement” that will meet their needs;<sup>6</sup> (3) a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement.<sup>7</sup> Common terms that occur in these definitions include the words “voluntary” and “mutual or consensual” and “outcome/settlement/agreement.” These terms indicate the importance of key elements inherent in mediation that make it a unique process.

The purpose of mediation is gleaned from the definition itself and is often further defined by the kind of mediation offered. For example, in transactional or evaluative forms of mediation, the purpose or goal of mediation is to find a reasonable settlement to a legal dispute.<sup>8</sup> In transformative mediation, the purpose is to support transformation of the interaction between the parties by supporting party empowerment, recognition by supporting party choice, and honoring party goals. This is true even if those goals do not include settlement of a case, but rather, joint and independent decision-making.<sup>9</sup>

These differences lead to divergence in the enactment of mediation. The process can look quite different depending on the goals or orientation of the mediator. In the evaluative or transactional model, the mediator will formalize the process and keep the parties in separate rooms while the mediator skillfully negotiates between the parties to reach settlement.<sup>10</sup> In the transformative model, the mediator will support the parties’ choice to remain in the same room, skillfully work with the emotion of conflict, support discussion of the issues of importance to the parties, support their desire to co-create solutions, and come to decisions that they believe are

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4. *See generally id.*

5. *Id.*

6. *Id.* (For example, *see* JAY FOLBERG & ALLISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICT WITHOUT LITIGATION* (1984).)

7. Model Standards of Practice for Family and Divorce Mediation, Ass’n for Conflict Resolution, <http://www.acrnet.org/Page.aspx?id=633>.

8. BUSH & FOLGER, *supra* note 3, at 86.

9. *Id.*

10. *Id.*

best suited to their particular situation.<sup>11</sup> In other words, the mediator's purpose drives practice.

Regardless of how different the process can look based upon the type of mediation practiced, the basic ethical obligations govern all forms of mediation and place ethical standards on a continuum of behaviors a mediator can engage in within the limits of those standards. There are three primary standards of ethical practice: self-determination, confidentiality, and neutrality.<sup>12</sup> While there are a few other ethical rules, these are the three primary rules that define the process and distinguish it from forms of dispute resolution, such as negotiation, including third party facilitated negotiations, arbitration, and early neutral evaluation.<sup>13</sup>

#### A. SELF-DETERMINATION

Self-determination is the foundation of mediation practice and what separates it from other processes of conflict or dispute resolution. Adherence to the ethic of self-determination means that the mediation process relies upon the ability of the participants to reach voluntary, informed, un-coerced decisions.<sup>14</sup> While a mediator may make suggestions, he or she may not coerce an agreement.<sup>15</sup> Parties to the mediation may not unduly influence others in the mediation.<sup>16</sup> Furthermore, self-determination requires the parties have the capacity to exercise free will without fear of their own safety, without being incapacitated in any way, such as by the use of drugs or alcohol.<sup>17</sup>

In addition, the fourth note in North Dakota's Mediation Ethics Code states:

A mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not conduct mediation if a mediator reasonably believes that a participant is unable or unwilling to participate due to lack of safety, capacity, or if the any party is experiencing undue influence.<sup>18</sup>

Supporting the same ideals, the Family Mediation Program of the North Dakota Supreme Court recognizes the impact of domestic violence on the

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11. *Id.*

12. *See infra* Part II.A-C.

13. *Id.*

14. N.D. CODE OF MEDIATION ETHICS I (2009).

15. *Id.* at cmt. 1.

16. *Id.* at I.

17. *See id.* at cmt. 4.

18. *Id.*

parties involved in mediation, excludes any cases involving domestic violence protection orders, and allows mediation in some cases, but only where the mediator is skilled in addressing domestic violence and safety steps are taken.<sup>19</sup>

#### B. CONFIDENTIALITY

Confidentiality protects the integrity of the process so that admissions, apologies, and information made for the purpose of resolving the dispute or reconciliation cannot be used in a formal proceeding later.<sup>20</sup> The comments made by the parties and the mediator, including the mediator's notes and work product are protected.<sup>21</sup> However, "the mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and notify the appropriate authorities if the mediator believes such threat is likely to be acted upon."<sup>22</sup> In other words, if threats of violence are made, confidentiality may be waived.

#### C. NEUTRALITY

A mediator must be neutral or impartial, which means "freedom from favoritism or bias in word, action or appearance, and includes a commitment [by the mediator] to assist all participants as opposed to any one individual or perspective."<sup>23</sup> This commitment includes a duty to disclose any potential conflicts of interest that may create a real or perceived bias.<sup>24</sup> It also requires a mediator to reveal any potential bias or conflicts of interest to the parties who can exercise self-determination by either choosing another mediator, or waiving any potential conflicts or biases.<sup>25</sup> A mediator must withdraw upon recognition that his or her impartiality has been compromised.<sup>26</sup>

### III. INTIMATE PARTNER OR DOMESTIC VIOLENCE

Domestic violence is often defined as a situation in which one person gains and maintains power and control over another person in an intimate

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19. N.D. Sup. Ct. Admin. Order 17 § 6 (2011).

20. *See* N.D. CODE OF MEDIATION ETHICS IV.

21. *Id.*

22. *Id.*

23. *Id.* at II.

24. *Id.*

25. *Id.*

26. *Id.*

relationship.<sup>27</sup> It reflects a pattern of behavior in which one intimate partner uses tactics including physical violence, coercion, threats, intimidation, isolation and emotional, sexual, or economic abuse to control and change the behavior of the other partner.<sup>28</sup> The abusive partner might be a current or former spouse, live-in lover, or dating partner.<sup>29</sup> All of the ways that an intimate partner can use power and control over an intended victim is documented in the “power and control wheel.”<sup>30</sup>

Partners engaged in domestic violence or emotional abusive behaviors may be married or not married, heterosexual, gay, or lesbian, living together, separated, or dating.<sup>31</sup> Examples of emotional abuse include name-calling or putdowns, isolating a partner from contacting their family or friends, withholding money, stopping a partner from getting or keeping a job, and threatening physical harm, and intimidation.<sup>32</sup> Domestic violence may become criminal in nature, including behaviors such as physical assault (hitting, pushing, shoving, etc.), sexual abuse (unwanted or forced sexual activity), and stalking.<sup>33</sup> Although emotional, psychological, and financial abuse is not criminal behavior, they are forms of abuse and can lead to criminal violence.<sup>34</sup>

The United States Department of Justice Office of Violence Against Women defines domestic violence as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.<sup>35</sup> Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.<sup>36</sup> This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.<sup>37</sup>

Domestic or intimate partner violence is in a class of its own and can be distinguished between situational or other types of violence. For

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27. *Domestic Violence*, WOMEN’S LAW, [http://www.womenslaw.org/simple.php?sitemap\\_id=39](http://www.womenslaw.org/simple.php?sitemap_id=39) (last visited Nov. 21, 2012).

28. *Id.*

29. *Id.*

30. *Id.*

31. Domestic Violence Definition, DOMESTIC VIOLENCE.ORG, <http://www.domesticviolence.org/definition> (last visited Nov. 21, 2012).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Domestic Violence*, U.S. DEP’T OF JUSTICE, OFFICE OF VIOLENCE AGAINST WOMEN, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Nov. 21, 2012).

36. *Id.*

37. *Id.*

example, situational violence is the most common form of violence between couples and differs significantly from domestic violence.<sup>38</sup>

*Situational couple violence* is . . . the sort of violence that enters a relationship when a disagreement that turns into an angry argument escalates into violence. The violence can be mild or severe, and although often this is an isolated incident in a relationship, some couples have a recurring pattern of such violence that is extremely dangerous. Although this type of violence is almost as likely to be perpetrated by women as by men, men do more serious damage and their violence is more likely to introduce fear into a relationship and to get the authorities involved.<sup>39</sup>

There are at least three elements that make domestic or intimate partner violence unique. The first has to do with the intent by the abusive person to *control* the victim.<sup>40</sup> The second underscores the abuser's use of a variety of forms of abuse to form a pattern of systematic abuse and control over the other person.<sup>41</sup> The final element is the outcome or impact on the victim, who will experience fear, depression, lower self-esteem, post-traumatic stress, and psychological distress.<sup>42</sup>

#### IV. EFFECTS OF INTIMATE PARTNER VIOLENCE ON VICTIM SELF-DETERMINATION

There has been much research conducted on the effects and impacts of domestic violence on a battered woman, including post-traumatic stress disorder.<sup>43</sup> In a significant study of victims of domestic violence, the effects include cognitive difficulties such as confusion and an inability to problem-solve, physical pain related to the emotional trauma, anxiety disorders, phobias, sleep disorders, extreme fearfulness, and obsessive compulsiveness.<sup>44</sup> There is most often a sense of helplessness in her ability

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38. *Id.*

39. CTR. FOR LAW & SOCIAL POLICY, A SOCIOLOGIST'S PERSPECTIVE ON DOMESTIC VIOLENCE: A CONVERSATION WITH MICHAEL JOHNSON, PH.D. 3 (2006), available at [http://www.clasp.org/admin/site/publications\\_states/files/0314.pdf](http://www.clasp.org/admin/site/publications_states/files/0314.pdf).

40. *Id.* at 2.

41. *Id.*

42. See Alytia A. Levendosky & Sandra A. Graham-Bermann, *Parenting in Battered Women: The Effects of Domestic Violence on Women and Their Children*, 16 J. FAM. VIOLENCE 171, 171-92 (2001).

43. See MARGARET J. HUGHES & LORING JONES, SAN DIEGO STATE UNIV., WOMEN, DOMESTIC VIOLENCE, AND POSTTRAUMATIC STRESS DISORDER (PTSD) 10 (2000), available at [http://www.csus.edu/calst/government\\_affairs/reports/ffp32.pdf](http://www.csus.edu/calst/government_affairs/reports/ffp32.pdf).

44. *Id.* at 18.

to resolve her life situation creating a debilitating effect on problem solving.<sup>45</sup> Furthermore, the fear a woman experiences from her abuser renders her less powerful, undermining her ability to stand up for herself, and exert her own power, or even experience self-confidence or inner strength.<sup>46</sup>

These impacts place into question whether a process that supports, encourages, or even requires the ability to exert self-determination, can work for victims of domestic violence. If processes like mediation require self-determination, then mediators must be able to judge party capacity to exercise self-determination throughout the process. The second part of this paper responds directly to these concerns by looking at subjective factors among victims and their intimate partners as well as mediator capability to screen for and accurately sense the indicators of violence throughout the process of mediation.

## V. MEDIATION IN THE AFTERMATH OF INTIMATE PARTNER VIOLENCE

Douglas D. Knowlton, Ph.D., and Tara Lea Muhlhauser, J.D., authored an article which looks at mediation as a panacea or a problem when domestic violence is a factor and ends with an argument for and against mediation.<sup>47</sup> Muhlhauser presents the argument against mediation in these cases by highlighting that once violence has impacted a relationship, the power differential and sense of vulnerability of the victim supports the likelihood of a negative result in mediation.<sup>48</sup> Furthermore, she questions whether a skillful mediator could “recognize the velocity, force, and coercive power of even a simple involuntary movement (a hand gesture, a blink) and the effect it can have on a victim of intimate violence” by diminishing her power in such a way that equality and power balance cannot be achieved in mediation.<sup>49</sup> As noted above, a mediator must remain neutral and cannot overstep even in areas where power imbalance exists, causing further discomfort for Muhlhauser.<sup>50</sup> She asserts until mediators are trained and practiced in recognizing and managing these concerns before, during, and after mediation, the question remains as to

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45. *Id.* at 19.

46. *Id.*

47. See Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is it A Train on the Track?*, 70 N.D. L. REV. 255 (1994).

48. *Id.* at 267-68.

49. *Id.*

50. *Id.*



whether this confidential process is appropriate, or safe, when intimate partner violence is part of the picture.<sup>51</sup>

#### A. MAKING THE DECISION WHETHER TO MEDIATE

When a mediator is requested to work with a couple who may have experienced domestic violence in their history, the mediator has a decision to make. Whether to mediate is a difficult decision for a mediator who is driven by his or her desire to assist couples to separate or divorce in a cooperative and casual manner. It is a difficult decision because of the mediator's commitment to supporting self-determination, which is directly undermined if the mediator denies use of the process. The mediator really does not know for certain what the impact of past abuse has been, whether the victim of abuse is now safe or will ever be safe, or if the victim could act with self-determination and make decisions free from fear or coercion. It is not the role of the mediator to act as judge or jury and decide who is right or wrong, who is truthful or not. It is an obligation that the mediator facilitates a process where all parties may make decisions of their own free will and volition.

If the mediator does not really know, then who is the expert? The best answer comes from Jody Miller and Dee DePorto, who worked together to develop a program in which a local domestic violence program works with the community mediation center to screen couples entering the mediation program.<sup>52</sup> In their opinion, the only expert in the process who can accurately assess the level of fear, coercion, power differential, and likelihood of future violence, is the victim.<sup>53</sup> It makes sense that no one but oneself could truly understand one's own fear and vulnerability.

What role, then, does the mediator play? It is critical, of course, that anyone who may be asked to serve families exposed to domestic violence must have an ongoing education in these dynamics and how to prepare and respond. Nearly every state that has enacted mediation standards requires this as an ongoing educational requirement for mediators.<sup>54</sup> Yet, before we discuss education, and steps and actions mediators can take to identify domestic violence, we must first acknowledge the role of human instinct.

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51. *Id.*

52. Dee DePorto & Jody B. Miller, ACResolution, *Honoring the Victim's Voice: The Domestic Violence and Mediation Safety Project 22-27* (2005). "Dee DePorto is Associate Director of Battered Women's Services of Family Services, Inc. in Poughkeepsie, N.Y. Jody B. Miller is Executive Director of the Mediation Center of Dutchess County, Inc." *Id.* at 27.

53. *Id.* at 24-25.

54. N.D. R. CT. 8.8, 8.9; MINN. GEN. R. PRAC. 114.

In the experience of many mediators, it is this basic instinct that drove the decision whether or not to mediate.

For example, Sarah Prom is an experienced mediator as well as a licensed therapist.<sup>55</sup> She is a staff member of the University of North Dakota Conflict Resolution Center, and she trains and mentors mediators.<sup>56</sup> She is trained in recognizing the signs of intimate partner violence.<sup>57</sup> Several months ago, she was conducting pre-mediation intake with clients who had filed for change of custody and visitation;<sup>58</sup> they had been divorced and living separately for some time.<sup>59</sup>

In her initial meeting, the mother reported a history of domestic violence in the marriage but a lack of ongoing violence since divorce.<sup>60</sup> She stated she had some fear of the father, but she wanted to mediate.<sup>61</sup> Upon speaking with the father, he did acknowledge that they had fought during the marriage but had no problems now.<sup>62</sup> Sarah did not feel confident, however.<sup>63</sup> She could not put her finger on it, but something did not “feel” right.<sup>64</sup>

She requested permission of the mother to speak with her attorney.<sup>65</sup> The attorney agreed that the mother wished to use the mediation process, but she too had some reservations due to their history and suggested that she, the attorney, attend the sessions too as “insurance” against any aggression or coercion.<sup>66</sup> A mediation date was set.<sup>67</sup>

In the coming days, Sarah’s discomfort continued to grow, and she confided in fellow staff members.<sup>68</sup> She described this discomfort as a growing fear that created anxiety for her.<sup>69</sup> Her colleagues supported her ultimate decision to call off the mediation.<sup>70</sup> When she called the mother to tell her that she felt uncomfortable, the mother breathed a loud “sigh” of

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55. Interview with Sarah J. Prom, Conflict Mgmt. Consultant, Univ. of N.D. (Nov. 12, 2012).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

relief and began to cry.<sup>71</sup> She told Sarah that she was scared to make the decision to not mediate, fearing repercussion by the father who continued to harass and emotionally abuse her and financially control the family.<sup>72</sup> When Sarah called the father, she owned the decision as a realistic conflict of interest, and she noted that the mother was disappointed and had also wanted to mediate in order to limit any anger he may have toward the mother.<sup>73</sup> Had Sarah proceeded with mediation, further harm could have occurred to this mother and her children. It was a strong lesson in trusting our instincts.<sup>74</sup>

## B. SCREENING AND PLANNING

While reliance on instinct, coupled with education in intimate partner violence, are strong components in making mediation a viable option for certain couples, it is still not enough. Careful screening of mediation cases involving couples before and during the mediation process is essential due to the stealthy nature of domestic violence. There are tools available to assist mediators and other professionals in asking the right questions of either party that may raise or lower flags related to violence. The Michigan Supreme Court developed one of these tools, used by many mediators, to assist in determining the level of safety in these cases.<sup>75</sup>

The Michigan screening tool provides a guide for helping mediators to make the decision whether to mediate in his or her premediation screening.<sup>76</sup> For example, the two primary situational factors include: (1) if a party is in immediate danger; and (2) if there is no apparent immediate danger, but the abused party discloses violence by or fear of the other party.<sup>77</sup> There are a variety of factors to consider as well as a guide on how to manage the decision of whether or not to mediate.

It is also critical to recognize that an ethical mediator should meet with the parties *separately* in order to assess for domestic violence, and to recognize signs and signals during mediation as well, in the event the parties were not forthcoming in the separate meetings. Of course, in cases where the abused party admits past abuse and the mediation still goes

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71. *Id.*

72. *Id.*

73. *Id.*

74. Interview with Sarah J. Prom, Conflict Mgmt. Consultant, Univ. of N.D. (Nov. 12, 2012).

75. DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION: ABBREVIATED DOMESTIC VIOLENCE SCREEN QUESTIONNAIRES (2005), available at <http://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/Domestic%20Violence%20Protocol-abbreviated.pdf>.

76. *Id.*

77. *Id.*

forward, the mediator should develop a subtle non-verbal signal that the abused party can use to signal a rising fear of violence. At that point, the mediator can pause the mediation and use proper protocol in separating the parties and ending the mediation if needed.

It is unwise to believe that a mediator can avoid future retaliation or violence by simply negotiating with parties in separate rooms. It signals that the mediator is lacking education and training about the implications inherent within violent relationships, or has developed over-confidence in their ability to control party behavior, an arrogance which a mediator cannot afford. The worst-case-scenario would be to hear that one of his or her mediation clients violently harmed the other following a mediation session simply because the other party voiced their opinion, albeit through the mediator, while in separate rooms during mediation.

### C. CASE STUDY: MEDIATION CENTER OF DUTCHESS COUNTY NEW YORK

There is a stellar program in upstate New York that has demonstrated mediation can work – even in cases where violence is somewhat active – if the mediators work in concert with the domestic violence field.<sup>78</sup> This program is the first of its kind in recognizing and weaving the theoretical underpinnings of the two disciplines, as well as the ethical obligations of both. This program also received support of the Family Court in forging their alliance.

What was most interesting in the forming of this alliance was the usual assumption of “safety first” in screening out (denying) certain cases as inappropriate for mediation.<sup>79</sup> This was found to be a faulty and erroneous assumption that removed voice and choice from the victims of domestic violence at a time when their inner sense of vulnerability and emerging strength was crying for self-determination.<sup>80</sup>

[W]e heard a similar message: that the answer is not to diminish power, choice and agency (as that is what batterers do every day to victims) by making decisions for the victim regarding mediation, but rather to deconstruct the mediation process and reconstruct it specifically for these cases. In listening to the voices of victims and the counselors who work with them, we re-directed our efforts to focus on a new goal: the development of a protocol that would honor a victims voice and choice around whether or not to

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78. DePorto & Miller, *supra* note 57, at 22-27.

79. *Id.*

80. *Id.*

participate in mediation while, at the same time, attend to a heightened awareness of the safety issues embedded within this choice. The critical aspect of this goal was to focus on case-specific safety issues born out of the unique ways in which the context and dynamics of each abusive relationship could play out in the process of mediation.<sup>81</sup>

In their article, Miller and DePorto discuss the complexities in creating this collaborative process between the mediation and domestic violence professionals.<sup>82</sup> In the process, they realized they would have to hear each other's often disparate perspectives and agendas.<sup>83</sup> However, what held them together was a recurring common philosophy: the belief that empowerment, self-determination, and a sense of agency can be gained through a helping process that facilitates "voice, choice, validation and safety."<sup>84</sup>

One of the important outcomes of this project was a five-phase protocol that would be followed in all intimate partner mediation cases.<sup>85</sup> The five phases include: (1) initial contact by the mediation center staff (gathering info); (2) extensive intake conducted by the mediation center staff (in-depth interview, identification of possibility of domestic violence, referral); (3) safety assessment by the domestic violence center staff (helping the client honestly assess her situation); (4) safety planning (should the decision be to proceed); and (5) mediation session with safety plans in place.<sup>86</sup> The protocol follows their underlying philosophy in recognizing and honoring the victim's voice, while offering personalized safety plans as well as counseling along the way so that when mediation is used by these couples, the benefits are maximized and the detriments minimized.

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81. *Id.* at 23.

82. *Id.*

83. *Id.* at 24.

84. *Id.* It is important to note the program recognized that the mediation process needed to be the least directive and favored the Transformative Mediation model for its adherence to the premise of self-determination and its focus on party agency, and the dimensions of empowerment and recognition. *Id.* In forms of mediation where the ultimate goal of the mediator was settlement, there would likely be overstepping of party agency or self-determination in favor of the mediator's desire for settlement, thereby overlooking the subtle and critical dynamics of domestic violence. *Id.*

85. *Id.*

86. *Id.*

## VI. IMPLICATIONS FOR NORTH DAKOTA FAMILY MEDIATION PRACTICE

Mediation practices in North Dakota offer advice, ethical standards, and guidelines for mediators who may mediate cases involving domestic violence. Obviously, we do not have such a novel program as they do in Poughkeepsie, New York. However, it is possible to replicate this program here if the state removes certain barriers. For example, there is at least one financial grantor who funds domestic violence programs in North Dakota who absolutely prohibits those grantees (domestic violence centers) from using mediation.<sup>87</sup> Should that grantor change its policies, or should the centers in North Dakota find other manners of financial support for their programs, policy barriers would be removed.

Another potential barrier is the limitations of the UND Conflict Resolution Center (CRC), North Dakota's only community mediation center. While the CRC offers services across the state, the primary resources of the CRC exist in Grand Forks, North Dakota, and at this time, a satellite office in the western part of the state does not exist. It is possible, of course, that other private mediators (primarily attorneys) would be willing to work with such a project and provide additional mediation resources, or that grant funding could create the potential for a satellite office in the future. Should these barriers be broken, such a partnership could exist with the same rates of success as in the New York program.

As mediators, we must not take a cavalier attitude in our family mediation cases, dangerously assuming that by separating the parties into different spaces, we are preventing the potential for future violence. We must take time to make separate intake and screening, to collaborate with our domestic violence advocates, to educate ourselves in the subtle signs of violence and coercion, and to understand the need for signals and safety plans needed in these cases. Only then can we make mediation an option that supports and offers empowerment, self-determination, and a sense of agency, gained through a helping process that facilitates voice, choice, validation, and safety. We can start now to follow the best practices available in making our processes safe for victims of domestic violence.

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87. See 42 U.S.C. § 10410 (2011) (regarding grants for state domestic violence coalitions).