



Mediation and Domestic Violence

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Polarized Discussion

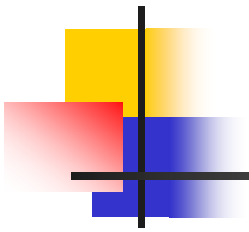
- Women's advocates oppose mediation of divorces involving domestic violence
- Mediators favor mediation of divorces involving domestic violence



Premise



- Victims should have the opportunity to make an informed choice about which divorce process will best meet the needs of their families.
- One size does not fit all!



“All happy families are like one another; each unhappy family is unhappy in its own way.”

-Leo Tolstoy



Today's Discussion

- Background information
- Research on types of violence
- Comparison of adversarial, mediated, and domestic violence mediated divorce
- Decision making factors
- Safeguards and precautions
- Clinical teaching implications



Definition - Mediation

- Impartial third party facilitates voluntary agreement by participants
- Attention focused on understanding common and individual interests
- Parties explore options, make decisions, and reach their own agreements

(Based on Model Standards of Practice for Family and Divorce Mediation)



Roles of the Mediator

- Housekeeper of the Process
- Ringmaster of the Proceedings
- Educator of the Negotiators
- Communicator between Disputants
- Innovator of Creative Approaches

(Theodore Kheel, "Keys to Conflict Resolution")



Lawyer's Role in ADR processes

- Counselor
- Advocate
- Problem Solver
- Architect
- Additional Roles?



Clinical Teaching Implications

- Preparing students for ADR processes
 - Background on Process
 - Level of formality, informality
 - Student role
 - Role of client



Definition – Domestic Violence (Model Code)

1. Attempting to cause or causing physical harm to another family or household member;
2. Placing a family or household member in fear of physical harm; or
3. Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.



Statistics – Partner Abuse

- 1/3 of women abused by partner
- Ongoing abuse in 25% of homes
- Victim often female (4x as likely to suffer serious and life threatening)
- Victim more likely to be young (19-29)
- Separation assault (4x as likely to assault, 6x as likely to be killed)



Statistics -- Children

- 50% of abusers batter during pregnancy
- 50% concurrent child abuse
- Harm to child witnesses
 - Boys twice as likely to become batterers
 - High risk behaviors (run away, substance abuse, suicide)



Case #1

- Severe ongoing violence -- weapons
- Violence used to control partner
- Victim severely traumatized --PTSD
- Couple has no children
- Victim has financial resources and will be represented by an attorney



Case #2

- Violence began at time of separation
- No ongoing violence at present time
- Victim able to state needs and problem solve
- Couple has young children
- Victim cannot afford ongoing legal representation



Case #3

- Sporadic violence during marriage related to escalating conflict
- Abuser has history of substance abuse
- Couple has one teenage child
- Victim has access to representation but finances are a concern



Clinical Teaching Applications

- Screening
 - Types of Cases
 - Clinic Students (A & B)
 - Clinic Resources
- Training
 - Prioritizing
 - Community Resources



Clinical Teaching Applications: Students

A: Former Police Officer, current law clerk for the Prosecutor's office.

Married, father of 3 small children

B: Domestic Violence Survivor, current advocate for DV Shelter, single mother of 2 children

Theories of Domestic Violence



- Families experience different types of violence
 - Emerging agreement on profiles
 - Implications for choice of divorce process



Types of Domestic Violence

- Walker (1 type)
- Ellis & Stuckless (3 types)
- M.P. Johnson (4 types)
- Johnston & Campbell (5 types)



Ellis & Stuckless

- Control-Instigated
- Conflict-Instigated
- Anger-Instigated



M.P. Johnson – Four Patterns

- Intimate Terrorism (IT)
- Common Couple Violence (CCV)
- Violent Resistance (VR)
- Mutual Violent Control (MVC)



Johnston & Campbell

- Ongoing or episodic male battering (control or anger-instigated)
- Psychotic/paranoid reactions
- Male-controlling interactive violence (conflict-instigated)
- Separation/divorce violence
- Female-initiated violence

Implications for Divorce

Process (Johnson and Campbell)

- No Mediation:
 - Ongoing & episodic male battering (control/anger)
 - Psychotic & paranoid reaction
- Possible to Mediate:
 - Male controlling interactive violence (conflict)
 - Separation engendered violence
 - Female-initiated violence



Emerging Agreement

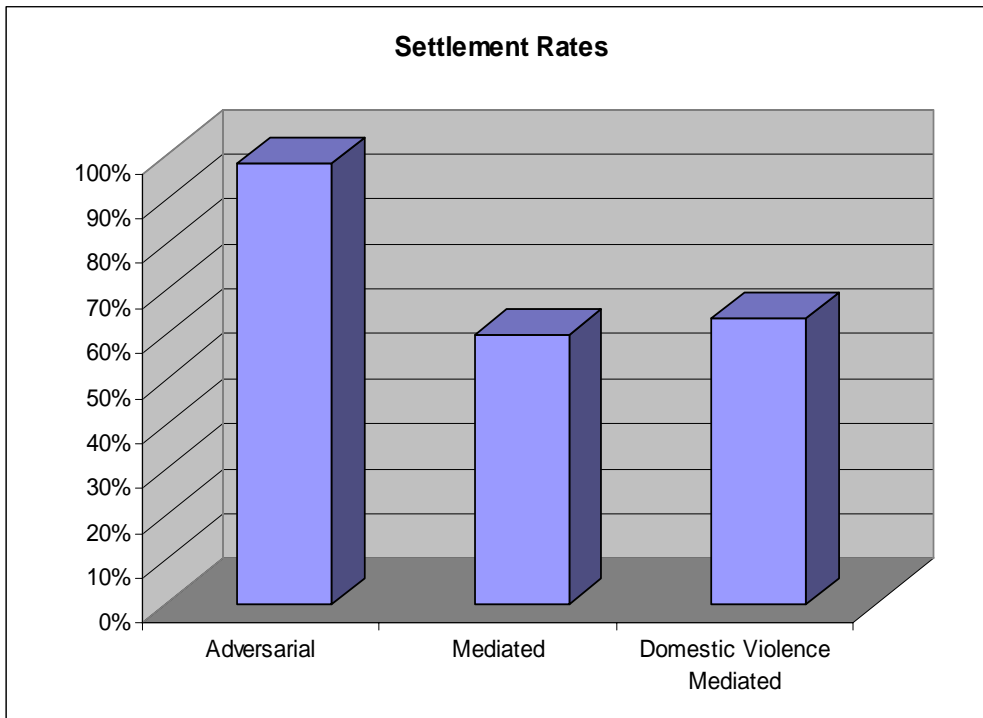
- There are different types of domestic violence.
- Violence is experienced differently by different families.



Adversarial & Mediated Divorce Compared

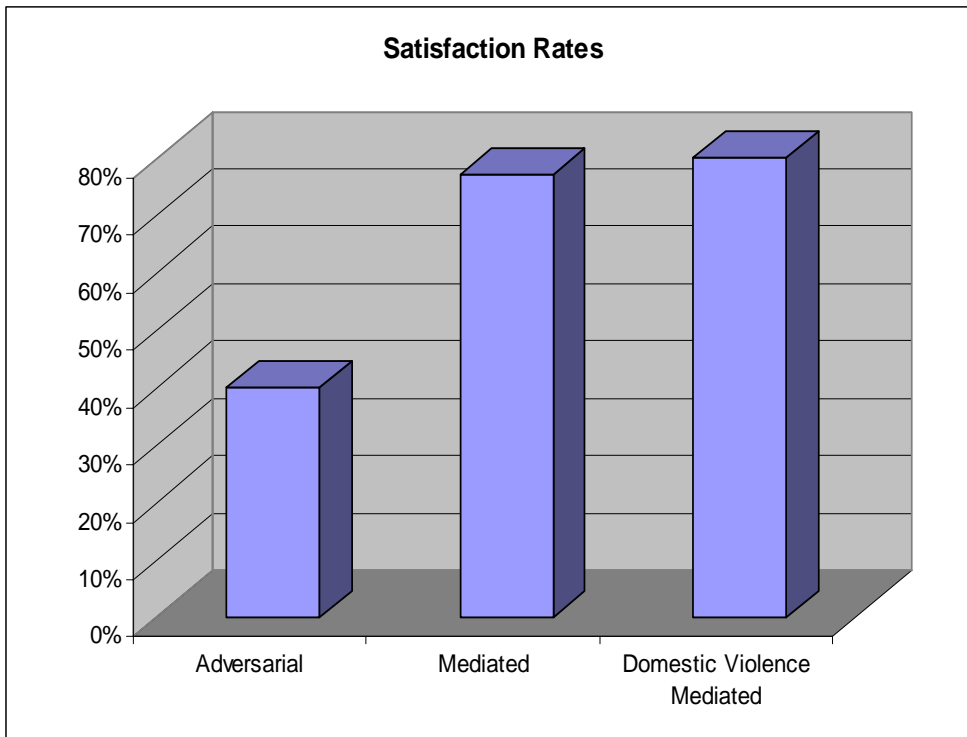
- Within each category of process, differences in quality exist
- Adversarial and mediated divorce processes differ with respect to settlement rates, satisfaction levels, compliance, time & cost, benefit for children, roles of professionals

Settlement Rates



- Adversarial
 - 98% settled
- Mediated
 - 40 to 80% settled
- Domestic Violence Mediated
 - 51 to 76% settled

Satisfaction With Process



- Adversarial
 - 40% satisfied
 - 20–30% see as fair
- Mediation
 - 77% satisfied
 - 85% see as fair
- Domestic Violence Mediation
 - 80% satisfied



Compliance/Relitigation

- Adversarial --lower compliance rates
- Mediated --higher compliance rates
 - Less relitigation during first few years
- Domestic Violence Mediated
 - Compliance rates equal to other mediated divorces
 - May prevent some future violence
 - especially voluntary multi-session



Time and Cost

- Adversarial
 - Potentially more costly and time consuming
- Mediated
 - Less costly
 - May be completed in half the time
 - However unsuccessfully mediated cases take longer to complete than cases where no mediation attempted



Skill of Judge/Mediator

- Adversarial
 - Judge may or may not be knowledgeable about domestic violence and parenting
- Mediated
 - Participants report that mediators are impartial, sensitive, skilled



Judge/Mediator (cont.)

- However
 - Only 70% of mediators receive ongoing domestic violence training
 - Only 80% screen for violence
 - Only 40% do private interviews
 - Little or no regulation or credentialing
- When domestic violence is identified most use special techniques



Research on Power Imbalance in Mediation

- Victims see themselves as less powerful than non-victims & may be afraid to disagree for fear of retaliation
- But victims also feel empowered to speak up for themselves and get what they want in disagreements
- Some, but not all, do negotiate effectively
- 5-15% opt out



Dealing with Power Imbalance in Mediation

- Knowledge is power – share and verify facts
- Mediator controls process
- Mediator monitors behaviors and watches for lopsided agreements
- Use of separate caucuses
- Representation by attorneys



Mediator Responsibilities

- Impartiality
- Helping parties communicate and exchange information
- Helping parties understand the other's points of view
- Active listening
- Acting as a reality checker



Mediator Responsibilities

- Identifying party issues & interests
- Keeping parties on topic
- Helping parties negotiate
- Assisting parties to determine and create options
- Building agreements



Adversarial Power Imbalance - - Attorneys

- At least one party unrepresented in 70%-90% of the cases (up from 24% in 1980)
- Represented party may be more likely to be awarded physical custody
- Dissatisfaction around communication issues

Children

Choice of process may have less effect on children than ongoing level of conflict.

■ Adversarial

- 71% of parents report escalated conflict
- Court may fail to link domestic violence and parenting

■ Mediated

- Detailed parenting arrangements
- Parental cooperation positively associated with amount of time spent in mediation
- Increased long-term contact with nonresidential parent



Informed Decision Making



- Individual Considerations
- Systemic Considerations



Decision Making Factors

- Factors to be considered in combination
- No one factor determinative
- Some factors more important to some victims
- Consider in light of options *actually available* to the victim
- Consider the quality of the processes



Contextual Factors: Options Available to the Victim

- Individual Considerations
 - Type of violence experienced
 - Frequency and severity of abuse
 - Victim status
 - Likely abuser response
 - Need for ongoing contact – children
 - Financial resources
 - Preferred decision making approach

Contextual Factors: Options Available to the Victim



- Systemic Considerations
 - Quality of process actually available
 - Availability of legal representation
 - State law



Clinical Teaching Applications: Involving Students in Informed Decision Making

- Screening
- Client Counseling
- Negotiation
- Power imbalances
 - Clients
 - Other Attorneys, ADR Professionals
 - Pro-se opponents



No! Some Cases Should Not Presently Be Mediated

- Safety concerns
 - Ongoing violence
 - Weapons
 - Broken ground rules
 - Substance abuse
 - Violent fantasies
- Control and intimidation
 - Involuntary or lopsided agreements
 - Coercion



Special Precautions If Mediation Occurs

- Experienced specially trained mediator
 - Use of co-mediators
 - Supervision and skills testing
- Initial and ongoing screening
- Use of special techniques during the mediation process (caucuses, support)



Special Precautions If Mediation Occurs

- Written ground rules
- Safety planning in & outside of mediation
- Order of protection
- Safe termination of mediation if necessary



Yes, No, Maybe? Case #1

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Yes, No, Maybe? Case #2

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Yes, No, Maybe? Case #3

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Clinical Teaching Implications

- Screening
 - Initial
 - On-going
- Education and Training
- Students A & B
 - Are cases ever inappropriate?
- Dual obligations: Students and Clients



Audience Questions



The End

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Based on a law review article written by Nancy Ver Steegh entitled *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 William and Mary Journal of Women and the Law 145 (2003).