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Representing Battered Women During Welfare Reform

All That Glitters Is Not Gold: Mediation in Domestic Abuse Cases

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I. Introduction

For more than a decade, the use of mediation in cases where one disputant has abused the other has been consistently denounced by battered women's advocates. /1/ However, much like a monster in a grade B horror film who reappears just when the protagonists have been lulled into a false sense of security, discussion of mediation in domestic abuse cases has resurfaced.

Mediation as a viable alternative in cases where domestic abuse is an issue has resurged for a variety of reasons, such as the frustration with shrinking advocacy resources for battered women, particularly those who are indigent, /2/ the apparent willingness of lawyers and judges to withdraw from complex, emotionally charged matters incapable of quick resolution, /3/ and reports of mediation's benefits, even in domestic abuse cases. /4/ The purpose of this article is threefold: (1) to reiterate that mediation is never appropriate at the domestic abuse protection order stage and is similarly problematic in subsequent proceedings when the parties have a history of violence; (2) to emphasize that advocacy and attorney-assisted negotiation are the preferred means to handle cases involving domestic abuse; and (3) to explore ways in which available resources may best be used to protect the safety and interests of battered women.

II. The Mediation Process

Mediation can be characterized in different ways. Proponents describe mediation as a voluntary process in which a neutral third person assists participants in reaching a consensual agreement on disputed issues after considering available options and alternatives. /5/ From a more skeptical perspective, mediation is viewed as a "private, nonappealable, and unenforceable approach" to dispute resolution that has no consistency in its application or outcome. /6/

General agreement exists, even among mediation enthusiasts, that no matter -- regardless of the specific issues involved -- should be mediated when domestic abuse of a serious nature has occurred between disputants. /7/ Many mediators do recognize that the use of mediation when domestic abuse is involved does not serve either their profession or the public. /8/ However, other mediators are rethinking the connection between domestic abuse and mediation, perhaps because of the higher incidence of domestic abuse between intimate partners than previously suspected. /9/ Taking a strict stance on the domestic abuse issue reduces the available number of suitable cases for referral to mediation.

The mediation literature purports to value voluntariness and equal bargaining power in the mediation process. Voluntary participation in the process, as well as voluntary agreement to specific terms, may be difficult to assess when battered women are involved. A victim may be too intimidated to give an informed voluntary consent to mediation. Domestic abuse reduces the abused woman's freedom to make many choices for herself, including her freedom to choose mediation. /10/ Even when the victim has "consented to" mediation, she may seem willing only because of her belief that she really has no other viable option. /11/ Her abuser may have threatened her or may have convinced her that the legal system will be much more sympathetic to him (e.g., that she will lose her children or lose all financial support). Neither victim participation in the mediation process nor any agreements achieved through such an unbalanced "mediation" are truly voluntary.

Research indicates that participants sometimes feel coerced into reaching settlements in mediation. /12/ Women who have experienced domestic abuse are more likely than other women to have established a pattern of deferring to their abusers in disagreements. /13/ Therefore, it should be assumed that a battered woman cannot voluntarily consent to participate in mediation or to the terms of a final agreement reached through mediation.

The importance of equal bargaining power is acknowledged by mediators. /14/ Mediators have exhibited limited focus, however, on identifying and attempting to remedy power imbalances. /15/ Many mediators, aware that a perfect power balance between two parties in a relationship can never be achieved, believe that sufficient skill and sensitivity can tip the balance of power to produce a fair outcome. /16/ Mediators need to understand that no amount of skill or training can make up for the control that an abuser exerts over his victim and that negotiations between these parties cannot, in good conscience, be called "mediation."

The mere presence of the abuser may be frightening and intimidating to a battered woman, to say nothing of the prospect of attempting to negotiate with him. /17/ The coercive effect of domestic abuse automatically skews the equality of bargaining power completely to the advantage of the abuser. It should be presumed that equality of bargaining power never exists when one disputant has abused another disputant and therefore principled mediation cannot take place.

Mediation emphasizes the privacy and autonomy of the family. /18/ The mediation process focuses on the relationship between the parties without assessing blame for inappropriate, asocial, or criminal behavior. The batterer is not required in mediation to admit responsibility for his abusive behavior. /19/

In our society, the battered woman is often blamed and made to feel responsible in some way for the violence perpetrated against her. /20/ The notion that the victim provoked her abuser is used to justify and support male dominance and control and to reduce the societal censure for the abuser's use of physical force against the victim. /21/ Since the mediation process is not designed to deter violent behavior or to protect victims, its use is particularly perilous for battered women. /22/ Protection of one's safety should be considered too important to entrust to any other but the legal system, which has the power to remove the batterer from the home, to arrest when necessary, and to enforce the terms of a decree if a new assault occurs. /23/

III. The Domestic Abuse Protection Order Process

In the mid 1970s, as part of a larger reform movement in the area of domestic abuse, the issuance of temporary protection orders (TPOs) for emergency relief replaced the cumbersome and time-consuming order-to-show-cause process, thus permitting access to the courts in an efficient and timely fashion. /24/ The current statutory schemes in most jurisdictions are designed to allow battered women to file these applications pro se or with the assistance of a lay advocate, court liaison, or volunteer from a local domestic abuse shelter or services program. /25/

A. Uncontested Cases

While some courts schedule particular days and times for the domestic violence docket, other courts hear applications for extension of TPOs on an as-needed basis. At the hearing, the judge or the clerk calls the docket to determine who is present. Due to the dynamics of the battering relationship, several no-shows on the petitioner and the respondent sides are not uncommon. These cases are often summarily dismissed without prejudice. /26/ In uncontested cases where the respondent fails to appear and there is proof of service, the court normally extends the TPO order automatically or after taking additional brief testimony from the petitioner. The battered woman then can proceed on her own or with the support of a friend or family member. Sometimes lay advocates are available to aid women during this stage. /27/ Occasionally, respondents appear and have no objection to the allegations of domestic violence or the relief ordered. The court generally extends the order in those situations, again after taking brief testimony or obtaining the respondent's assent on the record.

B. Contested Cases

The contested cases that remain on the docket are of two basic types: those in which the respondent denies the alleged acts of domestic violence and those in which the respondent admits the violent acts but disputes the temporary relief granted to the petitioner. That mediation will be used to determine whether domestic abuse occurred is unlikely, although there have been rare reports of its use in similar ways. /28/ If the court is satisfied that domestic abuse has occurred, then it is timely for the court to grant appropriate relief.

Woefully, mediation is being employed in some jurisdictions to resolve issues of custody, visitation, child support, spousal maintenance, and property settlement at the protection order stage. /29/ Mediation should never be used at this stage of the process, when the most recent incident of abuse may have occurred only a few days earlier. That an ethical mediator would even attempt to reach a settlement of these issues by conducting a joint mediation session, that is, with the parties sitting in the same room together, is virtually inconceivable. Voluntariness and equality of bargaining power, which form the cornerstone of mediation's effectiveness, would be virtually nonexistent. Domestic abuse intimidates the victim and reduces her ability to represent, or even identify, her own interests. The victim may not even recognize that she is acceding to her abuser's wishes for fear of abuse and that this pattern is detrimental to her. /30/ These concerns would apply

even if an individual caucus or shuttle mediation format were used. /31/ Nevertheless, mediation is sometimes offered to unrepresented parties as a viable shortcut to resolve these issues.

A mechanism should be in place to offer counsel for battered women at protection order hearings. If the respondent denies that domestic violence occurred, a hearing must be conducted to determine whether the statutory requirements for domestic violence are met. If not, the court has no authority to enter a protection order or to grant other relief. Even when the process is less formal, for example, where the rules of evidence are relaxed, an attorney advocate may be key to ensuring that the petitioner's case is presented fully on direct and cross-examination.

Planning for the contested case at the protection order phase presents a real strategic problem. /32/ Often, there is no way to know in advance whether the respondent will appear at all, whether he will come alone, or whether an attorney will be present with him. A few courts request that counsel notify the clerk if they intend to make an appearance on behalf of the respondent. As a practical matter, this is difficult to control. Unlike small claims court, where attorneys are sometimes excluded completely by statute or court rule, attorneys who appear on behalf of either petitioners or respondents are rarely denied the opportunity to participate in the protection order hearing. The court may grant a continuance to allow an unrepresented party on either side to obtain representation. When the respondent makes such a request, the court is likely to grant it while leaving the TPO's protections in place. However, when the petitioner asks for a delay to obtain counsel, she may be required to proceed without an attorney since she is the moving party. To pit an unrepresented, battered woman against her abuser and his attorney in a contested hearing is obviously undesirable. To avoid this problem, the court should liberally grant continuances for brief periods to allow victims to obtain counsel.

When the focus is on fashioning appropriate relief, an attorney's assistance, either by negotiating with opposing counsel or by presenting arguments for court-ordered relief, is vital. Statutory schemes vary greatly in the relief that may be granted. Most statutes provide for the inclusion of no-contact provisions and awards of temporary custody with visitation. /33/ A few states' statutes allow for monetary transfers for the purpose of spousal maintenance, and a greater number provide for child support. /34/ At least 38 states "explicitly grant judges the latitude to grant any constitutionally defensible relief that is warranted." /35/

Many judges are reluctant without encouragement to assert their authority to order necessary financial relief. /36/ This is unfortunate because economic pressure is a primary reason for battered women to reconcile with their abusive partners. Unless a temporary financial award is entered at the earliest possible point, the likelihood that a battered woman will return to her abusive partner is increased, perhaps with disastrous consequences for her and her children. /37/

The temptation may be great to allow battered women to proceed pro se through the protection order process. However, with representation at this juncture, the short-term payoff for a minimal amount of attorney labor can be high. Under either the detailed relief or the catchall statutory scheme, representation by counsel allows the greatest opportunity for battered women to obtain appropriate relief because attorneys are more likely to induce the court to exercise the full range of available options. /38/ If the court is not amenable to awarding prompt and effective relief at the protection order phase, an attorney is in the best position to appeal an unfavorable decision, to

continue representation in a superior court domestic relations proceeding, to advise the petitioner about other courses of action such as filing a criminal complaint, or to make a referral for other legal representation.

IV. Formal Domestic Relations Proceedings: Custody and Divorce Actions

Although the protection order process may be a temporary relief for the battered woman to get back on her feet, the issues of divorce or custody require the filing of formal pleadings at some point. Prior to the filing stage, clients may need legal advice, a unique function that may be performed only by attorneys. The essential elements of legal advice include applying the law to a specific set of facts, suggesting a particular course of action for the client, and predicting the outcome of a case or controversy.

An examination of the critical role played by an attorney in most matrimonial cases demonstrates some of the potential shortcomings of mediation, particularly where battered women are involved. /39/

A. Child Custody

Historically, child custody, whether standing alone or as part of a divorce case, was the initial legal issue referred to mediation for resolution. Attorneys and judges seemed eager to abdicate responsibility for decision making in the complex and emotionally charged area of custody. In the legal process, greater reliance is placed on input from psychologists and social workers, while "bright-line" rules have given way to vaguer standards in custody determinations and "joint custody" preferences.

The use of mediation "reduces the likelihood that a battered woman will receive custody." /40/ Women generally have a greater commitment to child rearing and may be fearful about the possibility of losing custody. /41/ Fathers may be less "risk averse" and request custody to gain leverage on other issues. /42/ Discussions about discrete legal issues such as custody can raise related concerns, many of them financial. Certainly, custody arrangements may affect child support and domicile in the marital residence. If custody is mediated without consideration of other issues, the mother has no other bargaining chips and only the mother has rights to forgo. /43/

"Joint custody" seems to represent the mediation ideal since the goal of the process is agreement and promotion of "win-win" results rather a determination of the "best interest" of the children. However, true joint custody in the sense of shared decision making and caretaking is rare. /44/ In practice, the typical joint custody arrangement is similar to the traditional single custodian with noncustodial visitation arrangement, with one crucial difference -- in joint custody the noncustodial parent has an important veto right over the parent who provides daily care and guidance. /45/ What has changed only is the authority of mothers to make decisions, and this may be dangerous for battered women compelled to deal continually with their batterers on issues concerning the children.

Mediation literature avoids discussion of the "primary caretaker" standard for custody. /46/ A higher rate of joint custody agreements result from mediation than from other prevalent means of dispute resolution, including adjudication and attorney-assisted negotiation. Most "functional plans" developed in mediation leave most of the mundane responsibilities of child rearing with the parent who has usually fulfilled them -- the mother. /47/

The well-being of the children is a consistent theme promoted by mediation advocates. /48/ The use of a particular dispute resolution process, however, has no impact on the children's ability to cope with the aftermath of divorce. /49/ Despite the lack of evidence linking mediation with postdivorce adjustment or "best interests" of the children, which is the standard used in most jurisdictions for custody decision making, "mediation is often the primary vehicle for resolution of custody disputes" by statute, local rule, or jurisdictional practice. /50/

However, demonstrable evidence exists that children are direct or secondary victims when domestic abuse has been perpetrated by one parent on the other. /51/ Such evidence militates against joint custody arrangements. In three-fourths of the states, courts are required or permitted to consider domestic abuse as a factor in custody decision making. /52/ In the mediation process, battered women may lose this statutory custodial advantage.

B. Child Support

The absence of specific, codified standards in the child support area may have fueled the mediation industry. /53/ However, federal law and regulations now require each state to have one set of guidelines for establishing and modifying child support orders. /54/ Accordingly, the need for alternative dispute resolution in this area has been virtually eliminated. /55/ This is good news for battered women for whom greater financial security overall, and for their children in particular, is a critical issue.

It is questionable whether child support should be mediated at all outside the presence of a third party who represents the child's economic interests. /56/ Earlier research results indicate that joint custody mediated agreements provide for the support of children less often than either attorney-negotiated or judicially assisted settlements. /57/

If disparities in earning power exist, payment of child support by the parent who is better situated financially is appropriate even in split custody or joint physical custody arrangements. /58/ If mediation is employed, it is imperative that neither mediators nor the process "exploits or feeds into the culturally induced tendency of women to be conciliatory and to trade away substantive benefits in return for affective and symbolic 'benefits,' especially those that are unlikely to be reaped." /59/

C. Spousal Maintenance

The extent to which spousal maintenance is addressed in mediation is not clear. /60/ Before1988, spousal maintenance might have been "traded off" for higher child support payments.

In many marriages, the greatest asset is the supporting spouse's earning power, which includes the homemaker's contribution: "[T]he only possible distribution of this asset is via alimony-maintenance." /61/ The economic consequences of divorce on men and women and the disparities in potential earning power based on gender are receiving growing recognition. The formal legal system may be better equipped to evaluate a homemaker's contribution and to translate it into a maintenance award.

D. Property Division

Mediation should be a reasonable method to resolve property issues between equally empowered disputants operating in good faith. /62/ But certain pitfalls may affect battered women's abilities to use mediation to a greater extent than other disputants. Mediators recognize the need for outside assistance when the financial picture presented by the parties is complex. /63/ The financially dominant partner, usually the husband, may urge mediation with strict instructions to avoid consulting legal counsel. One means of control typically exercised by abusers is command over financial matters in the household. As a result, many battered women have little or no information about their family income, assets, or expenditures.

Honesty and openness are essential elements of mediation; however, the withholding of information may be endemic in matrimonial matters. The mediator has no means to compel financial disclosure. Full revelation of assets including separate property is a critical prerequisite to division of marital property. Although, even in adjudication, there is no absolute guarantee of full disclosure, the legal system offers "various, albeit imperfect, means of obtaining disclosure, including depositions, subpoenaing of records, and coercive sanctions for noncompliance or false representations." /64/ When husbands control the assets, women may be vulnerable if mechanisms are not available to force disclosure. /65/

An interrelated issue is the identification and valuation of property for inclusion in the "marital pot," a complicated question in both equitable-distribution and community-property states. Financial experts may be needed to appraise and value assets. /66/ Recent decisions and legislation have expanded the definition of marital property to include vested pensions; professional licenses, degrees, and practices; life insurance; and deferred employment benefits. /67/ Homemakers' nonpaid contributions to the acquisition of marital assets are explicitly recognized in some states. /68/

In addition, functions routinely performed by attorneys for matrimonial clients may be lost in the mediation process. For example, if a pension is divided, the pension fund manager and the employer should be notified in writing of the nonemployee spouse's interest in the funds, especially if distribution is deferred. Since the law in this area is in flux, diligence is required, even for legally trained persons, in order to be familiar with the most recent developments.

In most jurisdictions, injunctive relief is available to prevent dissipation of assets. Mediation offers no such safeguard. Through the use of formal discovery mechanisms, information may be obtained regarding sale, exchange, barter, or destruction of property that occurred before and after the

separation of the parties. The spouse without domination or control over disposed assets may be allowed a "credit" when other property is divided. Since mediation is a "future-oriented" process, mediators may tend to exclude previously dissipated assets from consideration in the distribution of property.

In many divorce matters, allocation of property is less significant than the determination of responsibility for outstanding obligations to creditors. Mediators may be inclined to divide equally the debts or to assess responsibility for payment to the party who retains possession of a particular item, such as a motor vehicle. This approach ignores certain realties such as disparity in income of the parties or the actual ability to make payments. Mediated agreements may not have "indemnification and hold harmless" provisions, which may be necessary as a basis for a cross-claim if the former spouses are sued by a third party.

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

In order to address property issues effectively, mediators and advocates must understand the tax ramifications of the sale or exchange of property. /69/ The impact of certain intraspouse transfers on eligibility for public entitlement programs (i.e., Aid to Families with Dependent Children and supplemental security income) must be considered as well. Mediators may be particularly unfamiliar with the effects of property division on poor persons since the administrative policies and regulations are complex and subject to change. /70/

If one spouse has abused the other, the victim may have a claim through a tort action to recover damages. /71/ In some jurisdictions, such a claim must be pleaded as a part of the divorce petition. /72/ The impact of inclusion of such claims in a mediated agreement is unclear. The inclusion of the claim only in the mediated agreement may not be sufficient to reduce the matter to judgment for enforcement purposes or to collect from a victim’s compensation fund where the batterer is judgment proof.

E. Other Issues

Other complications may exist in a domestic relations case. Immigrant spouses who have been in the United States for less than two years may have only "conditional" status under federal immigration laws, and this becomes an underlying concern no matter what is at issue. /73/ Low-income parents who receive public assistance may become ineligible for various types of benefits if they agree to certain types of joint physical custody. /74/ In biracial or bicultural families, parents who disagree about custody may be concerned with preserving cultural or religious values through given custody arrangements. /75/

The participants may have emotional or mental health problems that block resolution of clearly identified legal issues. Depending on their levels of sophistication, participants and mediators may be able to identify none, some, or all of these issues. Mediators who are mental health professionals should be most sensitive to those matters. Gaps, however, remain. /76/

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

V. Subsequent Proceedings: Enforcement of Litigant's Rights and Motions for Modification

As domestic relations attorneys recognize, family law matters are not necessarily resolved permanently with the entry of a final judgment of divorce. Custody and visitation arrangements may be altered upon a showing of a substantial change of circumstances. A variety of occurrences may affect financial transactions such as child support and spousal maintenance.

Mediation may seem well suited to address some of these postdispositional issues. /77/ Any risk to battered women would seem to be minimized at this later stage. In actuality, the danger is exacerbated. /78/ The passage of time alone may not remedy balance-of-power issues. /79/ The existence of domestic abuse may permanently skew the ability of parties to bargain effectively. /80/ In addition, the very need for a modification procedure suggests that some element of the previous arrangement was unsatisfactory.

Recognition that "battering is power and control marked by violence and coercion" helps explain why the postseparation period may be particularly dangerous for the abused woman. /81/ In many abusive relationships, the loss of control may enrage the batterer. Causing disruption in the battered woman's life may be a way of maintaining continued domination. Withholding child support or sums for spousal maintenance may be a control issue.

If the battered woman is alleging a change of circumstances for a custody modification (e.g., because of her desire to relocate), the batterer may be aggravated that she has moved on with her life. Remarriage or the presence of a new partner could enrage the batterer. Certainly the well-publicized events of the past few years involving high-profile disputants underscore the need for continued attorney vigilance in postdivorce proceedings.

VI. Ensuring the Availability of Advocates at Various Stages of the Process

Acknowledgment of the importance of attorney involvement on behalf of battered women throughout the entire legal process is critical. But who should provide this representation?

A. Legal Services Attorneys

Ideally, representation of battered women at the protection order stage should be provided by experienced, sensitive attorney advocates who are committed to working in this emotionally charged area. Legal services attorneys seem to be the logical choice to fulfill this role. Familiarity with the issues, awareness of the particular needs of victims of domestic violence, and the ability to mount effective advocacy on short notice are all desirable characteristics that legal services attorneys could bring to the process. Designation of one identifiable and established group of persons to function as counsel at the protection order stage would allow for consistency and the opportunity to effectuate positive results in individual cases as well as systemically. In addition, representation of battered women at the protection order phase "is a preventative step that may ultimately reduce the need for other legal services." /82/

Constraints, most notably financial ones, exist. Work with battered women is labor intensive and can cause burnout. However, the more significant constraint may be attitudinal. Advocacy on behalf of battered women has not continued to be a high priority in many legal services programs, a phenomenon that developed during the funding crisis in the early 1980s. /83/ This is true despite the express needs of the client community in many locales suggesting that domestic violence work should be a higher priority /84/ and despite this work not being politically controversial for the most part to government grantors and thus attractive to private funding sources.

B. Private Attorneys

Viewed strictly as a resources issue, others in the legal community could provide competent representation, particularly in formal divorce and custody proceedings. Unlike complicated public entitlement cases, long the province of specialized public interest lawyers, the family law bar could be tapped to provide representation in domestic abuse cases. This solution may be good in theory but a little rough in practice.

Some volunteer attorneys are unwilling to accept domestic abuse cases and prefer to handle routine divorce cases that may be, in reality, more suited to resolution through mediation. The logistics involved in assigning private attorneys to represent battered women on short notice at the protection order stage may tax even the most organized volunteer lawyer programs. Despite these barriers, volunteer lawyers should remain a feasible resource. For protection orders, the most effective approach may be to establish a group of volunteers who agree to cover a particular court docket for a preestablished time period. /85/ If representation is limited to the protection order phase, the client must be informed of this arrangement and a referral system must be in place to ensure continuity of representation for any subsequent proceedings.

Volunteer attorneys certainly should be considered a primary resource for custody and divorce representation. Those who are willing to take on cases involving domestic abuse could be given some sort of special recognition. Calculation of any pro bono contribution could focus more on hours of service provided rather than on numbers of cases handled.

Volunteer attorneys should be urged to represent former clients in modification and enforcement of litigant's rights proceedings. This is a difficult task because attorneys may be reluctant to volunteer initially if they sense that they could be acquiring a particular client for life. If a per-case assessment is used to gauge the extent of the volunteer attorney's contribution, then the modification proceeding should be viewed as a separate case. It certainly makes more sense for an attorney who is already knowledgeable about a particular matter to follow through rather than to assign the case to another volunteer attorney who may need a considerable amount of time to become familiar with the case's specifics. A reminder that "your name could be next on the list" to handle a modification in an unfamiliar case might encourage the volunteer attorney to represent a former client in modification and enforcement proceedings.

C. Law Students

Another potential resource for representation of battered women would be clinical programs. Unfortunately, law school clinical programs may be operating under financial constraints similar to those experienced by legal services programs. In addition, this resource is obviously dependent on geographic proximity to a law school. Legal services programs are in the best position to forge relationships with law school students interested in working with battered women. Despite limitations, law students at clinic programs may be particularly well suited to represent clients at protection order hearings since they relish the opportunity to get courtroom experience.

Law school externship programs might place students in legal services offices for the specific purpose of representing battered women. Some law schools encourage or require students to perform pro bono work before graduating. /86/ Service-learning courses might require students to perform community volunteer work. /87/ Student groups such as the women's law caucus could have an interest in taking on a semester- or year-long project to assist battered women. Outright volunteers may come from the student population since paid clerking positions with law firms are diminishing. Training and adequate supervision are necessary for students to represent battered women effectively; however, the enthusiasm students bring to even the most mundane tasks is generally beneficial to clients.

D. Pro Se Representation

The protection order process was designed in most states to allow battered women to file for an order pro se. /88/ This approach permits greater efficiency in obtaining ex parte orders. It is effective as well, provided battered women have assistance in completing the necessary paperwork. /89/

A scheme, statutory or otherwise, that encourages battered women to attend the protection order hearing pro se is decidedly more problematic. The hearing may present the first opportunity for the victim and her abuser to come into contact with each other since the most recent battering episode. Understandably, the battered woman may be petrified, not knowing what to expect from the abuser or the process. Although the presence of a lay advocate may be helpful, an attorney can provide support and legal expertise at this critical stage of the process.

Nevertheless, many, if not most, battered women are compelled to go through the protection order hearing without legal representation. At a minimum, greater focus should be placed on preparation and dissemination of educational materials, including pamphlets and videos that realistically explain the process. /90/ Private and public interest family lawyers, along with battered women's advocates, can also informally monitor the process by asking clients who have secured protection orders whether they experienced any difficulties in the process. /91/

An increasing number of litigants are filing for divorce and custody actions without counsel. /92/ Self-representation may be appropriate in simple or uncontested matrimonial cases. Domestic abuse cases do not fall into the simple category, and determining at the outset whether any case will be uncontested may be nearly impossible. Therefore, self-representation by battered women in the divorce or custody process should not be considered a viable option. Postdispositional proceedings may allow for some form of self-initiation such as child support enforcement where an advocate may actually handle some aspects of the case. Attorney assistance is necessary in any subsequent proceedings that would require the battered woman, if unrepresented, to deal or negotiate directly with her abuser.

VII. Conclusion

Public recognition of the problem of domestic abuse has increased steadily in the past two decades. During this same period, greater attention has been focused on mediation as a means to resolve family law disputes. These two "reform" movements have converged in part due to miscategorization of domestic abuse under the general heading of family law. Domestic abuse, simply put, is violence that involves intimate partners. While acknowledging that traditional family law issues must be decided with respect to the victim and the abuser, it is critical to remain focused on the distinction, not on the apparent overlap, when choosing a suitable dispute resolution mechanism in cases involving domestic abuse. Attorney advocacy and attorney-assisted negotiation are the most appropriate ways to handle matters where one disputant has abused the other. A renewed commitment to attorney representation is needed by public interest lawyers and by the private bar in order to protect the interests of battered women and to send a clear message that domestic abuse will not be tolerated.

Footnotes

/1/ Feminists and battered women's advocates disparage the use of mediation in cases when any domestic abuse has been perpetrated by one disputant on the other disputant. See generally Andree G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, 15 Harv. Women's L.J. 272 (1992); Trino Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); Charlotte Germane et al., Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence, 1 Berkeley Women's L.J. 175 (1985); Barbara Hart, Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation, 7 Mediation Q. 317 (1990); Carol Lefcourt, Women, Mediation and Family Law, 18 Clearinghouse Rev. 266 (July 1984); Lisa Lerman, Mediation of Wife Abuse Cases: The

Adverse Impact of Informal Dispute Resolution on Women, 7 Harv. Women's L.J. 57 (1984); Mary Pat Treuthart, In Harm's Way? Family Mediation and the Role of the Attorney Advocate, 23 Golden Gate L. Rev. 717 (1993); Laurie Woods, Mediation: A Backlash to Women's Progress on Family Law Issues, 19 Clearinghouse Rev. 431 (Special Issue Summer 1985).

/2/ See American Bar Ass'n Consortium on Legal Services and the Public, Report on the Legal Needs of the Low and Moderate Income Public (1994) (detailing unmet legal needs of the poor).

/3/ Coping with the psychological aspects of divorce cases may be difficult for lawyers. Bruce W. Kallner, Boundaries of the Divorce Lawyer's Role, 10 Fam. L.Q. 389 (1977). Justice Phyllis Gangel-Jacob of the Supreme Court of the State of New York acknowledges that "judges turn their backs on these [matrimonial] cases; they wince and convey their distaste to administrators." Phyllis Gangel-Jacob, Some Words of Caution About Divorce Mediation, 23 Hofstra L. Rev. 825, 826 (1995). In determining the reason why "the matrimonial case is an anathema to the bench," she speculates that it may be "because the issues are complicated, the considerations great, the decisions long-lasting, the possibility of recurring motions for modification and enforcement haunting, and finally, since there is no jury to share in the process and render a quick decision, the judge must actually listen carefully, take copious notes, and ultimately write lengthy decisions which set forth findings of fact, conclusion, and judgment." Id. at 827, citing Thomas E. Carbonneau, A Consideration of Alternatives to Divorce Litigation, 1986 U. Ill. L. Rev. 1119, 1133.

/4/ See generally David B. Chandler, Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation, 7 Mediation Q. 331 (1990); Kathleen O'Connell Corcoran & James C. Melamed, From Coercion to Empowerment: Spousal Abuse and Mediation, 7 Mediation Q. 303 (1990); Stephen K. Erickson & Marilyn McKnight, Mediating Spousal Abuse Divorces, 7 Mediation Q. 377 (1990); and Alison E. Gerencser, Family Mediation: Screening for Domestic Abuse, 23 Fla. St. U.L. Rev. 43 (1995).

/5/ Jay Folberg & Alison Taylor, Mediation -- A Comprehensive Guide to Resolving Conflicts Without Litigation 7 (1983)

/6/ Woods, supra note 1, at 435.

/7/ Charles A. Bethel & Linda R. Singer, Mediation: A New Remedy for Cases of Domestic Violence, 7 Vt. L. Rev. 15, 16 (1982); Patricia A. Winks, Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce. 19 J. Fam. L. 615, 643 -- 44 (1980 -- 81). There is no actual consensus about activity which constitutes "abuse of a serious nature" or the methodology to be used to determine its occurrence.

/8/ In 1984, responding to these concerns, the Conference of Concerned Mediators and Concerned Advocates on Mediation of Family Law Issues resolved:

> There should be no mediation where past or present domestic violence is the presenting problem. . . . Any legal rights including property or custody or protection of the victim should not be mediated if it is known at the outset or discovered during mediation that there is or has been domestic violence.

Conference of Concerned Mediators and Concerned Advocates on Mediation of Family Law Issues, Conference Minutes 13 (Nov. 10, 1984).

/9/ Erickson & McKnight, supra note 4, at 377, state that "approximately half of all cases submitted for mediation involve some history of spousal abuse; the question therefore becomes not whether to mediate but what special steps must be taken when abuse is suspected or known."

/10/ Hart, supra note 1, at 321.

/11/ The apparent voluntary participation of a battered woman who believes mediation will be less expensive and more efficient than litigation is "akin to a contract of adhesion." Karla Fisher et al., The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU L. Rev. 2117, 2166 -- 67 (1993).

/12/ Jessica Pearson & Nancy Thoennes, Divorce Mediation: Strengths and Weaknesses Over Time, in Alternative Means of Dispute Resolution 456 (H. Dowison et al. eds., 1982). In the Pearson-Thoennes study, 23 percent of the California participants, 20 percent of the Minnesota participants, and 12 percent of the Connecticut participants agreed with the statement: "The mediator pressured me or my (ex) spouse into an agreement." Id.

/13/ In one study, 73 percent of the victims reported that the abuser "always" or "usually" prevailed in major disagreements, compared to just 16 percent of the control sample of nonabused women. Only 9 percent of the victims said that they prevailed in major disputes about half the time, compared to 59 percent of the nonabused women. Lenore Walker, The Battered Woman 174 (1979).

/14/ Folberg & Taylor, supra note 5, at 184 -- 86. But see Penelope Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 Buff. L. Rev. 441, 499 (1992), in which the author observes, upon closer scrutiny, "the literature proves insensitive to power issues." In support of this assessment, she refers to a recent book about divorce mediation that devotes only 16 pages out of more than 400 to the issue of power imbalances and "[i]n those sixteen pages the authors deny the existence of power imbalances or suggest that if they do exist they do not affect mediation." Id., citing Lenard Marlow & S. Richard Sauber, The Handbook of Divorce Mediation 103 -- 19 (1990).

/15/ But see Isolina Ricci, Mediator’s Notebook: Reflections on Promoting Equal Empowerment and Entitlement for Women, J. Divorce, Nos. 3 -- 4, 1985, at 49, 55 -- 57 (providing intervention strategies for mediators attempting to balance power), and Joan B. Kelly, Power Imbalance in Divorce and Interpersonal Mediation, 13 Mediation Q. 85, 96 (1995) (presenting eight different potential sources of power imbalances in mediation and providing examples of mediator interventions to use and suggesting that mediators may need to recommend termination if the parties’ needs are not met despite the use of empowering techniques).

/16/ See, e.g., Ann Milne, Mediation -- A Promising Alternative for Family Courts, 1991 Juv. & Fam. Cts. J. 61.

/17/ Martha Shaffer, Divorce Mediation: A Feminist Perspective, U. Toronto Fac. L. Rev. 162, 182 (1988). For a more recent analysis of the inherent power imbalance between men and women in society and in the mediation process, see generally Bryan, supra note 14.

/18/ Bennett Wolff, The Best Interest of the Divorcing Family -- Mediation Not Litigation, 29 Loy. L. Rev. 55, 69 (1983).

/19/ Woods, supra note 1, at 433.

/20/ Proponents of mediation may believe that family violence is the result of "family dysfunction; stress reaction; inadequate coping responses due to health or mental health problems; lack of anger or frustration control; situationally precipitated crisis such as unemployment; substance or alcohol abuse. . . . Many men experience each or some of the above and do not batter their women." Barbara Hart, Mediation for Women: Same Song, Second Verse -- A Little Bit Louder and A Little Bit Worse (unpublished manuscript, 1984) (available through the National Center on Women and Family Law).

/21/ United States Comm'n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice 62 (1982).

/22/ Arrest may be the most effective deterrent to domestic abuse. N.Y. Times, Apr. 5, 1983, at C1. Many abusers go on to abuse other partners. In one study, 57 percent of victims reported their partners had been violent with former wives. Mildred Daley Pagelow, Family Violence 62 (1984). In another sample, a Los Angeles abusers' counselor confirmed to the researcher that all of the 150 abusers he had treated acknowledged they had abused other partners. Id. at 106. Only 17 percent of the victims reported involvement in other abusive relationships. Id. at 59.

/23/ Woods, supra note 1, at 435 -- 36.

/24/ A comprehensive survey about legal remedies for battered women in the United States is the exhaustively researched (almost 400 pages in length) but very readable article by Catherine Klein & Leslye Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801 (1993). This work could be rightly viewed as a domestic violence handbook for scholars as well as practitioners; however, it is referred to here because the authors focus on the protection order phase of the process. The authors also mention their comprehensive training manual, which includes almost 300 pages of direct examination questions and sample pleadings, for attorneys representing battered women in the protection order process. Id. at 813 n.26. Klein is an associate professor and director of the Families and the Law Clinic, Columbus School of Law, the Catholic University of America in Washington, D.C.; Orloff founded the Clinica Legal Latina at Ayuda, Inc., also in Washington, D.C.

/25/ Id. at 844. See also Barbara J. Hart, State Codes on Domestic Violence: Analysis, Commentary, and Recommendations, 43 Juv. & Fam. Ct. J., No. 4, 1, 11 (1992) (identifying states which provide for lay advocacy and court accompaniment by statute).

/26/ Dismissing a civil protection order due to the petitioner's failure to appear may be unwise; the court should order a continuance and communicate with the petitioner. Klein & Orloff, supra note 24, at 1065 -- 66 (the authors cite Peter Finn & Sarah Colson, National Inst. of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 29 (1990) for the various reasons, such as physical injury, threats of additional violence, or uncertainty about the process, that might prevent the petitioner from attending the hearing).

/27/ Klein & Orloff, supra note 24, at 1060 -- 61, and Kin Kinports & Karla Fischer, Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes, 2 Tex. Women's L.J. 163, 182 -- 85 (1993) (urging the expansion of the role of lay advocates in the protection order process).

/28/ There have been instances of the use of mediation in criminal assault and battery cases involving intimate partners. Bethel & Singer, supra note 7, at 23.

/29/ The concerns about mediation in specific subject areas that may arise in protection order hearings as well as in divorce or custody cases are discussed infra.

/30/ Richard Gelles & Murray Straus, Intimate Violence 150 (1988).

/31/ In this type of mediation, the disputants are in separate locations, thus preventing direct communication, and the mediator moves back and forth between them. Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict 263 (1986).

/32/ These observations are based on my experience as a legal services lawyer representing battered women in New Jersey and Nevada and supervising students in a domestic violence mini-clinic in Washington State.

/33/ Klein & Orloff, supra note 24, at 925, 954.

/34/ Id. at 997 -- 98.

/35/ Family Violence Project, Family Violence: Improving Court Practice, Recommendations from the National Council of Juvenile and Family Court Judges, 41 Juv. & Fam. Ct. J. 1, 7-18 (1990). This is sometimes referred to as a "catchall" provision. Klein & Orloff, supra note 24, at 912.

/36/ "Judges may be uncomfortable issuing ex parte orders that evict the offender from the family home, require the payment of spousal or child support, or award custody of the children to the petitioner." Klein & Orloff, supra note 24, at 18. The National Council, recognizing that the victim will not be adequately protected, recommends that judges take this action. Family Violence Project, supra note 35, at 18. Even in New Jersey, which may have the most comprehensive statutory scheme for providing relief to victims of domestic violence, judges are not "awarding the full range of remedies afforded to victims under the statute." Lisa Memoli & Gina Plotino, Enforcement or Pretense: The Courts and the Domestic Violence Act, 15 Women's Rts. L. Rptr. 39, 48 (1993). Judicial masters, court commissioners, and attorneys serving in judicial capacities on a pro tem basis may be even more reluctant to award necessary relief.

/37/ Family Violence Project, supra note 35, at 18. Incidents of abuse often increase in severity and frequency over time. Lenore Walker, The Battered Woman Syndrome 24 (1984).

/38/ Attorney representation currently may be low. In one New Jersey county where a court watch program was implemented, plaintiffs were represented in only 15 percent of cases, defendants in 21 percent. Memoli & Plotino, supra note 36, at 57 citing Bergen County (N.J.) Commission on the Status of Women, Community Court Watch Project (May 1993). This chilling statistic indicates that victims in some cases proceeded pro se against an abuser who was represented by counsel.

/39/ Justice Gangel-Jacob, in expressing caution about divorce mediation as a panacea, observes that "[t]here is a lack of appreciation for the complexities of a matrimonial case; able counsel, familiar with the most recent decisions in a quickly developing field, with expertise not only in matrimonial law but in landlord-tenant law, real estate law, tax law, and consumer rights law, should be on hand from the beginning and through every stage of the advanced negotiation and, if necessary, the trial." Gangel-Jacob, supra note 3, at 828.

/40/ Developments -- Domestic Violence, 106 Harv. L. Rev. 1498, 1602 (1993).

/41/ Nancy Polikoff, Gender and Child Custody Determinations: Exploding the Myth in Families, Politics, and Public Policy: A Feminist Dialogue on Women and the State 195 (I. Diamond ed., 1983).

/42/ Viewpoint: The Politics of Child Custody, Guild Notes May -- Aug. 1982, at 18.

/43/ Lefcourt, supra note 1, at 269.

/44/ Id.

/45/ Margaret J. Nichols, Issues to Consider Regarding Mediation of Custody Disputes 4 (unpublished manuscript, 1984) (available through the National Center on Women and Family Law).

/46/ Joanne Shulman & Nancy Polikoff, Child Custody in Women and the Law 6.33 -- .39 (Carol Lefcourt ed., 1984) (1988 Supp.) [hereinafter Women and the Law].

/47/ Carol Bohmer & Marilyn L. Ray, Effects of Different Dispute Resolution Methods on Women and Children After Divorce, 28 Fam. L.Q. 223 (1994). In a New York study, mediator-negotiated agreements resulted in a substantially greater number of joint custody awards, with proportionally less actual equal sharing of child caretaking responsibilities within three to nine months after divorce. Id. at 232. The study was replicated in Georgia and with results similar to those reached in New York, particularly regarding caretaking responsibilities. Id. at 236.

/48/ Martha Shaffer, supra note 17, at 189. See generally David Saposnek, Mediating Child Custody Disputes (1983); Joan Blades, Family Mediation: Cooperative Divorce Settlement 27-31 (1985). It is not clear whether mediators have any independent, rather than derivative, obligation to

third parties, including children who are not present. Some mediators encourage the participation of children in custody decisions, provided they are old enough to comprehend the process. O.J. Coogler, Structured Mediation Divorce Settlement 27 -- 31 (1978).

/49/ Pearson & Thoennes, supra note 12, at 62, at 474 -- 76. Based on the results of objective tests administered to children, researchers found no consistent or significant differences in postdivorce adjustment according to exposure to mediation versus more traditional adjudicatory processes. Id.

/50/ Hart, supra note 25, at 37, citing Susan Myers et al., Divorce Mediation in the States: Institutionalization, Use and Assessment, 12 State Ct. J. 17 (Fall 1988).

/51/ Germane et al, supra note 1, at 21, and see generally Mildred Daley Pagelow, Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements, 7 Mediation Q. 347 (1990).

/52/ Joan Zorza, Women Battering: High Costs and the State of the Law, 28 Clearinghouse Rev. 383, 393 (Special Issue 1994).

/53/ Judith Cassetty, Mediation and Child Support (unpublished manuscript, 1984) (available through the National Center on Women and Family Law).

/54/ Nancy S. Erickson, Child Support Guidelines: A Primer, 27 Clearinghouse Rev. 734, 735 (Nov. 1993).

/55/ At a family mediation training I recently attended, the trainers gave participants a copy of state child support tables and suggested this was no longer an issue for consideration in the mediation context. Family/Divorce Mediation Training sponsored by the Spokane County Dispute Resolution Center, Spokane, Washington, April 19 -- 21, 1996.

/56/ Cassetty, supra note 53, at 3.

/57/ Bohmer & Ray, supra note 47, at 228. The mediated samples in three selected heterogeneous counties in New York provided for child support proportionally less frequently than the other mechanisms in all custody arrangements. Id. at 232. Results from a study in Georgia after passage of the Family Support Act of 1988 indicate that divorce agreement from all dispute resolution processes contained child support provisions at least 90 percent of the time. Id. at 237 -- 38.

/58/ Carol Lefcourt & Judith M. Reichler, Child Support in Women and the Law, supra note 46, at 5.09. Statutory child support guidelines may not provide for nontraditional custody or visitation arrangements. However, alternative arrangements alone should not "cause the court to vary from the guidelines unless it has been determined that there is sharing of physical custody to the extent that the primary custodial parent’s expenses are substantially reduced as a result." Id.

/59/ Cassetty, supra note 53, at 6, gives the example of a mother who thinks the father may be more willing to pay for children’s college education if he does not have to pay "too much" child support while they are young.

/60/ The structured mediation model sets forth specific guidelines for identifying the dependent spouse and determining the proper amount of support. O.J. Coogler, supra note 48, at 16 -- 17.

/61/ New York Task Force on Women in the Court Public Hearing 54 (Nov. 19, 1984), cited in The Report of the New York Task Force on Women in the Courts, 15 Ford. Urb. L.J. 3, 74 (1986 -- 87).

/62/ In a Georgia study there was no significant difference in the value of property women received in settlement from different dispute resolution mechanisms. Bohmer & Ray, supra note 47, at 244.

/63/ O.J. Coogler, supra note 48, at 45.

/64/ Lefcourt, supra note 1, at 268. See also Jessica Pearson, The Equity of Mediated Divorce Agreements, 9 Mediation Q. 179, 194 -- 95 (1990), in which the author reports, after conducting structured telephone interviews with 302 former divorce-mediated participants, that sizable proportions of women believe their ex-spouse was dishonest about his financial situation and withheld information during mediation.

/65/ Judith Avner, Mediation of Property Issues 2 (unpublished manuscript, 1984) (available through the National Center on Women and Family Law).

/66/ Pearson discovered that only 8 percent and 13 percent of public and private sector mediation programs, respectively, reported using independent appraisers for marital property valuations. Pearson, supra note 64, at 194.

/67/ Amy Pellman, Married Women's Property Rights in Women and the Law (1987 Supp.), supra note 46, at 3A-5.

/68/ Judith Avner, Equitable Distribution in Women and the Law, supra note 46, at 4-4.

/69/ Articles about tax consequences of certain property transfers are beginning to appear in the mediation literature. See, e.g., Landis Olesker, Qualified Domestic Relations Orders: Qualification Is Not the Problem, 12 Mediation Q. 313 (1995). Despite the attempt to give information even to nonattorney mediators in a straightforward manner, some of the conceptual nuances are not easy to grasp.

/70/ For more information about public entitlement issues, see Center for Law and Social Policy, Public Benefits Issues in Divorce Cases: A Manual for Mediators (1988).

/71/ See Laurie Woods & Myra Sun, Remedies for Battered Women, in Women and the Law (1988 Supp.), supra note 46, at 9.1.

/72/ Tort remedies available to victims of domestic abuse, including some various pleading requirements, can be found in Douglas D. Scherer, Tort Remedies for Victims of Domestic Abuse, 43 S.C. L. Rev. 543 (1992).

/73/ Deeana L. Jang, Caught in a Web: Immigrant Women and Domestic Violence, 28 Clearinghouse Rev. 397, 401 (Special Issue 1994); Charles Wheeler, New Protections for Immigrant Women and Children Who Are Victims of Domestic Violence, in this issue.

/74/ See generally Center for Law and Social Policy, supra note 70.

/75/ See Palmore v. Sidoti 466 U.S. 429 (1985) (Court reverses a Florida District Court of Appeals decision divesting mother of the custody of her infant child because of her remarriage to a person of a different race).

/76/ See Suzanne M. Retzinger, Mental Illness and Labeling in Mediation, 8 Mediation Q. 151 (1990).

/77/ But 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. 254, 265 (1994) (suggesting that the mediation process may not fully apprehend the danger to women and children in the postdispositional phase).

/78/ Women who are separated or divorced are more frequently and seriously battered by former partners. Zorza, supra note 52, at 386. Statistical data indicate that separated and divorced women account for 75 percent of all battered women and "are 14 times more likely to be battered than women still cohabiting." Id., citing Caroline W. Harlow, Bureau of Justice Statistics, Female Victims of Violent Crime 5 (1991). See also Desmond Ellis, Post Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors," 10 Intl. J.L. & Psychiatry 403, 408 (1987).

/79/ As one mediation critic has noted, "For many battered women, the period of healing and empowerment after separation from a batterer can last several years. Even if a victim no longer suffers the diminishment imposed by the battering in the relationship, she is still not free to deal with the batterer 'at arm’s length,’ voluntarily until he has stopped violent and coercive tactics for a substantial period of time." Hart, supra note 1, at 322.

/80/ Knowlton & Muhlhauser, supra note 77, at 267 (Muhlhauser’s conclusion in section titled "Con" Position on Mediation in Domestic Violence Situation).

/81/ Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 93 (1991).

/82/ Klein & Orloff, supra note 24, at 1062.

/83/ See Laurie Woods, The Challenge Facing Legal Services in the 80’s, 16 Clearinghouse Rev. 26 (May 1982); Klein & Orloff, supra note 24, at 1062 -- 63.

/84/ Klein & Orloff, supra note 24, at 1062 -- 63.

/85/ Perhaps a larger law firm might be persuaded to sponsor a program to represent victims of domestic violence. Apparently this approach has been used in the Washington, D.C., area where several large law firms have developed pro bono programs to assist victims of domestic abuse. Id. at 1064.

/86/ See Caroline Durham, Law Schools Making a Difference: An Examination of Public Service Requirements, 13 Law & Ineq. 39 (1994).

/87/ Mary Pat Treuthart, "Service Learning" Brings Real World Into Class, III (No. 2) The Law Teacher 12 (Spring 1996).

/88/ Hart, supra note 25, at 7.

/89/ New Jersey and Florida offer the most extensive, statutorily mandated assistance by court staff. Id. at 9.

/90/ While many battered women's programs supply such materials, much of the information reflects what should ideally occur in court. To the best of my knowledge, no videos portray judges curtailing women's speech, expressing incredulity at a victim's testimony, refusing to grant essential relief, issuing "in-house" restraining orders, or conducting group hearings as though the parties were errant schoolchildren called en masse into the principal's office. All of these -- and worse -- have happened in actual hearings. As a result of the gender-bias studies conducted nationwide, legitimate concerns about judicial handling of domestic violence cases are well documented. Karen Czapanskiy, Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts, 28 FAM. L.J. 247, 249 (1993). Increased judicial education and the gender-bias provisions in the 1990 Code of Judicial Conduct may have helped alleviate some of the previously reported problems; however, a battered woman should be given information about requesting a continuance to obtain counsel, asking to be permitted to put her side of the story on the record, and appealing an unfavorable ruling. At the same time, injecting too much realism into the information given may discourage the battered woman from proceeding at all.

The above examples of courtroom proceedings gone awry underscore the need for attorney assistance. Mediation supporters might suggest that the these examples serve to demonstrate that the mediation environment is more hospitable than the courtroom setting. However, bias and inappropriate conduct are much more difficult to detect in the privatized alternative dispute resolution setting, and mediators may be less accountable for their actions. Id. at 273.

/91/ The tragic homicide of a battered woman who failed to obtain needed relief in the protection order process prompted the establishment of a more formal court watch project in Bergen County, New Jersey, modeled after a program in Cook County, Illinois. Memoli & Plotino, supra note 36, at 47, citing Cook County Court Watchers, Inc., How to Start a Court Watching Project (ii) (1984).

/92/ In one study of divorce cases conducted in Maricopa County (Phoenix), Arizona, researchers found that in 1990 "approximately 90 percent of the cases involved at least one litigant who self-represented, while in 52 percent of the cases both parties self-represented." Bruce D. Sales et al., Is

Self-representation a Reasonable Alternative to Attorney Representation in Divorce Cases?, 37 St. Louis U. L.J. 553, 594 (1992).