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## Mandatory Custody Mediation: Empirical Evidence of Increased Risk for Domestic Violence Victims and Their Children

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Nearly all states utilize mediation for child custody disputes.<sup>1</sup> Individual states vary widely, however, from optional mediation at the parties' expense<sup>2</sup> to mandatory mediation with no exclusion for domestic violence.<sup>3</sup>

It is in cases of domestic violence where the use of mediation has drawn the most criticism.<sup>4</sup> Although proponents argue that it is possible to mediate child custody disputes even where there is domestic violence, critics have noted the potential harm to both the battered woman and the child victims of domestic violence.<sup>5</sup> Nevertheless, even the most optimistic proponents agree that in order for such mediation to be successful, the mediator must acknowledge the violence and balance the power.<sup>6</sup> Because mediation is a confidential process, the empirical literature has had relatively little to say about whether mediators acknowledge the violence, much less balance the power.

Empirical evaluations of the effects of mandatory custody mediation in domestic violence as well as non-domestic violence cases are exceedingly rare. Thus far, evaluations of mandatory custody mediation have focused almost exclusively on retrospective self-reported satisfaction, with little regard for evaluations of equitable outcomes.<sup>7</sup> The primary goal of the California courts in custody decisions, for example, is not parental satisfaction, but rather the health, safety and welfare of the children. Self-reported satisfaction may have little relationship to the critical outcome of safety for the victim and child. There is empirical evidence that when mandated to

<sup>1</sup> See Jana B. Singer, *The Privatization of Family Law*, Wis. L. Rev. 1443, 1496 (1992); Craig A. McEwen, Nancy H. Rogers, & Ricard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995).

<sup>2</sup> North Dakota: N.D. Cent. Cde Sections 14-09.1 -2 (1991).

<sup>3</sup> Cal. Civ. Code Section 4607 (West 2001).

<sup>4</sup> Richard D. Mathis & Zoe Tanner, *Effects of Unscreened Spouse Violence on Mediated Agreements*, 26 Am. J. Family Therapy 251 (1998); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buffalo L. Rev. 441 (1992) (noting power imbalances). Also see Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 Clearinghouse Review 1113 (1996) for a summary of how mediation endangers battered women) and Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 Mediation Quarterly 347 (1990) (for a summary of the arguments against mediation for violent couples).

<sup>5</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L. Rev. 1545 (1991). Karla Fischer, Neil Vidmar, & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2141 (1993).

<sup>6</sup> Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 Vt. L. Rev. 15 (1982). See also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L. Rev. 1545 (1991).

<sup>7</sup> Barbara Davies & Stephen Ralph, *Client and Counsellor Perceptions of the Process and Outcomes of Family Court Counselling in Cases Involving Domestic Violence* 36 Fam. & Conciliation Courts Rev. 227 (1998).

mediation, even the most extremely violent couples agree to terms of joint custody with the mother as possessory parent, but standard visitation – an arrangement that is ill-advised for the mother and child.<sup>8</sup>

One of the few relevant empirical studies examined a recruited sample of 131 couples that were divorcing or modifying their divorces, under court order in a metropolitan court services program.<sup>9</sup> Of the couples that reached agreement, 60 percent reported some level of violence, indicating that violence is highly prevalent among divorcing couples. Nevertheless, approximately 73 percent reached a full or partial mediated agreement. The researchers suggested that battered spouses may have sacrificed safety for themselves and for their children in a desperate attempt to end the conflict. However, no data were presented to support this hypothesis. Perhaps more importantly, due to the confidential nature of mediation there were no data at all for those couples that did not reach agreement.

The laws governing mandatory mediation in California have resulted in a unique opportunity to study mandatory mediation in child custody disputes for families that do not reach agreement. Most mediation in California is confidential, because the legislature recognizes the value of alternative dispute resolution in general and mediation in particular. California's civil code provides for confidentiality in all mediation, with the exception of child custody mediation. The confidentiality statute for child custody mediation is different:

**Family Code § 3177. Confidentiality of proceedings**

Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code.

The first sentence of the statute is similar to the one in the civil code. The second sentence, however, makes confidentiality an illusion in certain circumstances that depend, in part, on geography. Each jurisdiction is allowed to decide whether custody mediation will retain strict confidentiality. Counties may decide to allow their child custody mediators to make formal custody recommendations to the court following unsuccessful mediation.

**Family Code § 3183. Recommendations to court as to custody or visitation**

(a) The mediator may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child.

(b) Where the parties have not reached agreement as a result of the mediation proceedings, the mediator may recommend to the court that an investigation be conducted pursuant to Chapter 6 (commencing with Section 3110) or that other services be offered to assist the parties to effect a resolution of the controversy before a hearing on the issues.

(c) In appropriate cases, the mediator may recommend that restraining orders be issued, pending determination of the controversy, to protect the well-being of the child involved in the controversy.

<sup>8</sup> Richard D. Mathis & Zoe Tanner, *Effects of Unscreened Spouse Violence on Mediated Agreements*, 26 Am. J. Family Therapy 251 (1998).

<sup>9</sup> *Id.*

When a county decides not to allow its mediators to make custody recommendations, it reinforces by local court rule that custody mediation is confidential, at least with regard to the publication of information. Note, however, that even in these counties, any communication made to the mediator falls within a government privilege, meaning that the court (*i.e.*, the judge) holds the privilege for all information from the mediation. Therefore, unless limited in some way by a local court rule, the judge in any county may obtain information from the mediator. Counties that elect to allow their custody mediators to make formal recommendations to the court are referred to as "recommending" counties. San Diego is a recommending county. In a recommending county, when the parties fail to reach agreement at the end of custody mediation lasting an average of 2.5 hours, the mediator changes roles and formulates a custody recommendation for the court. This recommendation is based almost exclusively on observations from the mediation.

When California counties first began mandating recommendations, the mediator would file a written recommendation with the court, but was not available for cross-examination in court because the process was defined to be confidential. This is no longer the case. The constitutionality of that practice was challenged and taken to the California Supreme Court.<sup>10</sup> The U. S. Constitution guarantees the right to confront witness with adverse testimony, therefore the parties to a custody dispute have the constitutional right to cross-examine a mediator who makes recommendations to the court and to know the basis for those recommendations.<sup>11</sup> Therefore, because due process requires that the mediator disclose the basis for the recommendations, the mediation becomes non-confidential. The second sentence of the mediation confidentiality statute (§ 3177) allows the court, as holder of the privilege, to waive that privilege and release any contents of the mediation.<sup>12</sup> As a result, a written report is produced and placed in the Family Court case file, making it a matter of public record. Through these records, we have a window to examine how mandatory mediation may affect victims of violence.

It is important to emphasize that although in non-recommending counties the process is confidential, the judge always has access to information from the mediator. This is because California's child custody mediation statute grants the privilege to the family court for all communications to and from the mediator, regardless of whether it is a recommending or non-

<sup>10</sup> *McLaughlin v. Superior Court* (140 Cal.App.3d 473, 189 Cal.Rptr. 479 (1983)).

<sup>11</sup> *Id.*

<sup>12</sup> Family Code § 3177. *Confidentiality of proceedings*

*Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code.*

*Evidence Code Section 1040. Official Information.*

*(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.*

recommending county. Therefore information that the mediator believes is salient can be, and probably is, communicated to the judge even in non-recommending counties. The implication is that information gained from the study of non-agreement cases from recommending counties will likely generalize to non-agreement cases from non-recommending counties in California and perhaps to all U.S. jurisdictions where the judge holds the privilege.

The importance of the judges' access to information from mediators is revealed by an archival study of decision-making in child custody disputes in San Diego.<sup>13</sup> That study carefully examined information available to family court judges from investigative files as well as court records to determine predictors of judicial custody decisions. The authors found that only two factors directly affected the judge: counselor/mediator recommendation directly predicted the judges decision in 60% of the cases, and an inference about the child's preference predicted the decision in cases where no recommendation was available. Given that the mediator's recommendation drives the eventual custody order, it is crucial to understand what mediators use as the basis for their communications and recommendations to the court, and how domestic violence cases compare to non-violent cases.

The main purpose of the study reported herein was to provide empirical data to inform the debate and lead to meaningful answers to important questions in custody mediation and domestic violence. First, it is well known that where there is domestic violence, extreme power imbalances exist between the batterer and the victim.<sup>14</sup> Supposedly the mediator assesses for violence and balances the power during the mediation. No data are available, however, documenting the degree of success mediators actually have in identifying and recognizing violence. However, as Zorza aptly notes, "[t]he fear and powerlessness that the victim feels simply cannot be compensated for by even the most skilled mediator."<sup>15</sup> Further, it is unclear whether mediators actually address violence even when it is present.

Second, and perhaps more important, is the issue of equity of outcomes for families with partner violence versus those without any evidence of violence. Again, until now outcome has been defined in terms of satisfaction. There are many more relevant questions. For example, when a victim of domestic violence participates in a mediation, does that victim obtain a better or worse outcome in terms of such factors as the custody decision and details of the custody and visitation plans? A number of investigators have averred that victims of violence are greatly disadvantaged in mediation,<sup>16</sup> but until now all we have are debates among scholars. If batterers

<sup>13</sup> Carla C. Kunin, Ebbe B. Ebbesen & Vladimir J. Konecni, *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOLOGY 564-573 (1992).

<sup>14</sup> See FN 6. Also see Jessica Pearson, *Mediating when Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 Mediation Quarterly 319 (1997); Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 Clearinghouse Review 1113 (1996) (for a summary of how mediation endangers battered women); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buffalo L. Rev. 441 (1992) (noting power imbalances), ) and Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 Mediation Quarterly 347 (1990) (for a summary of the arguments against mediation for violent couples).

<sup>15</sup> Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 Clearinghouse Review 1113, 1121 (1996)

are, in fact, successful at manipulating their victims and the system by putting on an impressive front for the mediators,<sup>17</sup> then it is possible that mandatory mediation where there is domestic violence may result in empirically demonstrable poor outcomes for victims.

Still another issue of critical importance concerns health and safety outcomes for the children. In an extensive integrative review of the literature pertinent to child custody for children, Whiteside<sup>18</sup> has identified a number of specific factors that are correlated with outcomes for children. Such variables comprise four broad categories: (1) the parenting environment, (2) child characteristics, (3) family interaction, and (4) current parental relationship. The issue is whether mediation results in better or poorer outcomes for children when there is violence than when there is none. To date, there are almost no direct empirical data pertaining to this issue for mediated custody disputes.

A related issue concerns the safety dimension, not only for the child but also for the parent victim of violence. Presently the extent to which mandated mediation exposes battered women to such dangers as unsupervised child exchanges remains unknown.<sup>19</sup> Another example of a safety risk is a custody order or parenting plan that leaves details about exchanges and holiday time unspecified other than "to be negotiated by the parties."

In order to protect victims of violence, state legislatures have mandated a variety of safeguards in the custody process. These range from opt-out provisions for victims of violence through the California approach, in which there must be some "assessment" for domestic violence so that the mediator and the court will be aware of it. A threshold question would be whether mediators are able to adequately identify and recognize domestic violence. This issue would be relevant regardless of the mediation approach taken by the state legislature, because if mediators cannot recognize domestic violence then mandated assessment cannot be effective.

## Method

The starting point for the study was every single action filed in the Family Court in one Southern California jurisdiction (San Diego) during the calendar year 1996. Every seventh filing was examined. If there was a custody dispute in that filing, it was selected for further study. If there was no custody dispute, the researchers examined each subsequent filing sequentially and selected the first custody dispute that could be identified. From the resultant

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<sup>16</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L. Rev.* 1545 (1991). Barbara Hart, *Gentle Jeopardy: The Further Endangerment to Battered Women and Children in Custody Mediation*, 7 *Mediation Q.* 317, 326-27 (1990).

<sup>17</sup> *Supra* Note 15 at 1121.

<sup>18</sup> Mary F. Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, Ann Arbor, CENTER FOR THE FAMILY (1996).

<sup>19</sup> For a discussion of supervised visitation, see Robert B. Straus, *Supervised Visitation and Family Violence*, 29 *Fam. L. Q.* 229 (1995). Also see Janet R. Johnston, *High-Conflict and Violent Parents in Family Court: Findings on Children's Adjustment, and Proposed Guidelines for the Resolution of Custody and Visitation Disputes*, Corta Madera, Center for the Family in Transition (1993).

948 files we eliminated cases in which the parties resolved the dispute either before or during mediation. All remaining cases were those in which there was a mediation that failed to resolve the dispute, either in full or in part. Each of these 512 mediations therefore resulted in a formal report with custody recommendations by the mediator.

Every one of the 512 non-agreement mediation report and its associated Court Screening Form was scanned in its entirety and subsequently printed. These 512 mediation reports were the raw data that were categorized and content analyzed. The goal was to find an equal number of DV and non-DV cases for comparison.

The Court Screening Form provided the initial indicators of domestic violence. The form arises out of a number of legislative mandates for the court to screen in areas such as child abuse, domestic violence, and special needs (*e.g.*, language interpreters). The questions relevant to this study included:

1. Does either parent allege domestic violence?
2. Will either parent request to be seen separately?
3. Are there any domestic violence restraining orders?
4. Are there allegations of child abuse?
5. Is Child Protective Services involved with your family?

Mediation reports ranged from 2 to 11 pages in length and in general, contained two sections: in one, the mediator made detailed recommendations about custody and visitation. In the other, the mediator wrote a narrative describing the mediation process and the rationale for any recommendations given. Each report also contained an appended page, containing a detailed parenting plan in which the mediator summarized the percentage of physical custody recommended for each parent.

A content analysis system was developed to systematically capture the information in the mediator's report. The system was developed based in large part on Whiteside's integrative review of the literature pertinent to custody for young children.<sup>20</sup> In all, more than 170 variables were identified. Of these, some were eliminated because of redundancy and others for vagueness in that they could not be reliably coded, leaving a final list of more than 100 variables. These were grouped into five categories as follows: (1) general case information, (2) parental factors, (3) child factors, (4) family interaction factors, and (5) current parental relationship. A set of scoring guidelines and definitions was developed to assure reliability of the coding process.

Each report was studied and content analyzed by three trained raters who had no access to the Court Screening Form and so were blind to any a priori DV allegations. In general, the raters were attempting to ascertain the presence or absence of information pertaining to the specific factors identified by Whiteside. The majority of coding items called for yes/no responses, such as "Was child abuse mentioned by the mediator?" and "Is police involvement mentioned by the mediator?" Other coding items allowed the raters to choose from among more than two options, such as "The report mentions property destruction by whom?" A variable was coded in a particular direction if all three raters agreed or if two of the three raters agreed. In

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<sup>20</sup> *Supra* Note 18.



only rare instances was there no consistency among the three raters. In those instances, the investigators independently evaluated the report, so that each final data point was based on full agreement by at least two people.

The original intention was to find 200 randomly selected mediations with evidence of domestic violence in the screening form and compare them with 200 randomly selected mediations in which there was no evidence of domestic violence on the screening form. This goal had to be modified for three reasons: first, of the available cases, there were only 136 with domestic violence indicators (a DV allegation or DV TRO) on the current screening form. Second, there were a number of mediations in which there was a prior allegation of domestic violence on a court screening form and/or a permanent DV restraining order in the case file that was available to the mediator. Perhaps most importantly, our experience demonstrated the existence of clear cases of domestic violence as documented by the mediator in which there was absolutely no indication of domestic violence on any screening form or in the case file. All of these cases were considered DV cases, and to have included any of them in the non-DV sample would have confounded the results. In all, we identified 200 DV cases. All remaining cases were in the non-DV sample. A random number generator was used to eliminate non-DV cases until we had a sample of 200 non-DV cases.

In sum, we had two randomly selected samples. The DV sample contained mediations in which there were indications of DV in the case file available to the mediator or the mediator identified DV. The non-DV sample contained cases with no indicators of DV in the file and no mention of DV in the mediation report.

## RESULTS

Given the voluminous data generated by the 170 variables, the results are organized around three general questions, summarizing the key findings relevant to each question. Within each section, we have given summaries of the statistical findings as well as brief squibs of specific mediation cases that illustrate or amplify the particular topic or result.

### **Question 1. How well do mediators recognize, acknowledge, and cope with domestic violence?**

#### **A) The ways in which DV is identified: Failures to Assess or Acknowledge Violence**

Although the debate over the advisability, efficiency, and fairness of mediation in cases involving DV rages, there is relative agreement that such mediation requires effective screening methods in order not to further endanger victims and their children.<sup>21</sup>

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<sup>21</sup> Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. Disp. Resol. 253 (2001); Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U. L. Rev. 43 (1995).

California state law, for instance, requires an "assessment" of domestic violence. This involves a two-step process beginning with a written court screening form followed by intake assessment by the court's mediation agency. Further, state law requires the presiding judge to provide the rationale for any award of joint or sole custody to a perpetrator of domestic violence or child abuse.

Given that in this jurisdiction the mediator's role has been expanded to that of providing a formal report to inform the judge's decision, we expected that the mediator would address domestic violence whenever there was a DV allegation or an indication of a DV TRO/RO. We were particularly interested in how mediators handled clear screening indicators of domestic violence (a preliminary screening allegation or DV TRO/RO). We were also interested in how often the mediator identified violence through more intensive evaluation in the absence of a preliminary screening allegation or DV TRO/RO. Heretofore, arguments over the efficacy of mediator screening for DV have been primarily informed by theoretical and anecdotal arguments; but little empirical data exist to support these arguments.<sup>22</sup>

As indicated, violence in this study was identified in one of four ways: (1) an allegation of DV on the court's intake screening form for either a current or prior mediation, (2) a DV TRO reported on the current or a prior screening form, (3) the existence of a DV RO in the complete case file, or (4) documentation of DV in the mediator's report. It is important to emphasize that assignment to the DV group was not based on any a priori definitions. Rather, respondents identified DV through self-report; and/or mediators used their own judgment; and/or there was judicial notice of a credible DV allegation, as indicated by the existence of a DV TRO or RO. Our goal was to determine the extent to which, given a clear allegation of DV or a DV restraining order, mediators dealt with and confronted the issue of violence. On the flip side, we were able to evaluate the frequency with which a mediator would acknowledge DV in the absence of an explicit DV allegation (*i.e.*, a denial on the screening form) or other tangible evidence of DV, such as a DV restraining order.

Of the 200 violence mediations, no screening form could be found for seven. Of the remaining 193, 123 had an allegation of DV on the current screening form. A total 83 of the mediation screening forms indicated that there was a DV TRO in effect. Of these, 70 indicated both a DV allegation and a DV TRO in effect; so there were a total of 13 cases in which violence was ascertained on screening only by an allegation of a DV TRO. Finally, an additional 27 had either a prior allegation on file or a DV RO in the case file available to the mediator.

In sum, there were 163 mediations in which the mediator had clear indicators of domestic violence: by a current DV allegation with or without a DV TRO allegation

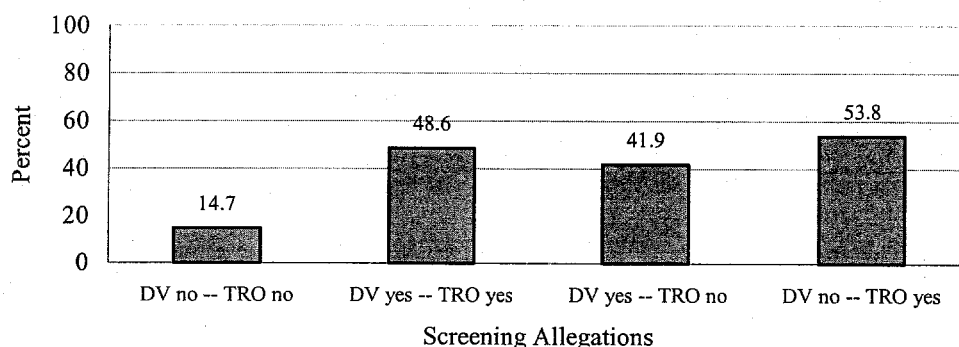
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<sup>22</sup> Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. Disp. Resol. 253 (2001); Jessica Pearson, *Divorce Mediation & Domestic Violence*, Center for Policy Research, Denver, CO (January, 1997); Mildred D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 Violence & Victims 69 (1993); Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 Med. Q. 347 (1990).

(n=123), a current DV TRO allegation only (n=13), and a prior DV/DV TRO allegation or an actual restraining order in the case file (n=27). Finally, in 37 cases there were no indications of domestic violence on the screening form or in the file, but the mediator nevertheless identified and addressed DV. These 200 cases constituted the overall DV sample.

Surprisingly, of the 123 mediations with an explicit current DV allegation on the court screening form, the mediator failed to account for DV in 56.9% of the reports. That is, the mediator accounted for acknowledged DV in only 53 of the 123 reports (43.1%) in which the screening form had an explicit DV allegation. Where there was a DV TRO documented on the current screening form, violence was addressed in the mediation report (*i.e.*, at least mentioned) in 41 of 83 cases, or 49.4% of the time. Even for those 70 mediations where the current screening form documented both an explicit DV allegation and a TRO present, the mediator so much as mentioned DV in the report in only 34 cases, or 48.6% of the time. Figure 1 illustrates these differences in self- and mediator-reported DV.

Figure 1. Rate of direct acknowledgement of domestic violence in mediators' reports



In a perfect system, every time the mediator sees DV allegations (including TRO/RO) on the screening form, DV should be addressed in the mediation report. Moreover, if the screening carries out the spirit of the law, then every time there is DV in a family, DV should be indicated on the screening form. Neither of these premises holds true. One way to view these data is to assume that the error rate in screening in our sample is 14.7%, based on the number of times the mediator identified violence (37) when screening resulted in a "no" response to DV (252 cases).<sup>23</sup> However, the rate at which the mediator fails to account for specific DV allegations on the screening form is much higher (56.9%).

<sup>23</sup> Of the 400 mediation cases, 252 were accompanied by screening forms that denied both DV and a DV TRO. The mediator nevertheless documented DV in 37 of these and, as indicated, these cases were included in the DV sample of 200.

Even assuming an error rate of 14.7% (*i.e.*, that the mediator can be expected to fail to account for DV allegations at the same rate as the parties themselves fail to account for it), the failure to address DV in the report by these trained mediators when there were specific allegations on the screening form reached statistical significance, Chi Square (1, n=123) = 174.77,  $p < .001$ . Even for those mediations with both explicit current TROs and DV allegations on the screening form, the rate of mediator failure to address the DV was 36 out of 70 mediations, which was also significant using a Chi Square test based on an expected 14.7% error rate (Chi Square (1, n=70) = 75.31,  $p < .001$ ).

On the other hand, we found 37 mediations with no ROs in the file or clear indicators of DV on any screening form, but the mediator still identified and addressed DV in the mediation report. In these mediations, the mediator provided an essential independent source of information for the court, over and above self-report by a party or tangible evidence in the form of a restraining order.

Taken together, these results lead to two conclusions of significance to practitioners. First, on the down side, in a significant percentage of mediations in which violence is explicitly alleged, the mediator fails to directly address DV in any formal communication to the court. To the extent that the court relies on the professional report, the intent of the legislature that the court assess and address DV is not well served. Second, the screening form does not serve its apparent purpose of providing an adequate assessment of DV, as pursuant to law, for substantial numbers of families. In short, the data provide strong empirical documentation for the proposition that "the present state of screening [for DV] . . . paints a dismal picture."<sup>24</sup>

There are two kinds of discrepancies: those mediations in which there is explicit evidence of DV allegations but the mediator fails to address them (mediation failure), and those where there is no such screening evidence but the mediator finds and addresses DV (mediation success). To better understand these discrepancies, we qualitatively examined the relevant mediation reports.

#### Mediation Failure to Confront DV Reported at Screening

For those mediations in which there was explicit evidence of violence but no direct mention of DV by the mediator, there appear to be three distinguishable categories. The first occurs when the mediator focuses on drug and/or alcohol abuse or child abuse to the exclusion of the violence. In some of these circumstances it may be that the mediator sees the violence as secondary to the substance abuse problem and believes that if substance abuse intervention for the alleged DV perpetrator is successful, then there will be no DV. In others, the alleged DV victim is the substance abuser and is perceived as a less fit parent. In still others, the focus is on child abuse to the exclusion of domestic violence. In all cases, the DV concerns are dismissed or trivialized.

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<sup>24</sup> *Supra*, Note 21 at 2.

In the second category, there is oblique mention of the violence, in the form of "conflict" or "fighting" between the parties, but no clear indication that this is domestic violence. For example, one report made reference to parents "quarreling," a second to a need for an "anger management class," and a third stated there was an "incident" and it would be best if the parents did not have direct contact.

In the last category, the violence had been mentioned in an earlier mediation but was denied on the current screening form. The mediator did not refer to current or past violence in the current report. Cases in these categories reveal the need for practitioners to examine the entire file, and to confront violence directly.

#### Mediation Success:

Instances in which the mediator identified DV despite a "no" response to the DV screening question also fell into three main categories. In the majority of cases, the DV perpetrator or an attorney filled out the screening form and said there was no DV. There is little doubt that practitioners need to be alert to who fills out the screening form, and to be especially diligent in the intake when the respondent is an attorney or husband. In a few cases the mediator mentioned violence that occurred on only one occasion, and in rare cases the violence happened long ago. The following case squibs are illustrative.

*Case Numbers 5799.1-3      The abusive father filled out the screening form and reported that there was no history of domestic violence. It was mentioned that at the first mediation, the mother was accompanied by a domestic violence support person. There was no other mention of DV in the first mediation. The mediation resulted in an agreement in which the father was awarded supervised visitation. The second mediation was held without benefit of a domestic violence support person. DV was not discussed. Because the mediator felt that the father had related so well with his children during one monitored visit and appeared to be "insightful and understanding," the mediator granted him unsupervised contact. Upon returning the children after his first unmonitored visit, the father physically assaulted the mother in the presence of the children, causing injury to her back and leaving bruises. After this incident, the family's extensive history of DV was discussed in a third mediation. Although DV was discussed, there were no recommendations for anger management or DV prevention classes. The only remedy recommended was a plan for child exchanges to take place in public.*

*Case Number 4979.1      The mother reported that she had been physically abused by the father. The father reported to the mediator that the mother was in a new relationship with an abusive partner. Eventually, the mother's new abusive partner was sentenced to a prison term for battery against the mother, and the father requested primary care of the child, to protect the child*

*from a mother who foolishly picked dangerous individuals as partners. The father was given a 39% share of the custody of the child. The mediator did not resolve the issue of the mother's DV allegation against the father, who was recommended 11 overnight visits per month with the child and no protection during child exchanges.*

In sum, there are two basic types of discrepancies in the assessment of domestic violence. In the first, violence is indicated on the court screening form or in the case file through a DV restraining order or prior allegation and the mediator does not address the violence. In the second, there are no indicators of domestic violence on the screening form or in the case file, but the mediator identifies the violence and addresses it. The latter error speaks favorably to the skill of the mediator, but the former leaves open the question of how often domestic violence is not recognized by the justice system, despite clear indicators. Both errors demonstrate serious problems in the assessment process.

#### **B) The Effect of Salient Variables on Mediator Acknowledgment of DV**

We examined cases in which the mediator clearly acknowledged some indicator of violence, such as police involvement, destruction of property or other criminal justice involvement, but then did not deal directly with the DV at all, despite a clear allegation and/or restraining order. These are clear cases in which the mediator seems to have failed to address the domestic violence, despite the mediator's own acknowledgment of clear indicators of violence.

As the most conservative estimate of mediator failure we examined all of the 200 domestic violence cases, including the 37 in which the presence of violence was defined solely by mediator report of violence. Of these 200 cases, the mediator reported violence in 104 (52.5%) and failed to acknowledge violence in 95 (47.5%). We evaluated whether the existence of certain indicators might be associated with a greater tendency to acknowledge or address DV.

For example, among 36 cases in which the mediator reported court orders against one parent or another, the mediator documented the violence more often (24 out of 36 cases, for a 66.7% acknowledgment rate). Among 34 cases in which the mediator reported the presence of a Child Protective Services recommendation regarding custody, the mediator addressed domestic violence only 32.4 % of the time (11 cases). Further, in the relatively rare cases in which the mediator documented property destruction (9 cases), the violence was acknowledged 88.9 % of the time (8 case).

Among 69 cases in which the mediator reported police involvement with the couple, 76.8 % of the time the mediator addressed domestic violence. In 41 cases in which the mediator acknowledged parental hostility, the mediator acknowledged domestic violence 56.1% of the time.

Thus, it would appear that evidence of criminal justice involvement and other clear indicators of violence do increase the odds that DV will be acknowledged. Nevertheless, the violence was ignored in an alarming number of these cases. For example, despite the fact that child safety is legislatively mandated to be a primary factor in any custody decision, mediators addressed child safety only 28.5 % of the time (57 of 200 DV cases).

*Case Number 4836.1-3*                      *Although Child Protective Services had substantiated domestic violence and child neglect charges against the father, there was no provision in the parenting plan for protective measures to be taken. The father was given full physical custody of the twelve-year-old son as well as 43% custody of the two younger daughters.*

In the above case, despite the fact that the mediator addressed the violence for the court, the mediator recommended custody for the abuser. However, in 18 of the 57 DV cases with mediator-acknowledged child abuse (31.6%), the mediator made no mention of the domestic violence to the court.

One of the indicators of poor prognosis for children is continued exposure to parental arguments.<sup>25</sup> In our violent sample, the mediator noted concern about children's exposure to arguments in 59 cases (29.5% of the time). Nonetheless, the mediator failed to acknowledge domestic violence in 14 of the 59 (23.7% of the time).

Again in the 200 violent cases, the mediator noted verbal abuse by the father in 41 mediation reports (20.5% of reports). Of these 41, the mediator failed to also address DV in the report 12 times (29.3%) despite, as discussed, the presence of a DV allegation or other indicator of DV. By contrast, the mediator noted verbal abuse by the mother 16 times, and addressed DV in 15 (93.8%). In none of these cases was the mother characterized as the sole DV perpetrator.

In a related area, the mediator noted verbal threats by the father in 22 cases (11%). For six of these (27.3%), DV was not addressed. The following case illustrates the kind of threats for which the DV was addressed.

*Case Number 30255.1*                      *The father threatened to blow the brains out of the mother and the eight-year-old son. In another incident, the father threatened the mother and five year old son in front of a group of kindergarteners. The mediator noted DV and recommended counseling for the father. The father's visits were to be supervised until the counselor was satisfied that the father could properly care for his children.*

<sup>25</sup> Mary F. Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, Ann Arbor, CENTER FOR THE FAMILY (1996); Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 Clearinghouse Review 1113, (1996); Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 Med. Q. 347 (1990).

In a more general question related to safety concerns, content analyzers were asked to rate for the presence of any allegations that alluded to safety concerns for child or parent (e.g., prior violence, child endangerment issues, physical outbursts, destruction of property, molestation, etc.). Therefore, this question overlapped with others previously discussed. Overall, such concerns were noted in 134 of the 200 violence cases (67.0%). The mediator failed to directly address DV in 36 of the 134 (26.9%).

In general, these results indicate that although certain variables may increase the likelihood that the mediator will confront DV, the DV is not addressed in an alarming number of cases even where there are clear indicators of DV as well as DV allegations. As will be discussed later, we believe that to avoid such omissions, the topics mediators address, and the reports they submit, need to have greater standardization.

#### Lessons for DV Advocates

It must be emphasized that in spite of these omissions, results concerning the mediation process are not all negative. For example, where there were specific concerns about mother's safety noted (25 of 200 cases), the mediator addressed DV in 84% (21 of 25 cases). It appears that when the mediator is so concerned about the mother's safety that the concern is documented in the report, the mediator is almost certain to directly document domestic violence. By contrast, when such concerns do not rise to the level that they appear in the report, the chances that the mediator will directly address domestic violence in a communication to the court are less than 50%. In the 175 cases in our DV sample in which the mediator did not note any concern for the mother's safety, the mediator directly addressed domestic violence only 48% of the time (84 cases). One practical implication is that victim advocates need to know that effective advocacy in a mediation context may require educating DV victims about the importance of communicating specific details and incidents that demonstrate safety risks.

*Case Number 25226.1                      The mediator noted the risk factors involved, including concern for the safety of the mother and the six-year-old girl's direct expression of her fear for her father. Because of the father's criminal record, violence against the mother, and sexual abuse, the mediator recommended that the father complete a program for sexual abuse and for alcohol and drug addiction. The mother was given custody of the children and permission to move the children out of state; the father was given limited supervised visitation and a treatment plan. Here, the safety risks to the mother and child were clearly communicated, and both received protections.*

Moreover, the general finding for each of the violence indicators above was that when the mediator documented an independent violence indicator such as police involvement, the mediator was more likely to document the DV than not. For example, for those 134 cases in which the report raised safety concerns about a parent or child, the mediator directly addressed DV in 98 cases, which is significantly ( $p < .01$ ) greater than



the 36 times it was not directly addressed.<sup>26</sup> Indicators that were particularly (and significantly) likely to lead the mediator to directly address DV are a court order against the father (19 times out of 26), a Child Protective Services recommendation in the case file (23 times out of 34), police involvement in the relationship (53 times out of 69), or a change in visitation sought by a parent (69 times out of 114). These appear to be particularly strong signals to the mediator concerning DV, although none are as powerful as safety concerns for the mother. Nevertheless, they provide cues to those factors that appear to trigger direct documentation of domestic violence by the mediator to the court, and to the kinds of evidence mediators need to reduce the probability that the DV will be trivialized or ignored.

### C. Extreme Mediation Failures

In order to examine the most extreme mediator failures to identify domestic violence, we selected the subsample of mediations in which the current court screening form indicated both a DV allegation and a DV TRO, and yet the mediator failed to directly address the domestic violence. As indicated, there were 70 such cases. The mediator failed to directly address DV in 36 of those cases. We searched for common themes in the reports of these 36 mediations.

Of the extreme failures, 27 of the 36 couples (75%) were seen together rather than separately in mediation. In contrast, among the 34 mediations that resulted in direct discussion of the DV in the report, only 18 (53%) were seen together. One of the major concerns with custody mediation in the presence of domestic violence is that the victim will be unable to communicate effectively with the mediator in the presence of the batterer.<sup>27</sup> These results suggest that DV victims would be better served by a process that ensures separate meetings with the mediator. In support of this, of the 36 worst failures, 11 had requested separate mediations at the time of case screening, but only 6 actually received separate mediations.

For 13 of these worst failure cases, the mediator reported drug use by the mother, the father, or both and alcohol abuse by the father was noted in seven. For nine cases, one or both of the parents were undergoing psychiatric treatment. The current visitation plan was being challenged in 19 of the cases.

The findings in which the mediator reported substance abuse or psychiatric treatment but failed to acknowledge or address the violence are consistent with the hypothesis that the mediator anchored on some problem other than the violence. Such an interpretation is consistent with decision theory applied to criminal justice system choice

<sup>26</sup> All results reported as significant are at the  $p < .01$  level or greater. Unless otherwise stated, the statistical test used was a chi square test that compared the frequency of response occurrence in one sample (e.g., the non-DV sample) with that in the other.

<sup>27</sup> Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 Clearinghouse Review 1113 (1996)

points.<sup>28</sup> According to decision theory, experts' decisions are not the result of careful weighing of numerous complex factors. Instead, decisions are driven by two or three salient variables. Under such a view, the mediator may lose sight of domestic violence because of the saliency of substance abuse or psychiatric treatment.

For example, it appeared in several cases that the enormity of the disintegration of one parent obliterated all other factors. Whether the disintegration was due to the schizophrenia of the mother or the alcohol addiction of the father, this disintegration became the focus, and the safety risks associated with DV were not adequately considered.

*Case Number 26017.1-2                      The report chronicled child physical and emotional abuse, domestic violence perpetrated first by the father and then by the mother, destruction of property, and the subsequent violent behavioral problems of the children. The remedy for the family's numerous problems was to "eliminate the abuse of alcohol from their lives in order to improve their ability to care for their children." Other than an order to refrain from physical punishment of the children and a neutral child exchange site, no other safeguards were put into effect.*

Based on our reading of the specific reports, we believe that the saliency of other variables depends on the frequency, severity, and duration of the domestic violence. Where evidence of domestic violence is particularly strong, it tends to be acknowledged despite the existence of substance abuse or psychiatric treatment. However, even among trained mediation professionals, there can be a tendency to view domestic violence as a problem specific to the couple and less relevant to child rearing than such problems as substance abuse and psychiatric disturbance. These issues will be revisited when we discuss why children from abusive families are placed with the abuser.

Another hypothesis that needs to be considered stems from our discussions with mediators. According to some mediation practitioners, the reason they do not address DV allegations is that they simply do not believe them. Mediators may often consider allegations of DV to be a tactic used to gain custody, just as it is the current tendency to consider allegations of child sexual abuse a mere tactic.<sup>29</sup> The problem with this practice is that the mediator is then usurping an essential fact-finding role of the court. It also ignores the fact that DV is estimated to be a factor in at least one half of the cases served at court-based divorce mediation programs.<sup>30</sup>

<sup>28</sup> See, for example, Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: the Setting of Bail*, 32 J. Personality & Social Psychology 805-821 (1975); Vladimir J. Konecni & Ebbe B. Ebbesen, *The Mythology of Legal Decision Making*, 7 Int'l J. Law & Psychiatry 5-18 (1984); Carla C. Kunin, Ebbe B. Ebbesen & Vladimir J. Konecni, *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. Clinical Psychology 564-573 (1992).

<sup>29</sup> LEORA N. ROSEN & MICHELLE ETLIN, *THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES* 119 (1996).

<sup>30</sup> Jessica Pearson, *Divorce Mediation & Domestic Violence*, Center for Policy Research, Denver, CO (January, 1997). Also see Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*,

*Case Number 27546.1-3*                      *In a series of mediations, the mother repeatedly attempted to make clear her fear of the father and to utilize safeguards such as separate mediations. Even after the two preschool age children witnessed the father threaten to slit the mother's throat and the father was convicted of making a terrorist threat, the mediator stated that "there was no way of determining the veracity of the mother's report." It continued to be the mediator's opinion that the mother was simply attempting to minimize the father's time with the children.*

Regardless of the reason for the mediators' failures to address DV even in these extreme cases, the need for a standardized process suggests itself. If there is an allegation of domestic violence, in any communication with the court the mediator should either directly address it, or be required to explain why it wasn't addressed. Such standardization would be a safeguard for either a decision theory interpretation or a theory of deficits in fact-finding.

For example, in several of the cases in our DV sample, the mediator noted charges of abuse leveled by each parent against the other at such a rate that the mediator could not form any opinion as to truthfulness. In some, the mediator attempted more accurate fact-finding by interviewing collateral contacts, but those contacts only served to further the confusion. In other cases, the mediator alerted the court to the charges as well as to statements from collateral contacts, but noted that they were unsubstantiated.<sup>31</sup> Nonetheless, the mediator communicated an opinion about custody to the court.

#### **D. Assessment and Acknowledgement of Child Abuse**

Paralleling the problem of failure to screen adequately for DV is the failure to identify child abuse. Both problems reflect limitations in the mediators' ability to assess and confront violence and victimization.

Within the violent sample, the court screening form contained an allegation of child abuse 21.4% of the time (40 screening forms out of 187 forms completed for this question). Of those 40, the mediator specifically acknowledged child abuse in 24 of the reports (60%), and documented CPS involvement in another five, for a total of 70% documentation. Thus, documentation of child abuse, though far from perfect, was better than for DV. The following summary represents one case in which the abuse was confronted.

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37 Fam. & Conciliation Courts Rev. 335, 335 (1999) (citing a 50-80% rate of DV for all marriages referred to court-based custody mediation programs).

<sup>31</sup> See Mildred D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 Violence & Victims 69, 69 (1993), noting that "Because both victims and abusers construct a veil of secrecy while married, even if abused wives disclose the violence during the separation process, there may be nothing to substantiate their claims."

*Case Number 31242.1*                      *The boy at the center of the custody dispute was an infant when his father attempted to stop his crying by pouring water down his throat. Since then, the mother had been the victim of repeated incidents of domestic violence. The mediator took into account the father's violence and recommended that he be required to complete parenting and anger management classes before being allowed to keep the child for overnight visits.*

On the other hand, there were also 40 cases in which the mediator reported child abuse despite a "no" response to child abuse on the screening form.<sup>32</sup> As with DV, the California legislature mandates that the court screen for child abuse in custody disputes because child abuse is detrimental to the child. However, as with DV, we can see that the screening method used by the court is far less than 100% effective; there were an alarming number of cases in which the mediator acknowledged child abuse in the absence of any screening allegation. Clearly, the mediator should not rely on the screening form, as it frequently is inaccurate in assessing child abuse as well as DV.

*Case Number 26407.1*                      *Father sought physical custody of his two sons, accusing the boys' mother of attempted suicide and inability to care for the children. Mother acknowledged taking the children to live with her mother, but explained that it was a necessity because father was molesting their 9-year-old step-sister (one of her children from a former marriage), abused alcohol, and had been violent with her over a period of years. The mediator interviewed the step-sister, who confirmed the mother's version. The mediator recommended primary custody with the mother, but did not recommend protected child exchanges.*

During the course of the study, the court screening form was modified to add the question of whether Child Protective Services (CPS) is involved with the family. The question was answered on 28 of the available screening forms. There was only one positive response in the violent sample, and this case also had a screening allegation of child abuse. However, the mediation report for that case did not address child abuse, Child Protective Services involvement, or any concerns regarding child safety.

In 34 other mediation reports from our DV sample, the mediator did document Child Protective Services involvement with the family. In 30 of those 34 mediations, there was a completed court screening form with an answer to the question of whether there has been child abuse in this family. Only 14 of those screening forms acknowledged child abuse, despite the fact that the mediator documented Child

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<sup>32</sup> These 40 cases represent 27.2% of the 147 DV mediations with a "no" response to the child abuse screening question.

Protective Services involvement with the family. This again shows a discrepancy between information provided through screening and what the mediator is able to identify for the court that is vital to any consideration of the child's best interest.

Child Protective Services involvement was documented in 11.3% of the cases overall (78% of these were DV; 44% involved illegal use of drugs). This result is at odds with a report by the Statewide Office of Family Court Services involving a retrospective survey of court professionals.<sup>33</sup> There, court professionals indicated that by 1993, 1 in 3 custody cases had been investigated by CPS. If CPS is involved, it was not being documented in the mediation reports. It is noteworthy that 44.4% of the cases in our sample with documented CPS involvement also involved illegal use of drugs; 53.3% of these cases had police involvement. These families have ongoing problems that spill over into all levels of the criminal justice system. For many of these families, their problems create revolving doors in and out of the family court and the criminal court.

In sum, there were a total of 89 cases with some indication of child abuse among the 200 DV cases in our sample. Forty of these were identified on the basis of a screening allegation of abuse. Another 44 had no screening allegation but the mediator addressed the abuse. Finally, there were five cases in which abuse was identified only because the mediator indicated the presence of CPS involvement even though there was no screening allegation of child abuse and child abuse was not directly discussed in the mediation report. These 89 allow us to provide a 44.5% upper estimate of the coincidence of child abuse and domestic violence reported in our DV sample. Using the same criteria in the non-DV sample, an upper estimate of child abuse in mediated non-agreement cases is 15.5% (31 cases out of a total of 200).

A more conservative estimate would be based on the number of times the mediator specifically addressed child abuse in the report. That conservative estimate is 34.0% (68 reports out of a total of 200) in DV cases. Using the same criteria in the non-DV sample, a more conservative estimate of child abuse in mediated non-agreement cases is 10.0% (20 cases out of a total of 200).

It is not surprising that where there were any indicators of child abuse (n=89) there was significantly more discussion of substance abuse and psychiatric treatment in the DV sample when compared to the non-DV sample. For example, psychiatric treatment was reported for the mother, father, or both in 33.7% (30 of 89 cases) of the child abuse with DV sample and 19.4% (6 of 31 cases) of the child abuse with no DV.

The data also suggest a very strong relationship among domestic violence, child abuse, and drug use. When DV indicators as well as child abuse indicators were documented on screening or by the mediator, drug use by one or both parent was a feature of the mediation report 46.1% of the time (41 of 89 cases). However, it must also be noted that drug use is strongly associated with child abuse even where no DV is

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<sup>33</sup> California Family Court Services Snapshot Study Report 7: Serving Families in the '90s: The Perspective of Direct Service Providers in California's Family Court Services. California Statewide Office of Family Court Services (1997).

present. For example, given child abuse indicators but no DV, drug use by a parent was featured in 35.5% of reports (11 of 31). Parental drug use was more prominent in mediation reports involving child-abusing families than was alcohol use, regardless of DV status (33.7% of DV reports and 16.1% of non-DV reports).

*Case Number 33025.1-2*                      *In addition to several incidents of spousal abuse perpetrated against the mother, the father had become angry during one child exchange and thrown the one-year-old boy. The violence, in addition to the father's drug abuse, prompted the mediator to recommend parenting classes and a 52-week domestic violence program. The parents were to exchange the child at a supervised neutral location.*

Mediators were much more likely to document law enforcement intervention in child-abusing families when domestic violence indicators were present than when they were not. Forty-five of the 89 families (50.6%) with histories of domestic violence as well as child abuse were noted to have had involvement with the police. Only 16.1% (5 of 31) of reports in families without DV indicators featured any mention of law enforcement activity.

Last but not least, child abuse appears to alert the mediator to domestic violence. Where child abuse was present, 61.8% of the time (55 of 89 cases) the mediator directly addressed domestic violence in the mediation report.

To get a flavor for the qualitative analyses of these data, we decided to examine the one DV case in which CPS involvement was specifically mentioned on the screening form. As stated, this same form also contained a child abuse allegation. Surprisingly, we found that the mediator did not address child abuse in the mediation report. A reading of this report revealed that the fourteen-month-old girl was placed in the custody of her maternal grandparents and was visited by her mother on the weekends. The case was complicated with issues like the father's homelessness, alcoholism, inability to provide financial support, and inability to care for the infant, and the mother's psychiatric hospitalization. Although we can infer that there must have been substantial child neglect, without information regarding the CPS involvement and the nature of the child abuse or neglect, there can be no certainty that the parenting plan ensured her future safety.

In sum, the empirical evidence demonstrates severe limitations and deficiencies in the assessment of both DV and child abuse in a custody mediation. Although certain salient variables may increase the likelihood that these will be detected, far too many are swept under the rug, no doubt endangering victims of DV and their children and increasing the risk of further involvement with the criminal justice system.

**Question 2. What are the mediator's custody and visitation recommendations (i.e., mediation outcomes) in DV and non-DV, and what drives them?**

We examined outcomes in terms of custody (legal, primary physical, joint physical), supervised visitation, and protected child exchanges. For each of these variables, we began with an overall comparison between the 200 DV cases and the 200 non-DV cases.

**A. Legal Custody**

Legal custody was at issue in 80.5% of cases overall. For the DV cases, it was at issue 81.0% of the time (162 cases) and for the non-DV 80.0% of the time (160 cases). When legal custody was at issue, joint custody was recommended 91.4% of the time for the DV cases compared to 90.0% of the time for non-DV. DV victim advocates argue that joint legal custody provides the batterer with a continuing means of control in that the batterer can do such things as pull the child out of school, transfer the child to a school further away from the victim, and access the child's mental health records.<sup>34</sup> In spite of this, joint legal custody was recommended in the overwhelming majority of DV cases, in fact even more so than in non-DV.

Recommendations for sole legal custody were rare events. The mediator recommended sole legal custody for the mother in only eight cases where there was domestic violence (4.9%) compared to 11 cases where there was no DV (6.9%). Although these differences are not statistically significant, it is noteworthy that there is a slight tendency against giving the mother sole legal custody in DV cases.

The mediator recommended sole legal custody for the father in three of the DV cases (1.5%) and one of the non-DV cases (0.5%). Although these numbers are small, they are significantly different based on the assumption that 0.5% represents the expected rate. Our examination of the specific case files indicated that child abuse or domestic violence by the mother was not necessarily the reason for the recommendation of sole legal custody for the father. In one case, for example, the mother had an extensive psychiatric and drug abuse history, including multiple suicide attempts and hospitalizations. She continued to live with a boyfriend who was reported to have repeatedly physically and sexually abused the child, who had herself been repeatedly psychiatrically hospitalized and had displayed a pattern of self-injurious behavior.

The above case illustrates the point that it takes extreme and multifaceted problems before a mediator will recommend less than joint legal custody for any parent. For victims of DV, this phenomenon is unfortunate in that mediators are loathe to deny the batterer power to make legal decisions affecting not only the child but also, indirectly, the victim.

<sup>34</sup> See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229 (1995); Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 CLEARINGHOUSE REVIEW 1113, (1996). Also see Mildred D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69, 69 (1993) (husbands may get revenge by using children as pawns).

## B. Physical Custody

In this section we examine mediator recommendations for custody and visitation. Both are critical to evaluating the outcome of the custody mediation, especially as it relates to safety protections for DV victims and their children.

### 1. Primary Physical Custody

There is no joint custody presumption in California law, although there is a preference for continuing contact with both parents. Although it is true that joint legal custody is the overwhelming outcome in California, physical custody is a different matter. Statewide figures released by the Judicial Council show that joint physical custody is not the predominant outcome.<sup>35</sup> Even when couples begin with an agreement to share physical custody equally, the *de facto* arrangement within very few years is that the mother assumes primary physical custody.<sup>36</sup> However, the issue of physical custody is complex, with a literature that uses the terms "joint physical custody" and "primary physical custody" in confusing ways. Our data indicate that the notions of joint physical custody are indeed difficult to define. In fact, excluding the relatively rare cases of sole (100%) physical custody, custody arrangements vary from 1% for one parent and 99% for the other, through all various combinations.

We determined the percent physical custody awarded to each parent in two different ways. First, at the end of each report the mediator indicates an estimate of overall percent physical custody recommended for each parent. Such summary estimates were available for only 164 of the DV cases and 157 of the non-DV cases. It should be noted that the recommendation sometimes included a recommendation of custody to a caretaker other than one of the parents (*e.g.*, to grandmother because a parent is in jail or incompetent). Therefore, the sum of the recommended awards to the two parents did not always equal 100 percent.

For a second method, we specifically examined the exact recommendations provided by the mediator in a detailed parenting plan, which often consisted of a form in which the mediator indicated how time would be shared during the standard week and also during times such as school holidays and family holidays. Then, based on a 4-week interval, we determined the percent custody awarded to each parent. For this purpose, we assumed that 6 hours of daytime custody for the non-custodial parent was the equivalent of one day of custody and an overnight stay was also equal to one day. We were able to calculate the percent physical custody for 177 DV cases and 179 of the non-DV cases. For the remainder, there was not sufficient information (*e.g.*, no detailed parenting plan, usually because the mediator recommended no change in custody).

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<sup>35</sup> California Family Court Services Snapshot Study Report 4: Mediated Agreements on Child Custody and Visitation. CALIFORNIA STATEWIDE OFFICE OF FAMILY COURT SERVICES (1994).

<sup>36</sup> California Family Court Services Snapshot Study Report 5: Visitation with Children: A Followup of Court Mediation Clients. CALIFORNIA STATEWIDE OFFICE OF FAMILY COURT SERVICES (1994).



To operationalize primary physical custody, we defined it as occurring when one parent has more than 75% of physical custody of the child.<sup>37</sup> Based on the mediator's estimate, the mediator recommended primary physical custody for the mother in 48.8% (80 out of 164 valid cases) of the DV cases and 47.8% (75 out of 157 valid cases) of the non-DV cases. Given that these differences are not statistically significant, it leaves open the question of how the mediator is ensuring the safety of DV victims and their children.

Based on our calculations of physical custody, the mediator's parenting plan actually recommended primary physical custody for the mother far less than was estimated: 35% of DV cases (62 of 177) and 40.2% of non-DV cases (72 of 179). Some comments on these findings are in order. First, it appears that the mediator substantially over-estimates the amount of custody recommended for the mother, and that over-estimate tends to be more pronounced in DV cases than in non-DV. In short, their estimates were gender biased in favor of men. This supports previous findings that gender bias frequently has been an element in custody disputes.<sup>38</sup>

To the extent that the Family Court judge relies on the summary communication from the mediator rather than a detailed analysis of the actual parenting plan recommendation, DV mothers are being poorly served. Further, if the judge is relying on the mediator as a fact-finder, reliance on the summary recommendation is more inaccurate than reliance on the details the mediator chooses to incorporate in the parenting plan. It may be important for mediators to have a more standardized and accurate way to calculate summary time, particularly since the bias tends to be against the mother and is stronger in DV cases, where primary physical custody is particularly important.

Based on the mediator's estimate, the mediator recommended primary physical custody for the father significantly more often in DV cases (11.0% of the DV cases) than in non-DV cases (7.0%), Chi Square (1, n=164) = 3.982,  $p < .05$ . This compares to calculations based on the actual parenting plan of 9.7% primary custody for father in DV cases and 8.9% for fathers in non-DV cases, which indicates that fathers in DV cases are no more likely to be recommended for primary physical custody than are fathers in non-DV cases. Table 1 provides a summary of these findings.

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<sup>37</sup> California Family Court Services Snapshot Study Report 4: Mediated Agreements on Child Custody and Visitation. CALIFORNIA STATEWIDE OFFICE OF FAMILY COURT SERVICES (1994).

<sup>38</sup> LEORA N. ROSEN & MICHELLE ETLIN, THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES 142 (1996).

**Table 1. Gender Bias in Mediators' Summary Estimates of Physical Custody: Primary Physical Custody Recommendations**

	Mediator's Estimate	Actual (Detailed Parenting Plan)
<b>Mother</b>		
<b>DV</b>	48.8%	35.0%
<b>Non-DV</b>	47.8%	42.0%
<b>Father</b>		
<b>DV</b>	11%	9.7%
<b>Non-DV</b>	7%	8.9%

Although use of the detailed parenting plan to estimate custody may have resulted in some systematic downward tendency, there was much less discrepancy between the mediators' overall estimates and our calculations for the fathers than for the mothers. For example, the over-estimate of primary custody for the fathers in DV cases amounted to 1.3 percentage points and for mothers the discrepancy was 13.8 percentage points, or more than 10 times higher. Again, we observe a gender bias against the women.

To further examine discrepancies, we restricted ourselves to the 151 DV cases in which the mediator explicitly indicated an overall custody estimate and we were also able to calculate a percent custody based on an analysis of the detailed parenting plan, as described above. Examining the frequency distribution of difference scores between the mediator's estimate and that based on the detailed parenting plan, there were 51 cases in which the mediator underestimated the mother's time and 87 in which she overestimated. If there were no systematic bias, the number of overestimates and the number of underestimates would be expected to be roughly the same. The chi-square test allows us to determine whether such bias exists, or whether the difference we see is likely to have happened by chance. The statistical test indicated clear evidence of systematic bias (Chi Square (1, n=138) = 9.391,  $p < .01$ ). Again, mediators seem to believe that they're giving more time to DV moms than they actually do in fact recommend. Judges who rely on the summary number from the mediator may in fact be giving the mother less time than they intend, because the detailed parenting plan becomes the custody plan ordered by the court.

Further analyses of these data indicated that when the mediator underestimated the mother's time, it was by a relatively small amount, with 32 of the 51 (about 63% of all underestimates) cases less than a 5% discrepancy. However, when the mediator overestimated, it was generally by a larger amount, with only 32 of 87 (approximately 37%) less than a 5% discrepancy. For 13 of the 151 cases (8.6%), there was an exact correspondence between the mediator's estimate and the calculation from the parenting plan. The discrepancy was within 5% in either direction 47% of the time (71 of 151 cases).

To evaluate the hypothesis that our results on discrepancies might have been due to cases in which the mother was the perpetrator of DV, we specifically identified all cases in which the mother was the alleged perpetrator. There were 11 such cases. Where the mother was the alleged perpetrator, she nevertheless was recommended for primary physical custody in 8 of the 11 cases. There was no evidence that the discrepancies could be attributed to the rare cases where the mother was the alleged perpetrator.

## 2. Joint Physical Custody

As with primary physical custody, prevalence estimates for joint physical custody are difficult to ascertain because of definitional inconsistencies. We defined joint physical custody as any arrangement involving at least 40% but no more than 60% time with each parent. These are the cases of true joint custody compared to, for example, arrangements in which one parent gets 40-60% and the other does not (*i.e.*, someone else such as a grandparent shares custody). Based on the mediator's overall estimate of the amount of custody recommended, we found that across DV and non-DV samples the overall percentage of joint custody recommended was 13.9%. This figure is entirely consistent with the findings of Donnelly and Finkelhor,<sup>39</sup> who stated that about 13% of all households with formal custody arrangements actually do time-share (usually the mother holds primary custody<sup>40</sup>).

The picture becomes a bit more complicated when we look at the DV versus non-DV samples. For the DV cases, joint custody recommendations were indicated in the mediator's summary percentages in 20 of 166 valid cases, or 12.1%; for the non-DV, joint custody was recommended in 25 of 158 valid cases, or 15.8%. These differences were not statistically significant, indicating that mediators were just as likely to recommend joint custody in DV as in non-DV cases. Given what is known about how batterers often use custody arrangements as a means of further control over the victim, it is somewhat disturbing that joint custody would be recommended in even 12.1% of the DV cases.

The picture becomes even more complicated when the actual parenting plan is used to calculate the percentages. Using the detailed parenting plans rather than the mediators' overall estimates, we found a much higher incidence (21.6%) of joint custody recommendations than indicated in the mediators' summary percentages. If accurate, this would tend to indicate that imposed custody arrangements tend to involve more joint custody than the recent national statistics of Donnelly and Finkelhor. It is important to note that our sample represents mediated non-agreement cases only, and represents the mediators' recommendations rather than the final orders of the judge. Nevertheless, it is interesting that the mediators in fact recommended joint custody far more often than they believed based on their stated estimates.

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<sup>39</sup> D. Donnelly & David Finkelhor, *Who has Joint Custody? Class Differences in the Determination of Custody Arrangements*, 42 FAMILY RELATIONS 57 (1993).

<sup>40</sup> Robert E. Emory, Lisa Laumann-Billings, Mary C. Waldron, David A. Sbarra & Peter Dillon. *Custody Mediation and Litigation: Custody, Contact, and Co-Parenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOLOGY 323 (2001).

This higher estimate based on the actual parenting plan occurred for both DV and non-DV cases. There were 28 DV cases, or 17.3%, for which the mediator's parenting plan recommended joint custody. For the non-DV cases the percentage was 25.2. Based on the various indices, recommendations for joint physical custody range from a low of 12.1% for DV cases based on the mediator's estimate to a high of 25.2% for the non-DV cases based on the actual parenting plan.

**Table 2. Gender Bias in Mediators' Summary Estimates of Physical Custody: Joint Physical Custody (40-60% for each parent)**

	Mediator's Estimate	Actual (Detailed Parenting Plan)
<b>DV</b>	12.1%	17.3%
<b>Non-DV</b>	15.8%	25.2%

These figures confirm that joint physical custody, no matter how defined, represents about a quarter or less of the actual recommended custody arrangements. Nevertheless, it is interesting to note that mediators actually recommend such an arrangement (based on a 40%-60% time range) far more often than they believe they do. As previously indicated, the disputants and the court would be better served if the mediator calculated the percentage of recommended custody more precisely. Such precision is even more critical in DV, where joint custody arrangements are thought to be associated with increased risk.<sup>41</sup>

### 3. When the Child is Placed with the Alleged DV Perpetrator

Generally it raises concern for the child and even more particularly the victim when the child is placed with an abusive parent. Indeed, it is a statutory requirement in California that when the court has knowledge of any history of abuse or habitual illegal use of controlled substances or alcohol by either parent and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record.<sup>42</sup> The California code does not give a precise definition, but instead defines joint physical custody as meaning each of

<sup>41</sup> Robert B. Straus & Eve Alda, *Supervised Child Access: The Evolution of a Social Service*, 32 FAM. & CONCILIATION CTS. REV. 230 (1994); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989); Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*.

<sup>42</sup> CA. FAM. CODE §3011(E)(1) (WEST, 2000).

the parents shall have "significant periods of physical custody such as to assure a child of frequent and continuing contact with both parents."<sup>43</sup>

We were able to locate 63 cases in which the father was the clear perpetrator and the mediator had provided a summary sheet estimating percent time custody recommended to each parent. Of these, the father received at least some physical custody in 61 cases, or 96.8%. It should be noted that any custody award to the father provides a vehicle of further control over the victim, using the child.<sup>44</sup> Of the 61 cases in which the father was awarded custody according to the mediator's estimate, 18 were for 10% or less time, 19 were for 11% – 20% time, 16 were for 21% - 40%, and the remaining 8 were given more than 40% time.

Using our calculation based on the actual parenting plan gave a somewhat different picture. There were 70 cases where the father was the clear perpetrator and percent time could be calculated. Of these, the father was given some custody in at least 66, or 94.3%. Eight received 10% or less time (12.1% of the total number of batterer custody recommendations), 16 received 11% – 20% time (24.2% of the total), 29 between 21% and 40% (43.9% of the total), and 13 received more than 40% time (19.7% of the total). See Table 3.

**Table 3. Physical Custody Recommended for Batterer Fathers (awards of 0% are excluded)**

	10% or less	11-20%	21-40%	More than 40%
Mediator estimate	29.5%	31.1%	26.2%	13.1%
Actual Parenting Plan	12.1%	24.2%	43.9%	19.7%

Inspection of Table 3 again graphically illustrates the finding that mediators recommend more physical custody to batterer fathers than they believe they do. Mediators estimated that in the majority of cases they recommended 20% time or less. In fact, in the majority of cases they recommended more than 20% time for the batterer.

In viewing the mediation reports, we were unable to find a reason for placement with the perpetrator for 64% of the cases. When reasons were given, they included mother's mental disorder (5%), the arrangement was less disruptive (10%), the abuse was deemed minor (5%), the abuser cooperated with some DV intervention (7%), and 10% other reasons. It is noteworthy that when we restrict ourselves only to cases in which the mediator directly addressed the violence, the perpetrating father was given at least some custody in 46 of 47 cases (97.9%),

<sup>43</sup> CA. FAM. CODE §3004 (WEST, 2000).

<sup>44</sup> Joan Zorza, *Protecting the Children in Custody Cases: Disputes when one Parent Abuses the Other*, April 1996 CLEARINGHOUSE REVIEW 1113, (1996); Mildred D. Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69, 69 (1993) (husbands may get revenge by using children as pawns).

including 7 of 40% or more, based on the mediator's estimate. Results are similar based on the actual parenting plan, with 49 of 51 perpetrators being granted at least some custody and 9 (17.6%) granted 40% or more.

*Case Number 31137.1*                      *The mother became concerned about her son's safety and came to mediation to request more time with him. She had attempted suicide when the minor was a year old, and the father became the primary parent as she recovered from depression. She now felt able to better care for the child and the child made it clear that he would like to live with his mother. After reporting "It appears that the father hits the minor and calls him names" and "It seems that the father loses his temper easily and becomes violent", the mediator proceeded to give physical custody to the father and recommended a parenting assessment to begin to deal with concerns about the father. The mother was given visitation rights. There were no further mediations for this family and it is not known if the parenting assessment was ever carried out.*

*Case Number 26407.1-2*                      *The mediator listened to this family's history, noted his/her belief that the incidents of domestic violence and child sexual abuse perpetrated by the father were factual, and yet came to the conclusion that the father should get a 36% share of unsupervised custody of his two biological children. The mediator gave no explanation of the decision and appeared to regard the division of custody as fair and reasonable.*

#### Stated Reasons for Giving Battering Fathers Sole or Primary Custody

We identified five cases in which the perpetrating father was given sole or primary physical custody. Reasons were as follows: the mother was evicted from her apartment due to drug use and had sent the child to live with the father, the mother was incarcerated due to immigration problems, the mother was sent to prison for trying to kill the child, the mother suffered from schizophrenia and the children said they wanted to live with the father, and the children blamed the mother for the divorce and did not want to move with her out of state.

The domestic violence documented in these reports ranged from severe beating to, in one case, an attempt to run over the mother with the family car. In two cases, the mediator documented clear evidence of the DV in the form of arrest reports, restraining orders and full police reports. In the case involving the drug-using mother who had lost her apartment, the mediator documented the father's history of drug abuse and arrest for battery against the mother, violation of restraining order, being under the influence of a controlled substance, and driving with a revoked license, but noted that he "appeared to be committed to the child's welfare and

that he seemed to function at a higher level” and “to be very convincing.” In the case of the mother held by the Immigration and Naturalization Service, the mediator noted that the children seemed to have been pressured and extensively coached by the father who was accused of battering. The mediator was concerned enough about the father’s pressure on the children that counseling was suggested for the children.

As these cases suggest, in some instances the victim is not available or appropriate as a parent; in others, however, the mediator appears to be ignoring classic sequelae of domestic violence. Often it may be that battered women, in an attempt to protect their children, are unwilling to share custody with their abusive husbands, are seen by mediators as uncooperative, and are penalized as such.<sup>45</sup>

#### 4. What predicts the mediator’s division of physical custody percentages between the parents?

As previously indicated, studies of decision making in the legal system have found the process to be driven by a few salient variables, regardless of how much information is available to the decision-maker.<sup>46</sup> To evaluate which variables drive the mediators’ custody recommendations, we used multiple linear regression analysis. We used the mediator’s perception or estimate of percent custody as well as our own calculation based on the detailed recommended parenting plan, as described above. We used the following sub-domains (as described under Question 3) as well as relevant variables not included in the sub-domains as predictors: occupation, parental stress, daycare, child demographics, child adjustment, child health/safety/welfare, child developmental, parental agreement, open family conflict, family structure, family resources, parental conflict, parental alliance, police involvement with the family, allegations of any threats, and DV indicators.

For the entire sample, looking at the mediator’s estimate of time recommended to the mother, four variables entered: family structure sub-domain, allegations of any threats, daycare, and number of severe parental problems (drugs, alcohol, and psychiatric). The multiple R was a statistically significant .276 ( $F_{4/319} = 6.5, p < .001$ ). However, this model accounted for only 7.6% of the variance. Therefore, predicting for the entire sample was not highly successful in practical terms. Using the detailed parenting plan on the entire sample did not improve this picture.

For the DV sample, again using the mediator’s estimate of mom’s percent time, the multiple R was .31 ( $F_{3/163} = 5.6, p < .001$ ), which accounted for 9.6% of the variance. Three variables entered significantly into the equation: allegations of any threats, the family structure sub-domain, and the daycare sub-domain. Again, the picture did not improve using the detailed

<sup>45</sup> LEORA N. ROSEN & MICHELLE ETLIN, *THE HOSTAGE CHILD: SEX ABUSE ALLEGATIONS IN CUSTODY DISPUTES* 142-43 (1996).

<sup>46</sup> See, for example, Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: the Setting of Bail*, 32 *J. Personality & Social Psychology* 805-821 (1975); Vladimir J. Konecni & Ebbe B. Ebbesen, *The Mythology of Legal Decision Making*, 7 *Int'l J. Law & Psychiatry* 5-18 (1984); Carla C. Kunin, Ebbe B. Ebbesen & Vladimir J. Konecni, *An Archival Study of Decision-Making in Child Custody Disputes*, 48 *J. Clinical Psychology* 564-573 (1992).

parenting plan calculations, where the multiple  $R = .22$  ( $F_{2/176} = 4.5$ ,  $p < .02$ ). Here there were only two variables that predicted: the current parental conflict sub-domain and the family structure sub-domain.

The models were somewhat more predictive when we restricted ourselves to those cases in which the mediator acknowledged the domestic violence. Beginning with the mediator's estimate of percent mom' time, the multiple  $R = .32$  ( $F_{1/84} = 9.6$ ,  $p < .003$ ), and accounted for 10.2% of the variance. Interestingly, only one variable entered in this model: the child's adjustment sub-domain. As was previously discussed, it was relatively rare for the mediator to acknowledge variables within the child adjustment sub-domain. The present finding indicates that when the child's adjustment rises to the level of saliency in the mediator's mind, it is a powerful predictor of the amount of time that the mother will receive. Using our calculation based on the detailed parenting plan improved matters somewhat and increased the multiple  $R$  to  $.53$  ( $F_{1/89} = 12.5$ ,  $p < .001$ ), accounting for 12.4% of the variance. Again, the only variable that entered was the child's adjustment sub-domain, which indicates the great weight given to this variable when it is acknowledged by the mediator.

### C. Supervised Visitation

Supervised visitation and protected child exchanges provide different types of protections. When the visitation is supervised, the goal is to protect the child from an abusive or incompetent parent.<sup>47</sup> By contrast, protected child exchanges aim to protect the victim of domestic violence during the high-risk time when the victim must interact with the batterer. We discuss both types of protections, as well as the concurrence between the two.

We examined baseline data concerning recommendation for supervised visitation. We compared DV versus non-DV, and within the DV sample examined for possible differences in supervised visitation when mediators addressed the violence and when they did not. In addition, we attempted to identify the variables, or combination of variables, that were most likely to trigger supervised visitation. These were: (1) the mediator recognized and addressed the domestic violence; (2) the mediator identified and noted the presence of threats; (3) the mediator documented police involvement; (4) the mediator specifically addressed safety concerns for the child in the report; (5) the mediator documented child abuse; (6) the mediator documented drug or alcohol abuse and (7) the mediator mentioned child exchange difficulties. As indicated below, although the presence of any one or more of these increased the likelihood of supervised visitation, even when at least four were present the mediator recommended supervised visitation in less than half of the cases (45.5%).

<sup>47</sup> Center for Families, Children & the Courts, *Research Update: Supervised Visitation: A Look at the Research Literature*, CA JUDICIAL COUNCIL ADMIN. OFFICE OF THE COURTS (March 2000); Robert B. Straus, *Supervised Visitation and Family Violence*, 29 Fam. L. Q. 229 (1995); Janet R. Johnston, *High-Conflict and Violent Parents in Family Court: Findings on Children's Adjustment, and Proposed Guidelines for the Resolution of Custody and Visitation Disputes*, Corta Madera, Center for the Family in Transition (1993).



Some form of visitation was recommended in 87.3% of the reports overall, 88.5% of the DV reports and 86.0% of the non-DV reports. It was from this sample of reports with visitation recommendations from which we calculated various percentages of supervised visitations.

Supervised visitation was recommended in 18.6% of the 349 reports in the sub-sample. Our first question concerned whether or not the presence of specific risk factors would increase the chances that the mediator would recommend supervised visitation. We attempted to answer this question by first examining the overall sample and then the DV sample. The California Judicial Council's Center for Families, Children & the Courts commissioned a search of research literature on supervised visitation, which summarized the most frequent reasons (risk factors) for supervised visitation.<sup>48</sup> We looked at whether the presence of each one of the risk factors increased the chances that the mediator would recommend supervised visitation. When the mediator documented domestic violence, supervised visitation was recommended in 24 of 95 cases, or 25.3%. This compared to a base rate in the overall sample of reports without mediator-documented DV of 41 of 254 cases, or 16.1%.

The percentages that follow all pertain to those derived from the entire sub-sample of 349 cases with visitation recommendations. In each case we determined the percentage of cases for which supervised visitation was recommended, given the presence of the risk factor in question. When the mediator documented threats, supervised visitation was recommended 38.2% of the time, compared to 16.5% when no threats were documented. When the mediator documented police involvement, supervised visitation was recommended in 32% of the cases, compared to 15% in reports with no such threats. When child safety concerns were documented, supervised visitation was recommended in 40.7% of the cases, compared to 14.1% in those with no child safety concerns. Documentation of child neglect and abuse was associated with a 28.6% recommendation, compared to 15.8%. Similarly, documentation of drug use by a parent was associated with 28.6% rate of recommendation compared to 14.7%, and documentation of alcohol use with a 25.8% compared to a 15.9% recommendation rate. Finally, results for difficult child exchanges were opposite to the direction expected, with a 13.4% rate of recommendation when the mediator documented difficulties with child exchanges and 19.9% when the mediator did not document such difficulties.

Results for the 177 DV cases with visitation recommendations were similar to those for the entire sample, except that the percentages of recommended supervision tended to be even higher when the mediator documented the domestic violence in the report. For the percentages that follow, we compared domestic violence cases in which the mediator documented the violence to those in which the mediator did not, but for which there were other indicators of DV such as an allegation or TRO.

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<sup>48</sup> Center for Families, Children & the Courts, *Research Update: Supervised Visitation: A Look at the Research Literature*, CA JUDICIAL COUNCIL ADMIN. OFFICE OF THE COURTS (March 2000). "The most common reasons for ordering supervised visitation are as follows: (1) proven history or allegations of parental sexual or physical abuse of the child; (2) proven history or allegations of child neglect; (3) history or allegations of domestic violence; (4) reinstatement of visitation after a prolonged absence; (5) impairment of parenting by a psychiatric illness; (6) history or allegations of substance abuse; (7) parental violation of custody orders, or denial of visitation with the parent; and (8) parental threats to abduct the child(ren)."

One of our most striking findings occurred when we compared four groups in terms of the concurrence of a recommendation for supervised visitation and the presence of one of the risk factors. These four groups were: (1) cases with no DV indicators, (2) all cases with DV indicators, (3) cases in which there were DV indicators but the mediator did not document DV, and (4) cases in which the mediator documented DV. Results are summarized in the table below.

**Table 4. Supervised Visitation Rates in the presence of documented risk factors**

	No DV indicators	DV Indicators	DV indicators: not documented by mediator	DV indicators: documented by mediator
Threats	22.2% (2/9)	44.0% (11/25)	33.3% (2/6)	47.4% (9/19)
Police	53.3% (8/15)	26.7% (16/60)	7.1% (1/14)	32.6% (15/46)
Child's Safety	50.0% (5/10)	38.8% (19/49)	31.3% (5/16)	42.4% (14/33)
Child Abuse	25.0% (5/20)	29.8% (17/57)	13.3% (2/15)	35.7% (15/42)
Drugs	21.2% (7/33)	32.3% (21/65)	29.0% (9/31)	35.3% (12/34)
Alcohol	29.0% (9/31)	24.2% (16/66)	25.0% (6/24)	23.8% (10/42)
Child Exchange Difficulties	16.2% (6/37)	10.0% (3/30)	5.9% (1/17)	15.4% (2/13)

Given the presence of domestic violence indicators (allegations or DV TROs) and any one of seven risk factors, mediators recommended supervised visitation at higher rates when they documented the DV within the mediation report than when they did not. Indeed, some of the differences were quite astounding. For example, where there was police involvement and the mediator acknowledged the DV, the rate of supervised visitation was 32.6%, compared to a mere 7.1% when the mediator did not acknowledge the DV. Anecdotally, mediators have told us that they are able to tell when a DV allegation is simply a tactic used to try to gain a custody advantage. It would appear that when mediators have such a belief, they tend to discount other indicators. In support of this notion, when the mediator documented DV and child abuse, supervised visitation was recommended 35.7% of the time, compared to 13.3% where there were indicators of DV but the mediator did not acknowledge it. If mediators are not perfect at assessing DV within the context of mediations averaging 2.5 hours in length, then the children of the true victims are placed at higher risk than necessary.

Present results on the frequency of recommended supervised visitation given the presence of one or more risk factors do not support the Center for Families, Children & Courts Research Update on Supervised Visitation, discussed above. That report was based on a review of the relevant literature. However, almost all studies in this field are based on post hoc self-report, in which a respondent, relying on memory, reports the most common reason for ordering



relationships among the delineated risk factors and the mediator's decision to recommend supervised visitation. At issue is the extent to which, if any, the presence of any given risk factor would tend to increase or decrease the probability that the mediator would recommend supervised visitation. Also at issue is the extent to which the mediator considers several risk factors, or whether the decision to recommend supervised visitation is driven by a few variables, as decision theory would predict.<sup>49</sup>

Table 5 below presents a summary of the logistic regression analysis using all seven risk factors plus concerns about the mother's safety and mediator documentation of the violence as predictors. The multiple R for the DV sample ranged from .35 to .44, depending on the formula used (Cox & Snell versus Nagelkerke). The model derived from these variables accurately predicted the mediator's decision regarding supervised visitation 81.9% of the DV cases and was statistically significant (Chi Square = 25.74, d.f. =9,  $p < .01$ ).

Based on statistical significance, three variables drove the mediator's recommendation for supervised visitation. These were child safety concerns, parental drug use, and difficulty with child exchanges.

**Table 5. Logistic Regression Analysis: Predicting Supervised Visitation in DV Cases**

Variable	B	S.E.	Exp(B)
Threats	.795	.497	2.217
Concerns about mother's safety	.030	.604	1.030
Child exchange difficulties*	-1.548	.695	.213
Mediator acknowledged DV	.265	.440	1.304
Child abuse/neglect	-.193	.478	.825
Concerns about child safety**	1.280	.472	3.597
Parental alcohol use	-.316	.443	.729
Parental drug use*	1.047	.431	2.849
Police involvement	.151	.469	1.163
Constant	.820	.813	2.273

\*  $p < .05$

\*\*  $p < .01$

Table 5 provides the Beta weights, which are the predicted log odds that the mediator would recommend supervised visitation, given the presence of the risk factor. The standard error (S.E.) is an indicator of the reliability of the coefficients. Finally, the Exp(B), sometimes known as the odds ratio or odds multiplier, which represents one way to express the degree of association between two variables. A ratio of 1.0 indicates there is no systematic relationship between the variables; in other words, the presence of one tells us nothing about the likelihood that the other will occur. For example, the mediator's documented concerns about the mother's

<sup>49</sup> *Supra*, Note 13

safety, had essentially no bearing on the likelihood that the mediator would recommend supervised visitation.

Ratios above or below 1.0 indicate the increase or decrease in the odds that the presence of one of the variables would be associated with the presence of the other. For example, the presence of mediator-documented child safety concerns is associated with 3.6 times the likelihood that the mediator will recommend supervised visitation. Similarly, mediator-documented parental use of drugs is associated with 2.9 times the likelihood. By contrast, documentation of difficulty with child exchanges is associated with .213 times the likelihood, or roughly an 80% decrease in the likelihood of a supervised visitation recommendation.

The increased odds of supervised visitation in the presence of documented child safety concerns and parental drug use are in the direction we would hope to see to provide protection for the child against an abusive or incompetent parent. In contrast, when the mediator acknowledged difficulties with child exchanges, the recommendation was only about one fifth as likely to contain supervised visitation as when no child exchange difficulties were raised. This is not what one would expect. Assuming that difficulties with child exchanges are relevant primarily to protect the DV victim during the exchange, we would expect to see supervised visitation recommended at least equally as often when there are exchange difficulties as when there are not. However, this was not the case. The mediator's acknowledgement of child exchange difficulties greatly lowered the likelihood of supervised visitation. It would seem that within the context of DV, when the mediator finds child exchange difficulties relevant enough to acknowledge, then protection of the child during visitation is for the most part lost, as revealed in the marked reduction in the chances of supervised visitation when such difficulties are noted.

Our findings on supervised visitation are consistent with a general pattern observed throughout our analyses: **the presence of domestic violence does not increase protections for the victim, whether child or parent.** In fact at best, victims get a comparable level of protection; at worst, they get less protection. In support of this, the logistic regression for the same predictor variables in the sub-sample in which the mediator acknowledged DV again showed that difficulty with child exchanges reduced the chances of supervised visitation by a factor of five. In this analysis, the multiple R ranged from .39 to .48 and two variables drove the decision (in a negative direction): child safety concerns and child exchange difficulties.

At this point, there are two alternative hypotheses. One would be that mediators become so focused on the need to protect the parent victim during difficult child exchanges that they lose sight of the need to protect the child from abusive or incompetent non-custodial parents. The other hypothesis is that when the domestic violence rises to a certain level of relevance in the mediator's attention, it tends to obscure other considerations. For example, when mediators acknowledged DV as well as parental drug use, they were less likely to recommend supervised visitation than when they acknowledged only drug abuse and not the DV. We will again examine these two hypotheses in the context of protected child exchanges, following our discussion of supervised visitation in non-DV cases.

We repeated the logistic regression in the non-DV sample. The multiple R for the DV sample ranged from .34 to .47. The model derived from these variables accurately predicted the

mediator's decision regarding supervised visitation in 88.0% of the non-DV cases and was statistically significant (Chi Square = 25.264, d.f.=8,  $p < .001$ ). In the non-DV sample, two variables drove the mediator's recommendation for supervised visitation. These were child safety concerns and police involvement.

**Table 6. Logistic Regression Analysis: Predicting Supervised Visitation in non-DV Cases**

Variable	B	S.E.	Exp(B)
Threats	.307	1.292	1.358
Concerns about mother's safety	-.137	1.954	.872
Child exchange difficulties	-.343	.654	.709
Child abuse/neglect	.490	.670	1.631
Concerns about child safety*	1.965	.111	7.143
Parental alcohol use	.576	.690	1.779
Parental drug use	-.414	.715	.661
Police involvement***	2.452	.700	11.628
Constant	-2.476	1.666	0.084

\*  $p < .05$

\*\* $p < .01$

$p < .001$

Documentation of child safety concerns increased the likelihood of a supervised visitation recommendation by a factor of 7.1 times; police involvement by a factor of 11.6 times. It makes sense that police involvement would be highly relevant here because if the police are involved in the absence of DV, then it is likely that their involvement is due to conduct such as child abuse that would put the child directly at risk. Police involvement in the absence of DV likely represents a child safety concern. More striking is the finding that in the absence of DV, child exchange difficulties do not decrease the likelihood of supervised visitation. This is consistent with our assumption that difficult child exchanges should have no bearing on the likelihood of supervised visitation, because supervised visitation protects the child from an abusive or incompetent non-custodial parent whereas protected child exchanges address the issue of difficulties during exchanges. It also supports the notion that the mediator's attention to DV may obscure other issues. The following cases illustrate child abuse in the absence of DV.

*Case Number 30903.1-3*

*The father was arrested for operating a motor vehicle while under the influence of alcohol. The father had his two and six year old children with him and was driving erratically at an excessive speed. The father was taken into custody and charged with child endangerment. The mediator recommended the father's visits be supervised by the paternal grandmother until the father completed an alcohol assessment.*

*Case Number 27156.1*                      *The father had attempted suicide on two occasions and had told his children that the angels were coming to take him away. Because the father continued to speak to the children about death inappropriately and cause them emotional distress, the mediator recommended supervised visitation.*

It should be noted that for both the DV and non-DV samples, child safety concerns, drug use, threats, and police involvement tended to increase the chances that mediators would recommend supervised visitation. We subsequently examined a variety of combinations to determine post hoc the maximum percentage possible. For the DV sample, this was 41.7% (5 of 12 cases) when the mediator documented the DV as well as police involvement, child safety concerns, and threats. This result again indicates how low the base rate of supervised visitation is, even in the presence of a number of risk factors. To better understand this finding, we looked at a number of specific cases with multiple risk factors and no supervision.

*Case Number 24979.1-3*                      *The father claimed the mother had been arrested for smuggling drugs across the border, had been raped by an acquaintance, and lived in a bad neighborhood. CPS had been involved when bruises were found on the child's body. The allegations of child abuse could not be substantiated. The mother had been the victim of domestic violence perpetrated first by the father, and then by her new partner. No protective measures were recommended during visitation.*

*Case Number 31823.1*                      *The mother took the children and moved into a shelter for battered women. She left the father after enduring years of abuse including being kicked, pushed, and choked. Incidents of abuse left her with black eyes, broken furniture, and fear for her life. The father kept her in isolation and taught her to 'keep her mouth shut' about the abuse. The mother came to mediation to request the father only see the children during supervised visitation. The father accused the mother of drug usage and child neglect. CPS investigated and reported that the home was marginally clean and the children had head lice. The father admitted to the mediator that he was not able to control his emotions while with the mother. The mediator recommended a parenting evaluation, a six-week parenting course, family counseling and DV programs and instructed them to come back to mediation after the evaluation was complete. The father was given a share of unsupervised parenting time without protective measures of any kind. There were no subsequent mediations in the file for this family and it is not known if the parenting evaluation, DV programs, or parenting courses were ever completed.*

In sum, where one might reasonably expect supervised visitation because of DV and the presence of risk factors, the data indicate that it is recommended only about 40% of the time. This finding exemplifies another of our results in general: when we would reasonably expect to see a safeguard all or most of the time, we actually found safeguards on more or less a "hit or miss" basis, and certainly less than 50% of the time.

#### D. Protected Child Exchanges

Related to supervised visitation is the issue of protected exchanges. For each of the seven risk factors, we paralleled the analyses above. Our goal was to determine both baseline data and the predictors of such exchanges. For these analyses, our sample included all mediation reports containing recommendations for any amount of shared custody, including any visitation, resulting in the need to transfer the child from one parent to another. Results are summarized in the table below.

**Table 7. Protected Child Exchange in the presence of documented risk factors**

	No DV indicators	DV Indicators	DV indicators: not documented by mediator	DV indicators: documented by mediator
Threats	75.0% (6/8)	37.0% (10/27)	50.0% (4/8)	31.6% (6/19)
Police	53.3% (8/15)	39.0% (23/59)	30.8% (4/13)	41.3% (19/46)
Child's Safety	66.7% (6/9)	43.1% (22/51)	31.3% (5/16)	48.6% (17/35)
Child Abuse	47.4% (9/19)	33.9% (20/59)	11.8% (2/17)	42.9% (18/42)
Drugs	25.8% (8/31)	37.3% (25/67)	41.9% (13/31)	33.3% (12/36)
Alcohol	22.6% (7/31)	38.5% (25/65)	52.2% (12/23)	31.0% (13/42)
Child Exchange Difficulties	35.1% (13/37)	46.7% (14/30)	37.5% (6/16)	57.1% (8/14)

Inspecting the data, we generally (in 4 of the 7 risk factors) find a higher percentage of protected child exchanges when there were no DV indicators than when there were. This is curious, given that such exchanges are usually used to protect the DV victim, as opposed to supervised visitation, which is designed to protect the children. The reverse was found in parental drug use, parental alcohol use, and child exchange difficulties, where DV victims were afforded somewhat more protection.

For four of the variables (police involvement, child safety concerns, child abuse, and difficult child exchanges) there were more protected exchanges when the mediator documented



DV than when DV indicators were present but not acknowledged. The reverse was found for parental drug use, parental alcohol use, and threats. The findings with drugs and alcohol would seem to confirm that when the mediator's attention is directed toward DV, the relevance of other risk factors may be minimized. The findings concerning threats are more disconcerting.

A 100% rate of protected exchanges in the presence of DV and threats is what one would hope to see. We see, however, the highest rate (50%) only when there are DV indicators but the mediator does not directly address DV. Closer examination of the four out of eight cases in this category indicated that the threats were directed against the mother by the father but there had been no overt violence: the mother obtained restraining orders and the mediator had acknowledged threats as well as fears about stalking, but did not characterize this as DV.

As with supervised visitation, we conducted a logistic regression in order to predict protected child exchanges. We began with the domestic violence sample, but the model was not statistically significant: this best model was able to accurately categorize only 67.4% of the cases, and that accuracy is not reliably better than chance. The model was able to account for only 4.1-5.7% of the variance. These data indicate that the decisions concerning protected child exchanges in the presence of DV were not driven by any unifying concept, but were instead essentially haphazard. We were unable to derive models for the DV subgroups (mediator-acknowledged DV and unacknowledged).

The model for the non-DV sample was in fact significant, with 16.9 – 25.9% of the variance accounted for (correlation between .41 and .51). This model was able to accurately predict 83.9% of the cases and was significant (Chi Square = 35.046, d.f.=8,  $p < .001$ ). Only three variables were significant and drove the decision. The presence of threats made a protected exchange 22.7 times more likely; acknowledged safety concerns made protected exchanges 10.1 times more likely and police involvement 4.8 times more likely. See Table 8.

**Table 8. Logistic Regression Analysis: Predicting Protected Child Exchanges in non-DV Cases**

Variable	B	S.E.	Exp(B)
Threats*	3.119	1.259	22.727
Concerns about mother's safety	-2.105	1.907	.122
Child exchange difficulties	.797	.493	2.217
Child abuse/neglect	1.166	.605	3.205
Concerns about child safety**	2.310	.857	10.101
Parental alcohol use	-.220	.702	.803
Parental drug use	-.264	.650	.768
Police involvement*	1.563	.668	4.785
Constant	-4.281	1.670	.014

\*  $p < .05$

\*\* $p < .01$

$p < .001$

The consistency between the DV and non-DV cases is demonstrated by the relationship between documented threats and protected exchanges in the two samples. In the non-DV sample, the documentation of threats was associated with a protected child exchange in 75% of the cases. In the DV sample, by contrast, such threats were essentially unrelated to protected exchanges: in DV, mediators recommended protected exchanges less than 1/3 of the time regardless of the presence of threats. Unfortunately, in our sample it appears that a DV victim seeking protection during child exchanges would be much better off emphasizing current threats and hiding the DV. Again we see two of our thematic points, namely that **the victims of DV get equal or even less protection and the presence of DV apparently obscures the relevance of other risk factors**. It might be helpful to impose a structured format for any communication, formal or informal, from the mediator to the court so that the mediator would be required to address all relevant major risk factors.

#### **D. The Concurrence Between Supervised Visitation and Protected Child Exchanges**

Both protections were recommended in 13.5% of the cases overall, but there was a greater tendency to recommend protected exchanges given that the mediator believed supervised visitation was necessary than to recommend supervised visitation when protected exchanges were necessary. Thus, when the mediator recommended supervised visitation, there was also a recommendation for protected exchange 71% of the time (72.2% of the time in DV and 69.2% of the time in non-DV). When the mediator recommended protected exchanges, supervised visitation was recommended only 48.4% of the time (47.3% of the time in DV and 50% in non-DV).

#### **Question 3. How well does the mediation directly address factors relevant to the child custody decision?**

Our approach to this question is heavily based on Whiteside's integrative review of the literature pertinent to child custody outcomes for children.<sup>50</sup> Whiteside's review presented a summary of the developmental consequences of post-divorce custody arrangements for young children, with an emphasis on those factors that increase risk for children and those that increase the chance of effective family functioning.

Whiteside proposed a "developmental-ecological model" that encompassed many of the key variables that affect the adjustment of young children following a divorce. In selecting variables to be included in our content analysis coding, we reviewed Whiteside's model to assist in the identification of critical variables. The basic question we hoped to address was the extent to which the mediator directly dealt with variables generally believed to be related to the child's health, safety, and welfare.

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<sup>50</sup> *Supra*, Note 18.

The need for the mediator to address such variables is evident, given that the child is an important, albeit absent, party to the mediation. The underlying issue concerns whether the child's best interests are addressed and protected or whether the mediation focuses on the needs of the parents and ignores those of the children.

*Case Number 28764.1-3                      Both parents stated  
their son was a troubled little boy. The two year old had been  
kicked out of two daycare centers for biting and other aggressive  
behaviors. The parents' acknowledgement did not stop the parents  
from continuing to behave in ways that increased the child's  
anxiety and insecurity.*

In this section we focus on the variables based on Whiteside's social-ecological model. As Whiteside carefully noted, these variables can have a direct influence on child outcome, an indirect influence, or both. Our discussion begins with variables pertinent to the parenting environment, which, according to Whiteside, is the core of the young child's world. Next we examine a variety of child characteristics and family interactions. Finally we address how the mediator handled environmental factors such as availability of the parents and safety issues. In sum, this section deals with four major categories of variables that are important to the adjustment of children following divorce: (A) the parenting environment; (B) child characteristics; (C) family interactions patterns; and (D) current parental relationships. The issue is the extent to which each of these is addressed, if at all, in the mediator's custody recommendation.

There are at least three ways to view our data. First, they provide insights into how often the various subjects are covered in mediations in general, providing baseline data. Second, they give important insights into differences between DV and non-DV, both in terms of how DV affects the mediator's analysis and in terms of the DV milieu. Third, to the extent that judges making custody decisions use or rely on mediators' information and opinions, our data reflect the quality of mediation's fact-finding for the court.

#### **A. Parenting Environment**

The parenting environment includes three major sub-domains: (1) parents' occupations and work schedules, (2) level of stress as reflected in substance abuse and psychiatric treatment, and (3) day care arrangements. In addition, we examine a variety of other relevant variables. Finally, we create an index in order to provide a broad view of the entire parenting domain. As Whiteside notes, a considerable body of literature has associated such variables with the child's adjustment in both divorced and married families.<sup>51</sup>

##### 1. Occupation Sub-Domain

We found no significant differences in the frequency with which individual factors such as employment status and work schedule were mentioned in the violent and nonviolent samples, suggesting that the presence of violence neither increased nor decreased the mediator's attention to these variables.

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<sup>51</sup> *Supra*, Note 18.

Another way to examine the extent to which mediators address the domain or category of variables relevant to parental environment is to examine how many of the individual variables within a domain are mentioned in the report. In this way we can deal with a whole cluster of variables (*i.e.*, sub-domain) or even an entire domain rather than looking at one specific variable at a time.

For example, to examine the occupation/work schedule sub-domain within the parenting domain, we determined the number of reports that mentioned any one or more of the five individual variables that were coded for this sub-domain: father's occupation, mother's occupation, father's work schedule, mother's work schedule, and mother's employment status. The mediators did not mention a single variable within this sub-domain in 41.3% of the reports. Therefore, this critical area was ignored in a substantial number of cases. The sub-domain was addressed at least one or more times in 58.7% of the reports, and all five times in 11.8% of the reports. Interestingly, where it was addressed once and only once, the vast majority were references to the father's occupation or work schedule (44 out of 54 cases). This is a curious finding and seems to suggest that mediators focus on the traditional male role.

## 2. Parental Stress Sub-Domain: Drugs, Alcohol, and Psychiatric Treatment

Drug and alcohol abuse are complicating factors in DV. As indicated in a recent report of a survey of court professionals,<sup>52</sup> 15% of the mothers and 24% of the fathers involved in custody mediations were alleged by the other parent to have abused drugs or alcohol. We evaluated substance abuse in the parental stress sub-domain, which included drug abuse, alcohol abuse, and psychiatric treatment. Drug abuse by the mother, father, or both was mentioned more than twice as frequently in DV as non-DV homes (74 cases out of 200 versus 35 out of 200). Similarly, alcohol abuse was mentioned nearly twice as often in DV (54 versus 29 out of 200). Current sobriety by mother, father, or both was mentioned in 42 of the DV cases and 19 of the non-DV. Psychiatric treatment for either or both parent was mentioned in 56 versus 30 of the DV and non-DV cases, respectively. All of the above differences are statistically significant.

It is noteworthy that the actual rate at which the mediator documented substance abuse for either parent is higher than that reflected in the retrospective survey of court professionals. We find a 21% rate of documented substance abuse problem or allegation for mothers and a 27.5% rate for fathers.

In domestic violence cases, the problems of mediation are compounded. When the mediator acknowledges that the father was the abuser and that the mother has used drugs or alcohol, adjectives such as competent, stable, and 'in control' are used to describe the father. When both parents use drugs and alcohol, the mediator's decision becomes even more difficult, and DV is of lesser concern.

*Case Number 29904.1-3*

*In this case, both the mother and father abused alcohol and drugs. The mother made*

<sup>52</sup> California Family Court Services Snapshot Study Report 7: Serving Families in the '90s: The Perspective of Direct Service Providers in California's Family Court Services. California Statewide Office of Family Court Services (1997).

*multiple suicide attempts, suffered from chronic depression, and had been hospitalized on several occasions. She had fought for time with her children, only to disintegrate under the pressure of caring for them. Her history included sexual and physical abuse as a child. Her current partner was accused of child sexual and physical abuse of her daughter. The nine year old girl had become assaultive, encopretic, and self-injurious under the care of her mother. In this chaos, it is hardly surprising that the mediator overlooked the mother's allegations of spousal violence perpetrated by the father, as well as paternal alcoholism. It is sobering to consider, however, that the daughter, who suffered so much in the care of her mother, was placed in the care of the man who had stalked and raped her mother.*

We take these findings on substance abuse and psychiatric treatment to mean that the DV environment is far more chaotic and disruptive in general. It is unlikely that the mediator addressed substance abuse and psychiatric treatment only because the mediator believed DV was present. However, this issue is addressed in greater detail below.

Our procedure for determining baselines for the parental stress sub-domain was the same as for the occupation sub-domain. The three main individual variables were parental drug use, parental alcohol use and sobriety, and psychiatric treatment. In the overall sample of 400, not a single variable within this sub-domain was addressed in nearly half the cases (49.5%). In another 29.8% only one is mentioned. In 15.8%, two of three are mentioned, and in a mere 5% all three are mentioned.

In comparing DV and non-DV, when there are no indicators of DV present, 66.5% of the reports mention none of these problems (*i.e.*, they are discussed in 33.5%, or only about 1/3 of the time in non-DV). When DV indicators are present, at least one of these problems appeared in the majority of reports (67.5%). Two of the above problems appeared in 23.5% of the cases in the DV sample, or nearly a quarter, but only 8% of the non-DV cases. All three were noted in 5.5% of DV reports and 4.5% of non-DV, making it relatively rare in either case for the mediator to address all three.

Using these summed data, we attempted to shed light on whether DV families are more disturbed in general or whether mediators simply focus on these problems when they believe that DV is present. Within our DV sample, we looked at the differences between reports in which the mediator either did or did not document DV. Results supported the disturbed milieu hypothesis.

Looking at the DV sample, when mediators directly addressed DV in the reports, they discussed one or more of the variables 73.3% of the time. When mediators did not directly address DV but there was some other indicator of DV (such as a DV allegation in the screening form or a TRO in the file), the percentage dropped to 61%. Finally, in the non-DV reports the mediators discussed one or more of the variables only 33.5% of the time. The telling difference is between the latter two percentages. Even where the mediator did not directly address DV, the

mediator noted one or more of the parental stress variables nearly twice as often when there was some DV indicator as when there were none. This finding indicates that DV was highly connected with the presence of substance abuse or psychiatric treatment in one of the parents, even when the mediator did not acknowledge DV.

Interestingly, when only two of the three parental stress variables were mentioned it was overwhelmingly drugs and alcohol. These two occurred together exclusively in 34 of 47 cases (72.3%) where exactly two parental stress variables were mentioned. Psychiatric treatment and drug or alcohol use accounted for 13 of 47 cases, or 27.7%.

The question remains – was substance abuse a problem only when the mediator addressed it in the report, or were some mediators simply better at eliciting information on substance abuse? This question is important because it demonstrates that information obtained from a mediation may be haphazard, and certainly is far from standardized. We believe that the participants in mediation, particularly DV victims, would be better served if there were a standardized approach so that, for example, the presence or absence of substance abuse by each parent is always addressed. This is because the absence of information is ambiguous at best and could be misleading. When a mediation report fails to account for substance abuse, the natural tendency for the reader is to assume that there is none, even though the mediator may never have elicited that information, or may know and did not report it. Given that communications from a mediator represent an important aspect of the fact-finding process, there is a need to ensure the reliability of the information communicated.

### 3. Daycare Sub-Domain

According to Whiteside, because divorce increases the necessity of both parents being employed, there is an increased likelihood that daycare will be an important issue. Consequently, the nature, quality, and consistency of the daycare arrangements affect the well-being of the child. Our daycare sub-domain consisted of five specific variables: daycare mentioned at all, quality of daycare noted, daycare provided by family, daycare plan proposed, and change in daycare.

Comparison of DV and non-DV cases for each of these variables indicated a significant difference for just one, where the quality of daycare was noted 3% more often in DV than in non-DV. Otherwise, there was no greater tendency for mediators to discuss this sub-domain in DV versus non-DV cases.

We used the previously described summary approach to examine the extent to which at least one or more of the variables were discussed across the two samples, in order to gather baseline information. The mediator did not address any variable in this sub-domain in 72.8% of the cases. When they did talk about it, 42% of the time they tended to mention something other than one of the four more specific variables above. In other words, it was relatively rare for the mediator to mention such variables as the quality of daycare (5.0%) or any proposed daycare plan (4.8%).

#### 4. Other Important Parenting Sub-domains

Obviously the choice of variables to include in any domain or sub-domain is a subjective matter. In addition, the categories are not conceptually tight, in that any given variable might be included in more than one domain or sub-domain. With this limitation in mind, we attempted to identify other variables in our coding system that might represent important parenting sub-domains. These were parents' involvement with the child and parental communication. Considering parents' involvement, there were no differences between the DV and non-DV samples in the frequency with which the mediator mentioned this variable. When mediators did mention parental involvement with the child, they commented on both parents' level of involvement the majority of times (3 in every 4 times it was mentioned). However, parental involvement was mentioned at all in less than half (45.7%) of the reports. Again we see a recurrent theme: the mediator failing to address information critical to any decision based on the child's well-being. Although California does not use a primary caretaker presumption, parental involvement with the child must be a major consideration in any child custody decision. The relatively low rate of mediators addressing this issue in formal communications to the court may reflect either a failure to acknowledge vital mediation content, or a failure to guide the mediation into consideration of vital factors.

Another important parenting sub-domain concerns parental communication. Parental communication was mentioned in 40.8% of the reports. When such communication was mentioned, it was overwhelmingly characterized in a negative way. Further, there were DV/non-DV differences. Negative communication was mentioned in about 38% of the DV reports compared to about 30% of the non-DV reports. Positive communication was mentioned in only 7 of the cases, or less than 2%. Positive communication was mentioned only once in domestic violence, and again the frequency of DV versus non-DV positive communication was statistically significant.

#### 5. Summary Score for Parenting Domain

In order to get a general estimate of the extent to which the mediator focused on this particular domain, we summed across all of the five sub-domains we identified as being relevant and created an index. We began by defining whether the mediator addressed any variable in each sub-domain: either the mediator addressed at least one variable, or none were addressed. Using this derived or created variable, we then determined the number of cases in which the mediator addressed one or more of the sub-domains. For the parenting environment domain, one or more of the sub-domains were addressed in 90% of the 400 cases (94% of the DV cases and 86% of the non-DV). One and only one of the sub-domains was addressed in 21.5% of the cases. Again there was a discrepancy between DV and non-DV: one was addressed in 23.5% of the non-DV and 19.5% of the DV. By summing the number of reports that covered one or none of the sub-domains, we determined the number of reports that dealt with this sub-domain only minimally. For non-DV, there was minimal coverage in 37.5%; for DV, 25.5%. Although there was apparently greater coverage in DV, the fact remains that coverage was minimal for a full ¼ of the cases.

Two of the domains were mentioned in 25.8% of the reports and three in 25.3%. Less than one in five reports covered more than three areas. Four areas were covered in 13.3% of the cases and five in 4.3%.

Next we assigned each report a score from zero to five, depending on how many of the five sub-domains were covered in each report. The total scores for each case was the divided by five (the number of sub-domains) in order to derive a ratio that could be compared to the other domains. In this way we were able to evaluate which domain or domains received the greatest focus. For the parenting sub-domain the mean ratio score was .446 (SD = .26). This result means that less than half of the areas we identified in the parenting domain were covered in the typical communication to the court. The difference between DV (M = .484, SD = .26) and non-DV (M = .408, SD = .27) was significant,  $t = -2.92$ ,  $df = 398$ ,  $p < .01$ . Areas in the parenting domain were covered slightly more frequently in DV reports than in non-DV, but even in DV the typical report covered less than half of the areas. For the practitioner, these findings reveal that mediator coverage of this domain was inconsistent and perhaps even haphazard.

## B. Child Characteristics

This domain included four sub-domains: (1) demographics, (2) adjustment, (3) health and safety, and (4) developmental factors. Our approach parallels that for parenting factors. First we evaluate each sub-domain in terms of DV versus non-DV differences and other notable information based on single specific variables within a sub-domain. Next we sum across the variables in each sub-domain to determine how well it was covered. Finally we calculate an overall ratio score for the entire domain.

### 1. Demographics

It is important to note that at the beginning of each report the mediator was asked to enumerate each child by name and date of birth. Mediators followed this precise format in 99.5% of reports. In examining these data we were able to determine differences in the family structure between the two samples. Fifty-six percent of DV families have only one child, compared to 65% of non-DV families (the difference is statistically significant). DV families tended to be larger across the board, with 31% versus 29% for two-child families, 8% versus 5.5% for three-child families, and 4.5% versus 0% for four-child families.

Because the standard report format required a list of all children within the family, we did not include number of children as a discretionary variable within the demographic sub-domain. The demographic sub-domain consisted of any mention of the child's residence, gender, age, or current schedule. There were no specific DV/non-DV differences in the frequency with which these were addressed by the mediators.

Summing across the variables in this sub-domain indicated that it was well covered by mediators. At least one variable was noted in 87.2% of the cases. Two were covered in 30%, three in 24.3%, and all four in 11.3%. It is hardly surprising that at least one of these variables was covered in most reports. On the other hand, one might expect all of the demographics to be



routinely covered in a standardized part of the report, yet our findings indicated that less than ¼ of the reports mentioned as many as three.

## 2. Adjustment

The adjustment sub-domain consisted of any mention of separation anxiety, child regressive behaviors (bedwetting, tantrums, sleep disturbances, nightmares, somatic symptoms, oppositional behavior), the child's psychological adjustment, child stability, therapy for the child, and any disruption of the child's schedule. Two of the six were covered significantly more often in DV than in non-DV: psychological adjustment (22.5% versus 16.5%) and child therapy (31% versus 21%). Disruptions in the child's schedule, by contrast, were noted significantly more often in non-DV than in DV (11.5% versus 7%).

At least one of these six variables was covered in only 43.2% of the cases. Many of these variables reflect turmoil within the family and therefore we would not expect them to be routinely covered. However, psychological adjustment and the child's stability are two important variables to be considered in any child custody decision. Given that custody mediation overwhelmingly involves the parents only, it would be extremely difficult for the mediator to make any reliable judgments about the child's adjustment or stability. Indeed, our data indicate that the mediator so much as met the child in only about 15% of the cases, with no significant difference between DV and non-DV. This finding, of course, is probably a reflection of system and resource limitations rather than mediator failure.

Given that the mediator must rely on the parents and that certain disruptive behaviors occur relatively infrequently, it is not surprising that coverage within this sub-domain is relatively low. In fact, the mediator addressed three or more in only 9.3% of the cases, and never once covered all six. Below are examples of cases in which some of these variables were covered.

*Case Number 25799.1-3*

*The seven-year-old girl began wetting her bed after discovering that her father had threatened her mother with violence. The mother stated that the girl was afraid to go to school because her daddy might find her there and hurt her.*

*Case Number 29904.1-3*

*Since the separation, the daughter's behavior had begun to deteriorate. She began having significant problems in school, was clingy, and frequently needed to be restrained when having angry outbursts. The girl became self-injurious and was soon hospitalized.*

## 3. Health and Safety

The health and safety sub-domain consisted of any mention of the child's safety, health, welfare, or neglect/abuse. It is not surprising that neglect/abuse was mentioned significantly more in the DV sample (34%) than in the non-DV sample (10%). Similarly, safety concerns were mentioned significantly more in DV (28.5%) than non-DV (5%).

*Case Number 25882.1-3*                      *Both children were seen by a therapist for aggressive behavior after it was discovered they had been molested. The five-year-old boy suffered enuresis and encopresis as a result of the trauma. Later, the CPS worker reported to the mediator that the custodial mother had discontinued the children's treatment against professional advice and appeared to be under the influence of drugs. The CPS worker concluded that no further action was needed. The mediator recommended that drug testing be implemented for the mother.*

Surprisingly, this sub-domain was sparsely covered, with only 36.5% of the reports mentioning even one of the factors. Given that the child's health, safety, and welfare are statutorily defined to represent "best interest of the child" and best interest is the criterion for the custody decision in California, it is remarkable that these factors were so seldom directly addressed. Perhaps the mediators addressed this important area indirectly, leaving inferences to the ultimate decision-maker (the family court judge). We think it more likely, however, that the mediator simply was not in a position to make informed judgments about the child, given that the main source of information was the disputing parents. Nonetheless, each of these mediators was ultimately required to formally communicate a professional opinion about how custody should be apportioned, and did so.

#### 4. Developmental Factors

The developmental sub-domain consisted of any mention of developmental delays, the child's temperament, the child's cognitive development, and the child's social skills. There was only one significant difference between DV and non-DV, and this was in favor of the non-DV cases. The child's cognitive abilities were mentioned more frequently in non-DV (9.5%) than in DV (5%).

In general, this domain was rarely covered. It was not mentioned at all in 83.8% of the cases. Again, the low coverage in this area could be because the mediator does not have any direct information about the child.

#### 5. Summary Score for Child Characteristics

For the child characteristics domain, one or more of the sub-domains were covered in 90.2% of the reports (93% of the DV cases and 87.5% of the non-DV cases). As indicated by the above discussion, however, this high result was primarily due to coverage of demographic factors. Less than 1/3 of the reports (29.3%) covered at least three of the four sub-domains.

The mean ratio score was .458 (SD = .27). As with the parenting domain, the difference between DV (M = .498, SD = .27) and non-DV (M = .419, SD = .26) was significant ( $t = -2.990$ ,  $df = 398$ ,  $p < .01$ ). As we saw before, there was slightly more coverage in the DV reports than in the non-DV, but even in DV the typical report covered less than half of the areas.



father's current relationships. Only one showed a significant difference, with the father's current relationships mentioned in 18% of the DV reports and 28% of the non-DV.

At least one of these three variables was covered in only 42.2% of the reports. The majority of those covered only one. Only about 10% covered two or more.

#### 4. Family Resources

The family resources sub-domain consisted of any mention of extended family involvement and family strengths. There were no significant DV/non-DV differences within this sub-domain. The sub-domain was mentioned in only 37.7% of the reports.

#### 5. Summary Score for Family Interactions

For the family interactions domain, one or more of the sub-domains were covered in 92.5% of the reports (95.5% of the DV reports and 89.4% of the non-DV reports). Less than 1/3 covered three or more (30.3%).

The mean ratio score was .483 (SD = .26). The difference between DV (M = .508, SD = .24) and non-DV (M = .460, SD = .27) did not quite reach statistical significance ( $p > .055$ ). Again, there was slightly more coverage in the DV reports than in the non-DV. For the first time, however, we see more than half of the sub-domains covered in the DV reports. Nevertheless, coverage is at best inconsistent.

### **D. Current Parental Relationship Domain**

In this domain we included a variety of factors stemming from the parents' current relationship. Such factors are important because there is a direct relationship between ongoing marital conflict and the child's ultimate adjustment. By contrast, a parental alliance is a predictor of positive child adjustment. There were two sub-domains: (1) parental conflict and (2) parental alliance.

#### 1. Parental Conflict

This sub-domain consisted of four areas: verbal abuse, parent distrust, parent hostility, and verbal threats. Verbal abuse was noted in the coding system if it was specifically mentioned in any form in the report. Parent hostility was scored if there were any references indicating that either or both parents were described as hostile. For verbal abuse and verbal threats, we coded whether such abuse or threats was by the mother, the father, or both. Naturally such threats or abuse were more common in the DV than in the non-DV cases and occurred significantly more frequently in the fathers.

Summing across the sub-domain indicated that parental conflict was not often seen or addressed. At least one variable in this sub-domain was noted in only 37.7% of the reports, with much greater mention in DV (50% of the reports) than in non-DV (26% of the reports). Two of the four were covered in 21 % of the reports. Three or four were covered in 14.1% of the reports.

## 2. Parental Alliance

This sub-domain consisted of any mention by the mediator of positive indicators. These included parental cooperation, parental emotional support, and parental mutual respect. Significant differences between DV and non-DV occurred only for parental cooperation, which was mentioned roughly half as often in DV (12.5%) as in non-DV (24%).

It is not surprising that mention of positive variables was infrequent, given that all the cases were non-agreement. Nevertheless, as we previously indicated, it is impossible to know if the absence of mention is due to the fact that the parents were not demonstrating these positive indicators or that the mediator simply failed to address it. At least one of the three was noted in only 19.5% of the cases, with the vast majority (17.8% of the total reports) mentioning only one.

## 3. Summary Score for Current Parental Relationship Domain

For the current parental relationship domain, one or more of the sub-domains were covered in 48% of the reports (54.5% of the DV reports and 41.5% of the non-DV reports). *Cue* was covered in 38.8% of the cases and both were covered in 9.3%.

The mean ratio score was .286 (SD = .33). The difference between DV (M = .315, SD = .32) and non-DV (M = .258, SD = .34) was not statistically significant. Thus, this area was poorly covered compared to the others.

## **Concluding Comments**

Child custody mediation is complicated by a number of serious social problems, including illegal drug use and involvement with the criminal justice system. In a recent study,<sup>53</sup> it was noted that such problems are the norm rather than the exception. In that study 54% of all mediation cases, based on retrospective reports, involved concerns about child abuse, neglect or abduction, substance abuse, or other criminal activities. In support, we found a similar result in that 56.5%, or 226 of our 400 cases involved mediator-documented allegations of child abuse or neglect, substance abuse, domestic violence, and other criminal activities as reflected in police involvement with the family. Of these 226 cases, 70.8% (160 cases) have direct indicators of DV. Given the seriousness of these problems and their intricate link with the justice system, it is important to have statistical verification of their existence and impact on custody decisions.

Present results provide such data in terms of baseline frequencies and insights into the process and outcome of mediation in general and mediated domestic violence custody disputes in particular. Strong evidence was found indicating that the court screening form evaluated in the present study very often failed in screening for domestic violence or abuse. It must also be recognized that even when there are clear indicators of DV as well as DV allegations, the DV is not addressed in an alarming number of cases. To the extent that the court relies on the

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<sup>53</sup> California Family Court Services Snapshot Study Report 7: Serving Families in the '90s: The Perspective of Direct Service Providers in California's Family Court Services. California Statewide Office of Family Court Services (1997).

mediator's report, the intent of the legislature that the court assess and address DV is not well served. Perhaps more importantly, the safety and welfare of victims may be jeopardized.

Present data point clearly to the sobering conclusion that victims of DV and their children get no more protections, and sometimes fewer, when alleging DV than when they do not. Those that allege DV run the risk that the mediator will not believe her. Even if the mediator does believe the allegations, the DV is trivialized whenever some other factor, such as perpetrator substance abuse, can be used to account for the DV. Given this sad state of affairs, DV victims who are compelled to mediate child custody disputes would seem better served to remain silent about their victimization.

What mediators recall in post hoc retrospective studies and what they clearly communicate in their formal reports to the court are two different things. For example, a report of mediator retrospective descriptions of the topics addressed in mediation<sup>54</sup> indicated the main topics discussed in "each mediation session." According to the report, common themes discussed in each mediation session included:

needs of the child (e.g., the child's adjustment, developmental needs, or special needs), parents' ability to meet children's needs, or other concerns about parents' care or treatment of children, supervision, discipline, building a working relationship between the parents (e.g., communication, abiding by the parenting agreement), and mutual parenting responsibilities (e.g., decision-making and authority, child care, and transportation). The majority of sessions also explicitly addressed the issue of hostility or arguments between the parents. [p. 9]

Even a cursory reading of our report indicates that these topics are hardly covered in the majority of mediation reports. Clearly, these topics are of vital importance, as confirmed by Whiteside and others. Based on our findings, we must conclude that either the reports are not an accurate reflection of what was actually discussed or the topics are simply not covered with anywhere near the frequency needed. In either case, the result is an inadequate communication to the court. As noted, any factor related to the child's adjustment was covered in only 43.2% of the reports. Any reference to the health, safety and welfare of the child was mentioned in only 36.5% of the reports. Developmental factors were rarely covered, and were mentioned in only 16.2% of the reports.

Although it is true that the history of parental agreement is well covered, variables pertaining to current parental relationship are not. Considering not only parental hostility but also verbal abuse, parent distrust and verbal threats, not a single one was covered in 62.3% of reports. Arguably, our non-agreement cases are different from the typical case. If they are, one would expect even more hostility and arguments than typically found. Or, if hostility is indeed explicitly addressed

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<sup>54</sup> California Family Court Services Snapshot Study Report 1: Overview California Family Court Services Mediation 1991: Families, Case, and Client Feedback. California Statewide Office of Family Court Services (1992).

in the majority of mediation sessions, then perhaps steps are needed to ensure that topics such as this are discussed in all cases, including those that do not reach agreement. One such step, as we have indicated before, would be the use of a standardized format for custody mediation.

It must be acknowledged that the known variables related to a child's adjustment are incorporated by most mediation reports in an inconsistent and haphazard manner. This finding suggests that the best interests of the child are frequently glossed over or ignored in an effort to appease the parents, who are the only ones the mediator must address.

Clearly mandatory custody mediation disadvantages women who are victims of DV, as well as their children. As indicated, the data repeatedly pointed to the grim reality that the child and adult victims of DV were afforded no greater protection and often even less protection than that afforded non-DV families.

The data suggest that even where mediators do not believe a DV allegation, it is important for them to directly address the allegation and state the reasons for the disbelief. Failure to do so in this study was perhaps one reason for the failure of mediators to provide the reasons why abusive parents were recommended for partial or even joint custody. Mediators also need to be aware of their tendency to under-estimate the percent time custody recommended to mothers in general and perpetrators in particular.

There were, however, some indicators that provided strong signals of the existence of domestic violence. These included safety concerns for the mother or child, police involvement, a court order against the father, a Child Protective Services recommendation, and a request for a change in visitation. The presence of any of these provides important clues to the mediator that domestic violence may be present and attention to these variables may lead to a better assessment of DV than currently occurs in practice.

The link between custody mediation and the criminal justice system was repeatedly demonstrated in these reports. In addition to the crime of domestic violence, reports were replete with references to illegal drug use, police involvement, child abuse, child neglect, child abduction, and numerous concerns voiced for the safety of DV victims and their children. As seen, for example, illegal drugs were associated with 44.4% of the cases involving Child Protective Services, and police involvement was associated with 53.3%. Unfortunately, the presence of these serious risk factors may often mask the importance of DV. For example, the presence of drug abuse often was a factor in a mediator's failure to address the violence, as if the mediator anchored on the drugs so as to minimize the relevance of the violence.

Surprisingly, police involvement in the presence of DV indicators is often not enough to trigger mediator acknowledgement of DV or supervised visitation. Despite police involvement and DV allegations or DV restraining orders, the mediator failed to acknowledge DV or recommend supervised visitation when the father made death and kidnap threats; violated the DV RO (several cases); would not return the children to the custodial parent (several cases); was arrested for armed robbery; and during child exchange, threatened to slit the mother's throat and was convicted of making terrorist threats in front of the children.

If a desired outcome of mediation is the establishment of protections for DV victims and their children during child exchanges and visitation, then our data indicate that the promise of mediation is not being fulfilled. Even in cases involving threats, police involvement, child safety concerns, child abuse/neglect, illegal drug use, or alcohol abuse, or even combinations of these risk factors, supervised visitation is recommended less than half the time. Protected exchanges are recommended even less. In fact, in the 226 cases discussed above involving any one of a number of serious risk factors, protected exchanges were recommended only 35.1% of the time, and supervised visitation 23.1% of the time.

Of course present results are limited in a number of ways. First, the sample is exclusively based on the San Diego Family Court. Although San Diego is a highly diverse area, the records in this study are drawn from those of the court's administrative agency and do not represent private mediation. They are, therefore, likely to represent slightly lower socioeconomic status than would records from private mediation. Perhaps more importantly, the cases are those in which the parties failed to reach an agreement. This sampling therefore distinguishes this study from the vast majority of those reported in the literature, which are primarily based on cases that reached agreement. The issue is whether the present findings generalize to agreement cases.

We have no data about outcome in agreement cases in the present study, but a previous study found no differences in mean time-sharing between agreement and non-agreement cases.<sup>55</sup> DV is reported at about the same frequency in agreement cases as in non-agreement cases. Based on these similarities, there is some reason to believe that the general findings of this report may be applicable to cases in which the parties reach agreement. This is an empirical question and it remains to be seen whether the best interests of the child and protection of the victim of DV are better dealt with in agreement cases, in which arguably there is less contention between the parties. In either case, it is clear that results pertaining to agreement cases, as reported in the vast literature, may not necessarily generalize to non-agreement cases. Whether the parties reach agreement then may be a critical variable in evaluating the efficacy of mediation.

Another limitation concerns the range of variables selected. Although we attempted to be as comprehensive as possible and used Whiteside's model as a theoretical base, it is possible that even in the variables studied herein, important information was not recorded. Similarly, for the most part our coding system merely identified the presence or absence of a specific factor narrowly defined so as to ensure reliability of coding. Such a system may fail to fully capture subtle distinctions or communications provided in the report. On the other hand, it can be argued that the report, in being a communication to the court, should be as clear and unequivocal as possible.

We recognize the crucial role mediation and other alternative dispute resolution processes play in resolving conflicts in a non-adversarial manner. True mediation, as practiced in areas other than child custody, is confidential and non-judgmental. The confidential and non-judgmental nature of mediation is probably a major reason for its general effectiveness. In custody mediation, however, mediators are all too frequently asked to fill a fact-finding role for

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<sup>55</sup> Manuscript in preparation. Janet Bowermaster & Nancy E. Johnson, 2002.



the court. Consequently both of the major foundations on which mediation is based are abandoned, at least as regards the court. California's recommending counties are not some quirk or aberration that can be ignored: California has simply codified and formalized the common practice of disclosing mediation contents to the family court decision-maker.

Family courts are overwhelmed, and the caseloads continue to rise.<sup>56</sup> Indeed, as direct service providers in the courts have noted, there are three serious threats to the quality of services: "(1) growth in number and intensity of cases"; (2) the high percentage of those cases complicated by serious social problems; and (3) unprecedented constraints in court resources."<sup>57</sup> Ideally, mediation would be confidential in the strictest sense of the word and would not involve a judgment or a communication of information outside mediation. Short of that, our consistent recommendation for a standardized approach should ease the burden by streamlining the process while at the same time improving the fact-finding function. It is in the spirit of improving the process that we offer the following recommendations.

### **Recommendations**

Recommendations are offered in a non-mutually exclusive hierarchy, from most extreme in theory and implementation to what might be considered the absolute minimum to ensure safety for victims, reliability within the mediation process, and promotion of the child's best interests.

1. Domestic violence cases should not be mediated at all. It is apparent that mediators do not guide or address factors that are relevant to the best interests of the child or victim. Moreover, it is clear that domestic violence cannot be reliably assessed, even by trained mediators who fully believe that they are capable of such assessment.
2. There should be an opt-out provision for domestic violence. As indicated, protections for victims ranged from no better to worse. Therefore the interests of victims and their children would be better served if they are not required to mediate.
3. All custody mediation should be standardized and totally confidential, with a prohibition on communications between the mediator and the judge other than the achievement of an agreement with associated parenting plan or the failure to reach resolution. Standardization would force the mediator to always address critical variables and hopefully increase the likelihood that a mediator would consider these. The confidentiality recommendation would preclude the mediator from becoming a de facto arbitrator in non-agreement cases.
4. At a minimum, recommending counties should be required to bifurcate the process when the parties are unable to reach agreement. Step 1 would be a completely confidential mediation, as described above. In step 2, a neutral representative of the court other than the original

<sup>56</sup> California Family Court Services Snapshot Study Report 12: Preparing Court-Based Child Custody Mediation Services for the Future. California Statewide Office of Family Court Services (1992).

<sup>57</sup> California Family Court Services Snapshot Study Report 7: Serving Families in the '90s: The Perspective of Direct Service Providers in California's Family Court Services. California Statewide Office of Family Court Services 7 (1992).

mediator would engage in a standardized fact-finding process as the basis for making any communication to the court. Such a process would allow for a mediation in its true spirit, allowing the parties to express their positions freely without fear that the mediator would later use this information adversely. Further, standardized fact-finding would better protect the rights of all concerned and be more in the spirit of the intent of the judicial process.

5. The entire process of mediation and recommendation must be standardized. Such standardization would encourage the mediator to address critical topics and allow for reliability in the process as opposed to the apparent haphazard approach found in this study.