
Mediating Spousal Abuse Divorces

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This article declines to debate whether or not mediation of spousal abuse cases is appropriate. Rather, it assumes 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. Concerns about protection, control, and power balancing require sophisticated skills that the beginning, inexperienced, or minimally trained mediator may lack. This article outlines special procedures that have been developed to assure successful mediated outcomes of these special cases.

When asked what could be done to eliminate world conflict, Mother Teresa replied: "Go home and love your family."

The *Minneapolis Star and Tribune* reported in its December 30, 1989, edition that thirteen Minnesota women had been killed by their spouses in 1989.

The *Minneapolis Star and Tribune* reported in its November 6, 1989, edition that a group of women representing battered women's groups picketed a two-day seminar on divorce mediation.

Because it is not possible to reconcile these quotations, it is easy to understand why some mediators and some battered women's groups disagree so much about methods and tactics to end the violence. We wish everyone could go home and love their families. Unfortunately for many, such a directive is difficult if not impossible to follow, and many families experience severe violence.

One method used to end the violent marriage relationship is mediation. However, critics of mediation say it is unwise to put the abused and the abuser in the same room. The criticism overlooks the fact that in most cases the husband and wife will still have future contact around parenting their children. (Courts have been unwilling to terminate the parental rights of an abuser.) Courts have also shown a reluctance to impose long-term incarceration of a spouse abuser.

There appear to be three choices in the matter of future contact between the parties: (1) prevent forever all future contact between the husband and wife; (2) temporarily prohibit all contact and assume the couple will learn on their own how to interact better as they exchange the children under a court-ordered visitation schedule; (3) temporarily prevent contact and help the couple create settlements with specific parenting arrangements that control the abuser's contact with the abused.

The first choice is never used where the couple has minor children. The second choice is helpful if it quickly forces the abuser to acknowledge the gravity of the offense and change the behavior. Obviously, the third choice is the best, but the key issue is still how protection can be achieved in those situations where continuing contact is likely through the exchange of the children after a divorce.

We believe that mediation sessions with both spouses present can reduce the likelihood of future abuse. We believe that because a mediation process encourages cooperative interaction, it should be used as an additional method or treatment modality to end spousal abuse after divorces. We do not advocate that mediation replace any process, but we suggest mediation as an additional tool designed to help break the cycle of abuse. Mediators work well with existing therapeutic and legal approaches, and mediation is not inconsistent with the other approaches' goals or methods.

Based on our mediation efforts with both abusive and nonabusive divorcing couples since 1976, we believe that face-to-face mediation sessions increase the likelihood of positive postdivorce interaction because the couple begins to use a method of cooperation, rather than the pain of adversarial, competitive conflict resolution. Through repeated court appearances, animosity is often heightened. Mediation attempts to reduce hostility and establish clear boundaries for the couple.

Responsibilities of the Mediator

Mediation, properly done, need not place the victim in danger, nor is it inconsistent with wanting the abuser to acknowledge and accept abusive conduct as wrong. However, the mediator must have special skills and must employ a process that is tailored to the complex dynamic of spousal abuse. Perhaps because mediation is seen as conciliatory and compromising, many fear that it will coddle the abuser and allow the victim to be further victimized by meeting with the abuser in the same room. This could happen at the hands of an inexperienced "mediator." By analyzing the intake questionnaires filled out by couples who voluntarily used our mediation service in the past thirteen years, we concluded that either physical or emotional abuse occurs in more than one half of all our cases. This is consistent with other observations reported in the literature. This finding prompted us to establish special procedures to be followed when spousal abuse is an issue in the divorce mediation.

Our own experience mediating couples with a history of abuse leads us to believe that the mediation experience is positive and results in the couple agreeing to detailed rules and boundaries, which guide them during future interactions. Our past discussions with battered women's advocates revealed that their primary concern is not so much with the private mediation process itself, but rather with the poor quality of mediation conducted by counselors, attorneys, and volunteers frequently used by the court.

If the couple is to successfully detach and at the same time develop separate methods of parenting their children, new rules and new agreements must be made and followed. It is helpful for couples to think about these new rules as they would in a business or partnership relationship, which usually has clearly defined written rules or at least clearly understood rules. The role of the mediator in this situation is to help the couple adopt new rules that will help them end the cycle of abuse, such as a specific parenting schedule that has pick-up and return times that are to be followed with only fifteen-minute's leeway on either side of the time.

What is done in mediation can enhance the rules already set by the court. If the couple has not yet contacted attorneys, the mediator will ask the couple to follow concrete rigid rules of avoiding contact and can reinforce the blanket command made by the court to avoid all contact. How is this to be done when there are children to exchange, bills to pay, and property and household goods to divide? The mediator can help the couple reach agreement on these issues while at the same time respecting and reinforcing the rules about boundaries, safety, and detaching. Seen in this light, both mediation and the court process have the same goal, to establish new rules for the couple to follow while they live apart, wind up the business of the money and property of the marriage, and start the new business of acting as separate parents in two houses.

Based upon the above assumptions, we believe the controversy becomes not "Should mediators mediate divorces where wife abuse has occurred?" but instead "How can mediators screen for abuse?" and "What experience, education, methods, and techniques must mediators employ when mediating these particularly difficult cases?"

Even though, historically, about one half of our caseload is believed to consist of couples where spousal abuse is not present, we have found the following screening procedures necessary in all cases to ensure as much protection as possible.

Screening

When couples first enter the mediation office for an initial interview, we have them fill out a one-page questionnaire that asks in one of its questions whether there is some form of abuse in the relationship. These questionnaires are filled out separately and not revealed to the other spouse.

If the mediator knows that spousal abuse is part of the history of the

divorcing couple, it makes it easier to implement a different procedure with the couple early on rather than learning later that this issue was contaminating the negotiations all along. Even if the abuse occurred in the past, it interferes with the mediation process because the victim still may fear abuse and intimidation. As a mediator becomes more experienced, it is possible after one two-hour session to conclude that abuse might be present through the following indicators:

- The husband is angry and speaks mostly about his wife. He often has little to say about himself and gives the impression that his wife is the entire problem.
- The wife is the initiator of the divorce and the husband clearly communicates that he does not want the divorce to occur.
- The wife speaks in low and measured tones, taking great pains not to openly disagree with the husband.
- They fight over who should move out of the house, with the husband saying that if she wants to leave, she should be the one to move out of the house. Any attempt to discuss the husband moving out is met with great resistance and anger.
- The wife seems to have difficulty expressing her needs and will often mask comments about the past by saying things have been difficult, we can't continue to go on like this, and it is hard on the children, but never openly indicates physical or emotional abuse.
- Controlling behavior is present on the part of the suspected abuser. He is the one who scheduled the session. He may be the one who has managed the finances, and the wife may comment that she has not hired an attorney because she does not have any money.
- The body language of the wife indicates fear and tension, and she is unable to have direct eye contact with her husband.

Of course, some of the same indicators may be common in a typical nonabuse mediation case, but when some or all of the above are present, it is wise to inquire further about possible abuse. In addition to relying on in-session observations, we have found that using a questionnaire at intake can be useful in identifying spousal abuse cases. It must be remembered that spousal abuse, like incest, alcoholism, and drug abuse, are family secrets that couples have extreme difficulty acknowledging openly.

We attempt to learn some marital history in an effort to uncover the dynamics of the relationship. This is not the typical family history a therapist will conduct, as the purpose is not to conduct therapy, but rather to more successfully manage mediation discussions leading to a written agreement about the terms of the divorce contract. An intake questionnaire, asking whether abuse was present in the relationship, is very helpful. We are not here trying to learn about the underlying cause of the breakdown, only whether abuse was present in the relationship. Part of our questionnaire asks to independently answer the following question:

Was abuse present in the marriage relationship? Yes _____
No _____
Type: Physical _____ Emotional _____ Chemical _____
Other _____

Care must be given in attempting to uncover a past history of abuse, as it will be necessary to implement special mediation procedures even where the abuse occurred long ago. Another method we employ when abuse or past violence is suspected is to meet separately with each spouse for five or ten minutes. During this separate meeting, the mediator may describe an observation to the wife: "Mary, you seem to have great difficulty in speaking for yourself, or in saying clearly what your needs are. John seems to have some sort of power over you. Has he ever physically or emotionally abused you in the past?" In one such meeting recently, the wife said, "Five years ago, he threatened to kill me." The mediator's response to her was, "Although the threat occurred five years ago, it is operating in the mediation room today. It still has power over you." It was important for the mediator to know about the threat as he then decided to encourage her to speak with her therapist and retain an attorney from the recommended list in preparation for the next session. This had the effect of making it easier for her to negotiate her real needs without being intimidated by her husband.

Likewise, it can be important to obtain an acknowledgment from the husband about the past abuse. This is not always possible to get (or is in the form of denial and minimization), but when the husband recognizes his behavior, it makes it easier to take the next step and point out that some special procedures will be implemented by the mediator to make sure the negotiations proceed safely. The mediator is careful not to be judgmental or fault finding when discussing this with the husband. In the above case example, the mediator also took the husband into a separate room and said that Mary was afraid of his anger and intimidating methods and this was making it difficult for them to conclude the negotiations around the children, support, and property. He was then asked not to speak with her except in the presence of the mediator and also asked if he had ever assaulted her or threatened her in the past. He said no and became angry, questioning what this had to do with the mediation. At this point, the mediator noted their progress toward a settlement, and observed that they had worked out good agreements about the children and that these agreements were working and being followed. The husband was commended for paying the support on time. However, the mediator then said that the negotiations seem to be hanging at a precarious point; Mary was unable to ask for some spousal support to get a master's degree because she was afraid of the reaction she might get to her request. In this particular case, the mediator decided not to ask about the details of the threat made five years ago, because the husband now appeared to understand her fears.

(Mary indicated she did not feel he was a current threat to her and he had never physically hurt her.) After consulting with her attorney and therapist prior to the last session, the result was that the husband agreed to pay \$8,000 from his one-half share of the property settlement to support her finishing her master's degree. This case was successfully concluded in mediation even though the wife declined to seek a protection order.

Safety Issues

Most mediators are deeply concerned about protection of the abused party. A history of abuse is not always an indicator that mediation will fail, nor does it always require the full regimen of protections set forth below. We have completed mediation of cases where there was abuse that was not revealed through our screening. In a recent case, the wife phoned and left a message with the secretary that her husband was physically abusive to her and that he had been arrested a year earlier for an abusive assault against her. The wife declined the mediator's suggestion that a protection order could be obtained and told the mediator that she wanted to continue to mediate and conclude the settlement as soon as possible. In the mediation room, she was assertive and stood up for herself, and the negotiations concluded with her receiving a settlement that both attorneys agreed was fair in comparison to the predicted outcome in court when Minnesota law is applied.

Perhaps the best course for the mediator to follow is to diligently try to uncover the history of abuse. When such history is uncovered, further steps must be discussed, and some or all of the following special procedures implemented.

Rule 1. Take it seriously. When in doubt, err on the side of caution. At the slightest inkling of abuse being an issue for either party, the mediator needs to begin addressing issues of protection, boundaries, communication procedures, and safety.

Rule 2. There is never an excuse for abuse, and the mediator making a strong statement about this need not jeopardize neutrality. The mediator need not make judgments about who is at fault or why the marriage has become dysfunctional. Mediation is not an attempt to determine who is at fault. It is unwise to inquire about how the incident of abuse came about. It must be said by the mediator, "There is never a valid excuse or reason for abuse and violence. Mediators do not mediate whether or not violence and battering was justified, nor do we try to determine what caused it or who started it. Rather, we try to help the two of you see what is needed to escape the violence of the past. Because abuse has been a part of your marital history, we need to discuss procedures for establishing a safe environment for you to successfully end the relationship and be protected, even if one of you denies that it is a problem. If it is a problem for one of

you, then it is a problem for both of you in this room.”

Rule 3. Always proceed by discussing the special steps that might need to be taken given the history of abuse in the relationship. Even if it is only an issue for the wife, the husband must be told that it becomes an issue for him because it affects the negotiations and her perceived fear will make it difficult to be successful.

1. The first step is to review with the wife what a protection order is, how is it obtained, and where she may go to procure one. Urge that such a protection order be secured in order to clearly establish the principle that while in mediation as many safety measures as possible are in effect to lessen the risk of abuse occurring again. If the husband says that a protection order is not needed because he will not do it again, the mediator's response can be: "Good, since you are sure that it will not happen again, you should not mind her formally obtaining such an order as it will not have any effect on you if it is not violated. It will then have a positive effect on the mediation process, because she feels will give her greater comfort and security while in mediation."

2. In addition to the protection order, the mediator will discuss what she may do about the fear of further violent contact with him. In Minnesota, she needs to know that when threatened, she can call 911 or the police and have him removed from the home. The wife should also be given the names and phone numbers of battered women's shelters or counseling and advocate programs. In most cases, this can be done in the husband's presence; such a discussion impresses on him the seriousness of the concern.

3. The mediator should concentrate on establishing clear, detailed boundaries for the exchange of the children and for whether any contact between the parties is going to be permitted. This will usually involve rules concerning communication, such as no phone calls except in the case of emergencies concerning the children's welfare. It is often desirable to have the children exchanged in a public place, such as a restaurant, or having them picked up at school, day care, or at relatives' to avoid any kind of contact between the two.

4. Urge the wife to retain an attorney who is skilled in family issues and who understands the mediation process and spousal abuse. This has the effect of giving the mediator another professional who will assist on the case and allows the wife and the attorney to determine whether they wish to obtain a protection order.

5. Ask that each have their attorney present at the sessions to assist them in the negotiating. When this occurs, they will each have the additional consultation and advice of an attorney to assist them in their negotiations.

6. In some instances, it may be desirable for the wife to have an advocate with her to assure her of her strengths and to provide emotional

support. The husband may also wish an advocate to assist him with his emotions and give him security that he is not being bulldozed by the wife's advocate. (The mediator must maintain control of the process and be clear with the advocates about their roles in the session.)

If the husband acknowledges that abuse has occurred, or if the mediator has heard from the wife that it is a fear and the husband minimizes her fear, care should be taken to explain his options for preventing abuse and assuring the safety of his wife and children.

1. Explain to him the services available for husbands who abuse wives. In some cases, the mediator can strongly influence the course of the conflict and still remain neutral.

2. Ask him if he abuses chemicals or alcohol; if so, provide information about where he can explore treatment.

3. If he denies that abuse has occurred, ask if he will attend counseling with his wife if her program requests that he participate so he may better understand her allegation of his abuse.

4. Stress that as the mediator, you will not work with them if there is repeated violation of the ground rules established about communication boundaries and contact. Inform him that if he comes to the next session saying he had to stop by the house to get the mail, or that she asked him to change the oil in her car, he is in violation of the protection order and the special rules agreed to by them for separateness.

Frequently men respond better to the need for such ground rules when the mediator points out that under our current laws protecting women, the mere allegation of abuse sets in place a large piece of machinery that will eventually accomplish all of the special rules that he is being asked to observe. This does not mean he is viewed as guilty before having a trial on whether the abuse actually occurred; it is simply the reality of the situation. The special rules are required in order for them to be successful in mediation as well as to not place him in a position where further allegations against him will occur. By cooperating with the special rules, he has the opportunity to remove any danger that he will be accused in the future of abusive behavior.

In our practice, one of the mediators received a call at home from the wife saying she was calling from the police station. The police apparently didn't have the time to deal with her concern and urged her to call her attorney. The couple had completed only one session in mediation and had not yet physically separated, and the wife decided to call the mediator for help. She said she had not been assaulted by him, but he had started yelling and screaming at her so she drove down to the police station and tried to lodge a complaint and get help. The mediator told her to stay at the police station and said she would call her back in ten minutes. The mediator called the husband at home; he said he had been sleeping in his part of the house when his wife came in, woke him up, and started to

complain about his past behavior. He admitted that this argument was the worst they had ever had. The mediator suggested he pack an overnight case and go to a motel. He protested until it was pointed out that he had two choices. He could stay there and risk another confrontation, with a probability of the police being called and him being taken away. He could also stay in a motel for the next few nights, get in touch with a counselor at the domestic abuse project to help him learn what he must do to avoid the violence that seemed to be escalating, and talk further with his wife and the mediator at the next mediation session in three days. When the mediator pointed out that if his wife alleged that he had committed physical violence toward her, he would spend \$500 to \$1,000 for an attorney to defend himself at the hearing on the matter, he wisely decided that spending \$42 a night for a motel room was the best choice. Although he did not formally enroll in the domestic abuse program, he did follow through with contacting them.

Mediator Neutrality

A recurring concern expressed by many opposed to mediation of abusive couples is the claim that men need to acknowledge their criminal behavior; only when that is done will they begin to realize the seriousness of their behavior. In the legal system, both the wife and the husband are given the protection of the Constitution, which states that everyone is presumed innocent until proven guilty. The adversarial approach to spousal abuse often actually encourages the husband to deny his past abusive behavior because his defense attorney will assist him in denying the offense. Moreover, when and if the abuse is ever found true by the court, the options available to the court are limited. (Only a few jurisdictions have been able to pass legislation requiring domestic abuse counseling for the man.)

In mediation, the mediator and the couple can immediately deal with the abuse because the neutral role of the mediator takes away the need for the mediator to be a judge determining what happened in the past and allows the mediator to focus on steps to remove any possibility of future allegations or occurrences of abuse. Said another way, the mediator can actually obtain more immediate changes if the truth or falsity of the allegation of abuse is bypassed and the mediator assumes that protections must be implemented because the wife has raised the issue. We have actually observed the empowerment of a woman just by taking this action, because her concern is validated and accepted in the mediation process in a way that she has not experienced in the past.

One of the primary strengths of the mediation process is that when the focus is on the future, people have more success in reaching good agreements. Whereas the court system says: "The problem is trying to determine if abuse has occurred in the past and if it has, we will then order that you

stop the behavior and we will send you to jail, fine you, or order you to stay away from her," the mediation process says: "The problem is that one of you alleges some type of physical or emotional abuse has occurred in the past. Without needing to conduct a trial to determine if it has occurred, we assume that the two of you need special rules and must follow a more rigid set of procedural agreements in order to be successful in mediation." What has just happened is that the mediator can assume for the purpose of the mediation that the abuse is real because it has been alleged; the protective agreements need not be seen as onerous for the husband because they are really an expansion of what normally occurs in all divorces at the temporary hearing. The mediator can be assertive and insist that procedural rules be followed (to establish safety, boundaries, and counseling), leaving the substantive rules, such as the amount and time of visitation, for the couple to negotiate and decide.

If a protection order is obtained in conjunction with the mediation, the wife is in no worse position vis-à-vis the court and, arguably, in a better position because she has regular meetings where the boundaries can be strengthened and enforced, she does not have to contend with a criminal defense attorney who helps her husband deny the abuse, and she can begin to assert herself in front of him, something that is very empowering for her.

Cases Where Mediation Is Inappropriate

Mediation is not a panacea for every divorce with a battered woman and her spouse. It clearly does not work when the wife does not want to mediate and consents only because she wishes to placate her husband. It may only work for women who are emotionally at the point where they can move forward psychologically and may physically begin to leave the marriage relationship. (Psychological readiness is a topic in itself for another paper or research project.) The following points acknowledge when mediation may not be appropriate for a battered woman.

- Be careful of cases where the wife's commitment to the process seems shaky, and the couple persist in having "mediation sessions" on their own. We recently worked with a couple who planned their sessions far apart and negotiated between sessions to save money. During mediation the husband was in charge, though the wife seemed capable of understanding the issues and options. At the last session, the couple informed the mediator they had met outside of mediation and settled everything, needing only a little help on some minor details. The wife was questioned about some points in their settlement, and she was adamant about sticking to their agreement. After the mediator sent out a draft of their agreement, the husband phoned; his wife had called him to say she was disappointed with the agreement and was asking her lawyer to go ahead with what he

thought she would get in court. When we contacted the wife, it became clear that she was intimidated by her husband even though no physical abuse had occurred. She was afraid of his threats about what he would do to her financially, and she caved in. His threats kept her from feeling safe about disagreeing with him in mediation. She said she did not wish to continue, and the mediator wrote them a letter stating that no further sessions would be held without their lawyers present.

- Mediation is not appropriate when a husband totally discounts everything his wife says and does and refuses to acknowledge her worth after the mediator has discussed this with them and made efforts to get him to understand how his behavior affects her. Such an attitude or behavior is usually revealed in the initial session, where it should be addressed by the mediator.

- Mediation is not appropriate if the abuse is occurring at the time of the sessions and if the husband refuses to respect the safety boundaries and continues to violate them.

- Mediation is never appropriate with clients who insist on carrying a weapon or are under the influence of chemicals.

- Mediation is usually terminated when either party violates the rules and, after discussion in mediation, refuses to acknowledge the violation as a problem and agree to even more restrictive rules.

Summary

Integrated in the full panoply of court involvement, police protection, and shelter advocacy and counseling, mediation can be seen as an additional piece of the puzzle that does not have to be inconsistent with the goals and methods of battered women's organizations. It is clear that the court system alone, with its vast authority and power, has often not stopped an abuser who is obsessed with harming his wife. Protection orders are important, but they are hardly worth the paper they are written on if a husband refuses to honor the order. Moreover, protection orders do not accomplish their purpose when the wife yields to the dysfunctional urge to interact with her spouse again.

The mediation process recognizes that all of the methods currently used to halt spousal abuse are necessary and valid. The use of protection orders, the arresting of the abuser at the first police call, the vigorous prosecution of abusers, the shelters to temporarily shield and hide the victim, and the domestic abuse counseling programs for men should all be expanded and more fully funded, staffed, and implemented. On top of all of this, divorce mediation can be used as an additional tool to change the abuser's attitude more convincingly than the adversarial approach, without coddling him or condoning his behavior.

Perhaps such progress has been achieved with abusive husbands in

our own mediation practice because change seems to come quicker and easier when it focuses less on punishment and more on the positive and constructive reasons change is needed. It would be difficult to speculate more about the reasons change occurs with these couples. Until more research is completed in this area, we can only speak from an experiential base, which, in this emerging field, after all does present the truth. In thirteen years of mediating over 1,400 divorce cases, we have experienced not one instance of a wife being abused while the mediation process was continuing. This can be compared to one of the writers' experience as an attorney, representing far fewer divorce cases, where he lost two women clients to homicide during the course of representation.

Mediation does work with spousal abuse couples when the mediator follows special rules for conducting the sessions to ensure the safety of the wife and when the husband and wife make a commitment to the rules established in mediation. Mediation is not counterproductive to the court process, but is rather an enhancement to the power of the court. For those couples who begin in mediation without the contempt power of the court behind the agreements, the individual attorneys can easily convert the mediation rules to a binding court order. Since more than half of all couples who divorce have a history of some type of abuse, it is imperative that mediators and battered women's organizations cooperate and coordinate their efforts. We suggest that research and discussion about this subject continue. Through our own effort in mediating approximately 1,400 divorces, we believe that the mediation process is positive, constructive, and protective of people's best interests. Battered women and their husbands can succeed in this process and create a better future for themselves and their children.

It is time that we all keep searching for truths through sharing of information and research so we may some day find a way for more people to carry out Mother Teresa's directive to "go home and love your families."

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