PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 14 | Issue 1 Article 4

3-15-2014

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[Vol. 14: 91, 2014]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Divorce Involving Domestic Violence: Is Med-Arb Likely to be the Solution?

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CHAPTER ONE: INTRODUCTION

Domestic violence is a complex problem facing today's society.[1]

In recent decades we are unhappily witnessing an increase in two social phenomena: One, a dramatic increase in the incidence of domestic violence against women[2] and the second, an increase in the rate of divorce. There are cases in which a couple may be part of both trends. Such couples, who are in the process of dissolving their marital bond and who have a history of domestic violence in the course of their marriage are the subject of this article, and the issue shall be termed 'divorce cases involving violence.'

The academic discourse regarding this issue, examining whether divorce cases involving violence can suitably be handled in mediation proceedings, compares how such cases are handled by the **mediation** process and how they are handled by the **judicial** process. In effect, this discourse has developed against the background of the disappointment with the judicial process and from the manner of handling such cases. Proponents of mediation and its suitability for handling divorce cases involving violence point to the disadvantages of the judicial process while opponents of mediation point to its disadvantages. The problem arising from this discourse is precisely the fact that it is convincing! In other words, an examination of the discourse discloses that those who express serious reservations regarding the efficacy of the judicial process in handling such

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1. K. Loomis, Comment: *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 355 (1999).

2. *See* Jeske, *supra* note 1, at 671. "Currently in the United States, '… on average three women are murdered each day their husbands or boyfriends.'" *Id*.

cases are correct, but those opposing the use of mediation, pointing out its failures and serious disadvantages in terms of handling such cases are also correct. These failures and disadvantages have not yet been satisfactorily resolved, in spite of empirical attempts at improvement, alongside a great deal of writing being done in the field.[3] This article proposes, therefore, a third solution: **Med-arb**.

Med-arb is a hybrid process of two stages for dispute resolution that integrates mediation with arbitration and combines the advantages of both processes. This process, one of the most innovative methods of ADR, has been gaining in popularity in recent years in various countries around the world and in the various areas of applicability. After surveying the existing situation (as reflected in the academic discourse), regarding the judicial system's handling of divorce cases involving violence and the failures of that system, as well as the handling of these cases through mediation and the limitations of that process in dealing with such cases, this article proposes, perhaps for the first time, the med-arb process for the handling of such cases, asserting that due to the special structure of this process (as well as its advantages) it holds unique promise for such cases. The article examines, therefore, the possibilities of implementing med-arb as a further and complementary solution for the party to a divorce who is the victim of domestic violence where neither the judicial nor the mediation process managed to provide satisfactory redress for the victim.

This article includes six chapters in addition to the first chapter, the introduction. The second chapter presents statistics regarding the phenomenon of domestic violence and presents the definition of "violence" (with its attendant difficulties). The third chapter presents the existing problems regarding the judicial handling of divorce cases in general and those involving violence in particular. The fourth chapter analyzes the academic discourse regarding the issue of mediation of divorce cases involving violence (the position of the proponents and the opponents, as well as the problems of the current situation). The fifth chapter proposes med-arb as addressing the issue of divorce mediation in the presence of domestic violence and the problems presented by the current situation. The sixth chapter includes the recommendations of the article and the seventh chapter is a concluding chapter.

3. Regarding these efforts at improvement *see infra* notes 146–50 and accompanying text.

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CHAPTER TWO: DIVORCE CASES INVOLVING VIOLENCE

A. Statistics

> Fifty percent of couples now entering mediation programs have experienced domestic violence.[4]

In recent decades there has been a steady increase in the rate of divorce and many divorcing couples have children.[5] In addition, the statistics demonstrate that there is on-going violence in at least a quarter of American homes.[6] The vast majority (90%–95%) of domestic abuse victims are women.[7] Violence between couples occurs every 15 seconds in the United States.[8]

B. The Definition of "Violence"

When discussing "domestic violence," the emphasis is on behavioral patterns including elements of control of one spouse by the other through coercive means. Such behavior is likely to include physical attack, sexual assault, financial abuse, psychological abuse and emotional abuse.[9] The

4. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 194 (2003). Another study cites figures of 50% to 80%. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 335 (1999).

5. *Id*. at 159–160. *See* Jeske, *supra* note 1, at 657.

6. Ver Steegh, *supra* note 5, at 148.

7. *Id.* at 149.

8. Jeske, *supra* note 1, at 670. "'One out of nearly every three women will be the victim of domestic violence in her lifetime.' . . . Further, the Centers for Disease Control and Prevention report that United States women experience two million injuries from domestic violence annually. It appears this trend has filtered down to younger girls, who may later become ensconced in the dynamics of domestic abuse and face child custody issues as well. Indeed, it is reported that approximately one in three adolescent girls in the United States is a victim of physical, emotional or verbal abuse from a dating partner." *Id*.

9. Megan Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 613 (2007). Thompson provides a definition: "Domestic violence is a pattern of behaviors that one partner uses to establish power and control over the other partner. A batterer may use physical, emotional, psychological, or sexual violence, manifested through behaviors that include intimidation, coercion, threats, isolation, financial control, and insults." *See also* Jeske, *supra* note 1, at 694 ("Domestic violence is a broad concept encompassing behaviors ranging from 'isolated incidents to patterns of repeated violence involving physical, sexual, and emotional abuse that controls the victim.'"). Jeske notes that several generally accepted concepts are used to define domestic violence, e.g., "coercive controlling violence," "situational

legal definition of the term "domestic violence" appears in the Model Code on Domestic and Family Violence:

> "Domestic or family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:
> (a) Attempting to cause or causing physical harm to another family or household member;
> (b) Placing a family or household member in fear of physical harm; or
> (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.[10]

This definition places the emphasis on physical abuse. However, there are broader definitions, including one proffered by some social scientists, according to which:

> Domestic violence is a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is patterns .†.†. and gestures, which, taken together, establish power and control over an intimate partner.[11]

The current academic literature notes that it is not possible to point to one prototype for the term "domestic violence,"[12] and that there is relevance

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couple violence," "separation-instigated violence," "violence resistance," "intimate partner sexual assault." *Id*. at 663–70. Regarding the nature, the dynamics, and the history of domestic violence, see Thompson, *supra* at 612–16. *See also* Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 430 (2011). Landrum also notes various distinctions between types of domestic violence, which are relevant to the decision as to whether to engage in mediation in order to terminate the marriage: "Scholars have also begun to differentiate between different types of domestic violence and to argue that the type may matter when determining whether a couple can effectively mediate. For example, Joan Kelly and Michael Johnson have defined four different types of domestic violence: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence. Kelly and Johnson define coercive controlling violence, also sometimes called 'intimate terrorism,' as 'a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.' Coercive controlling violence is what most people typically associate with domestic violence. The second type of domestic violence, violent resistance, has also been defined as 'female resistance,' 'resistive/reactive violence,' and 'self-defense.' Situational couple violence is a 'type of partner violence that does not have its basis in the dynamic of power and control.' Finally, separation-instigated violence is a term used to describe violence that does not occur until a couple is in the process of ending their relationship. Kelly and Johnson believe that an understanding of the different types of domestic violence can lead to better screening processes." *Id*. at 432–33. *See also* Ver Steegh, *supra* note 5, at 152–58.

10. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, Sec. 102 (1994).

11. Mary Ann Dutton, *Expert Witness Testimony*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, ABA COMMISSION ON DOMESTIC VIOLENCE, Sec. 8-81, Sec. 8-8 (Deborah M. Goelman et. al., eds., 1996).

12. Elayne E. Greenberg *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence*, 24 ST. JOHN'S J. OF LEGAL COMMENT. 603, 608 (2011).

to the categorization of each of the types of violence for purposes of coming up with an appropriate solution for each case, in recognition of the fact that "cookie cutter responses or one-size-fits-all solutions will not do."[13] This insight regarding the need to relate differently to different kinds of abuse paves the way for adopting med-arb in various cases, as will be discussed in Chapter Five below.[14]

CHAPTER THREE: CONCERNS ABOUT ADVERSARIAL DIVORCE IN HANDLING DIVORCES

> The notion that ordinary people want black-robed judges and well-dressed lawyers and courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible.[15]

In recent decades there has been a great deal of questioning of the degree to which the judicial process is equipped to deal with divorce in general and divorces involving domestic violence in particular. The common assertion is that in spite of the fact that the legal process has a long history of dealing with disputes of this nature, it is not capable of providing true relief of the pain of the conflict and in many cases it may exacerbate it.[16]

A. Divorce Cases—in General

Parties involved in divorce and custody cases are often hurt, angry, fearful, and above all, very vulnerable. The parties to a divorce are adversaries in a very personal sense, and personal problems are emotional, which complicates the substantive problems, exacting a high price from the couple and their children. The end of a marriage is widely viewed as an emotionally fraught experience in which the parties almost always view one

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Greenberg mentions the distinction made by Janet Johnston, who defined five typologies of domestic violence: "Ongoing or male episodic battering, female-initiated violence, male-controlled interactive violence, separation and post-divorce violence, and violence stemming from psychotic and paranoid reactions." *Id*. at 608.

13. *Id.* at 608.

14. *See infra* Chapter Five Med–Arb—The Proposed Solution.

15. P.M. Lisnek, A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION 105 (1993).

16. Marsha B. Freeman, *Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs. The Jetsons*, 13 CHAP. L. REV. 249, 249 (2010).

another as opponents.[17] The adversarial system that is an inherent part of the judicial process only serves to exacerbate the problem. The adversarial approach views the parties as rivals fighting for their share of a limited pie of resources. The litigation "game" becomes a zero sum game, in which one party prevails at the expense of the other. The conflict is fueled by the litigation, often contributing directly to the complete emotional destruction of the couple and their children. The litigation process, "which often includes an assessment for purposes of custody [determination], observation of the parents with their children, [and] psychological and psychiatric evaluations," directly and significantly contributes to the trauma that the family experiences. "The evaluations, by their very nature, are intrusive and cause each parent to focus upon the shortcomings of the other," thereby exacerbating the conflict and increasing the level of hostility. Studies demonstrate the serious repercussions in terms of the emotional state of the children and the cumulative negative effects as the process continues in a combative manner.[18] These findings have given rise to the idea that parties in cases of this kind need a system that will provide them with some degree of emotional and financial stability. They need to be able to focus upon the financial and psychological well-being of their family.

The judicial system operates upon the assumption that the judge can make an objective determination as to who is right and who is not, what the best outcome is for the family and what the correct solution is.[19] However, according to its critics, in divorce cases this process ignores the emotional and psychological aspects of the conflict and puts the judges in an untenable position because most of them have not undergone sufficient training in such subjects.[20] In effect, the judges are expected to solve problems within the family that neither the parties nor even professionals in the field would be able to solve.[21]

Regarding the litigants themselves, a recent study found that 50 to 70 percent of couples involved in divorce litigation assert that the judicial system is "impersonal" and threatening.[22] Their dissatisfaction focuses on the fact that the judicial process served to increase their feelings of anger and

17. Jordan Leigh Santeramo, *Special Issue: Models of Collaboration in Family Law: Student Note: Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321 (2004).

18. Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy*, 13(1) CARDOZO JOURNAL OF CONFLICT RESOLUTION 61, 66–67 (2012); Steegh, *supra* note 5, at 167–68.

19. Ver Steegh, *supra* note 5, at 162.

20. *Id.*

21. *Id.*

22. MARY R. CATCHART & ROBERT E. ROBLES, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 11, 39 (1996).

hostility towards their spouse.[23] Divorcing couples described the litigation process as lengthy, expensive, inefficient and disempowering.[24]

Freeman summarizes this point:

> Legal pundits, practitioners, judges, psychiatrists, psychologists, social workers and virtually anyone who has dealt with families in distress due to divorce or related issues have agreed for years that **the family law legal system is broken**. Parties remain angry years after the initial hurt, relationships crack under stress, and most difficult of all, children are unable to maintain meaningful and positive associations with their family members. While everyone involved in litigious family law proceedings, most especially the parents, likely believe, or at least convince themselves, that they are acting in the children's best interests, the reality is that this system creates unnecessary turmoil in everyone, particularly the children, separate and apart from the difficulties inherent in the initial breakup itself.[25]

And indeed, these critical insights regarding the judicial process have given rise, in the last few decades, in a number of countries, to a trend of transition to non-litigious methods for resolving family matters, foremost among them being mediation.[26]

B. Divorce Cases Involving Domestic Violence

Specifically with regard to divorce cases in which violence is involved, the doubts with respect to the degree of suitability of the adversarial system are even greater. In academic discourse, it is asserted again and again that in such cases where a dangerous conflict already exists, the adversarial system, which by its nature exacerbates the conflict, is particularly likely to be harmful.[27]

Firstly, in divorce cases complicated by domestic violence, the conflict is likely to be escalated in a particularly severe manner. The increased hostility between the parents has, in extreme cases, led to the murder of the parent who has been the victim of the abuse, or of the children, followed by suicide of the violent parent.[28]

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23. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L. Q. 283, 298 (1999).

24. *Id.* at 299–300.

25. Freeman, *supra* note 17, at 249 (emphasis added).

26. *Id.* "There is a national movement in the family law practice area toward 'alternative dispute resolution,' as opposed to litigation, as the first and favored method to resolve custody disputes." Jeske, *supra* note 1, at 673.

27. Ver Steegh, *supra* note 5, at 162–63.

28. Jeske, *supra* note 1, at 658.

Secondly, in such cases, the traditional fault-based inquiry of the courts, focusing on whether domestic violence has indeed occurred, often fails to arrive at an accurate determination. Batterers often appear to be more credible witnesses, while victims may lack credibility. Moreover, emotional abuse is extremely difficult to prove in accordance with the rules of evidence, and cognitive dissonance makes it difficult to accept horrific allegations.[29] Furthermore, many domestic violence cases come before the courts as contested custody and child support cases, with the element of violence being concealed by these labels. The adversarial system has been widely recognized as ineffective in promoting justice in such cases.[30]

Greenberg, in her criticism of the judicial process and the degree to which it is appropriate for handling divorce cases involving violence, analyzes five painful realities based, *inter alia*, on empirical studies:

1. There is no agreement about what constitutes domestic violence.
2. There is no fool-proof screening for domestic violence.
3. Courts have been ineffective in stopping many forms of violence.
4. Batterers are statistically more successful than survivors at securing custody of their children.
5. Children are the casualties of their family's violence.[31]

When questions of custody are being determined, the victim is likely to lose out due to "the lack of awareness about domestic violence, the failure to link battering and parenting under the law and the proliferation of 'friendly parent' provisions."[32]

It seems that the fact that violence exists is not adequately taken into account by the courts in rendering decisions regarding child custody or visitation rights. Studies demonstrate that the abusive parent sometimes prevails in custody battles.[33] However, even when the victim is awarded sole custody, the visitation rights of the other parent are likely to constitute a problem. At times the courts do not pay sufficient attention to questions of security related to such visits, giving the violent party the opportunity to manipulate the family.[34] Moreover, many victims of domestic violence are reluctant to take legal recourse against their attackers due to concerns about the attendant publicity, the implications for their family's reputation, and the ability to keep the family together.[35]

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29. Greenberg, *supra* note 13, at 605.
30. *Id*. at 605–06.
31. *Id.* at 606–12.
32. *Id.*
33. Ver Steegh, *supra* note 5, at 169.
34. *Id*. at 168–69.
35. Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. ON DISP. RESOL. 349, 367–68 (2009).

We can summarize this discussion of the judicial handling of divorce cases involving violence by stating that although the judicial process has a long-standing history of providing solutions in family law cases, the degree to which it succeeds in protecting the family's interests when cases involving violence are being adjudicated is questionable.[36] It must be remembered that:

> For a victim of domestic violence, a process that is expensive, increases hostility, requires lengthy and ongoing contact with the batterer, and removes her ability to make empowered decisions is far from a perfect solution. Given these problems, requiring that domestic violence cases be litigated is not an ideal solution.[37]

In addition to the above-mentioned failures regarding the way the judicial process deals with family law cases involving domestic violence, a number of feminist also raise arguments concerning this manner of dealing with the problem. Among other things, the assertion is that the judicial process does not adequately fulfill the function of "giving a voice" to women (and therefore, a better option for resolution of disputes should be developed). Feminists point to the "female voice" being systematically pushed out of the legal arena, blurred, ignored or subsumed within the "male voice." The assertion is that the "female voice" tends not to be heard in public and formal situations, e.g., formal negotiations or judicial proceedings.[38] The negative aspect of the judicial process in this constellation is the fact that it shuts out and mutes the female voice, thereby contributing, in practice, to the cycle of oppression of the victim.[39]

36. Ver Steegh, *supra* note 5, at 159–70.

37. Thompson, *supra* note 10, at 620–21.

38. Liora Bilsky, *The Violence of Silence: The Legal Procedure Between Allocation and Voice*, 23 TEL-AVIV U.L.J. 421 (2000).

39. *Id*. at 437–38. Knowlton & Mulhauser also note, "[m]y experience, however, leads me to believe that the courtroom is the place where victims most often feel humiliated, embarrassed, controlled, and discredited…." Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255, 266 (1994). *See also* Jeske, *supra* note 1, at 600–61.

CHAPTER FOUR: IS MEDIATION LIKELY TO PROVIDE A SOLUTION? THE EXISTING ACADEMIC DISCUSSION

A. Divorce Mediation in General

Mediation is a process in which a neutral person assists disputing parties in identifying and discussing issues of concern, exploring various solutions, and guiding parties toward a settlement agreeable to all of them.[40] The process is volitional and confidential. In cases involving divorce and related issues, many courts regard mediation as preferable to litigation.[41]

In handling divorce cases that do not involve violence, the transition to mediation as an alternative to litigation[42] is a common phenomenon. This is a result of the criticism of the judicial process,[43] and for the most part, it offers many advantages.[44] Studies report: high levels of satisfaction with the mediation process,[45] a high rate of achieving settlement agreements,[46] very

40. The Model Standards of Practice for Family and Divorce Mediation define mediation as: "A process in which a mediator, an impartial third party, facilitates the resolution of family dispute by promoting the participants voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements." [Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L. Q. 1, 3 (2001).] *See also* UNIF. MEDIATION ACT § 2(1) (2003) ("'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute"); See also: "A forum in which an impartial person, the mediator, facilitates communication between the parties to promote conciliation, settlement, or understanding among them." [*Mechtel v. Mechtel*, 528 N.W.2d 916, 919 (Minn. App. 1995) (quoting Minnesota Supreme Court-Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report, Appendix D (July 1989)), as quoted in Vogt v. Vogt, 455 N.W.2d 471, 474 (Minn. 1990).]

41. Cindy Fazzi, *ADR and Cases of Domestic Violence*, 60 J. DISP. RESOL. 85, 89 (2005).

42. As well as other alternative methods such as ENE and Collaborative Law. *See, e.g.*, Dafna Lavi, *supra* note 19; Dafna Lavi, *Looking at the End from the Beginning: Early Neutral Evaluation-Theoretical and Practical Aspects and a Critical Perspective*, 27 BAR-ILAN STUD. 455 (2012); Yvonne Pearson, *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672 (2006); Jordan Leigh Santeramo, *Special Issue: Models of Collaboration in Family Law*: *Student Note: Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321 (2004); Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237 (2008).

43. *See supra*, Chapter 3 Concerns about Adversarial Divorce.

44. *See supra*, notes 26–27 and accompanying text.

45. Studies note that satisfaction from mediation ranges from six to ninety-three percent. Men and women express almost identical levels of satisfaction from mediation with seventy-eight percent of the men and seventy-two percent of the women reporting that they are quite satisfied to very satisfied. Additionally, even among those who did not arrive at settlement agreements, eighty-one percent would nonetheless recommend the mediation process to a friend. *See* Ver Steegh, *supra* note 5, at 159–70. "In another study, divorcing couples indicated that their interactions with each

effective results, financial advantages (significantly lower costs than the judicial route),[47] significantly faster resolution of the case, etc.[48] Further significant advantages of the mediation process as opposed to litigation in such cases are: improvement of relationships (by decreasing hostility), or at least not exacerbating existing difficulties,[49] developing honest means of communication and conversation about interests, and focusing upon the child's best interests. The accepted opinion is that mediation and the mediator provide a healthier and more constructive and creative atmosphere to deal with the issues confronting the couple in the process of separating.[50] Especially as pertains to the best interests of the child, the idea is that when couples are in the process of separating, the mediation process focuses on mutually attacking **the problem** and striving together to reach agreement, rather than attacking **one another**, as happens in litigation. As a result, the couple has the energy necessary to help their children cope with the psychological processes and social implications of their parents' divorce. Cooperation between the parents saves the children from having to side with one parent at the expense of the other. The mediation process also encourages the continued connection between the parents and the children, a connection that is vital for the proper development of children of all ages.[51]

It must be remembered that the fundamental premise of mediation is that it is a process of interests-based negotiation, as contrasted with a discussion of positions that at times leads each party to become "locked into" his own

other improved following mediation, an outcome that commentators attribute to mediated agreements that help structure future contacts." *Id.* at 190.

46. *Id.* at 175–76.

47. Most of the studies found that mediation is less expensive than the traditional judicial process. In one study, couples in mediation realized a savings of 134% of the costs of the divorce process in comparison to couples who hired two attorneys to handle a judicial process. In another study, couples saved 42% of attorneys fees. *Id.* at 174–75.

48. *Id.* at 174. A number of studies found that mediation processes end in half the time as compared to the judicial process. *Id.*

49. Thompson, *supra* note 10, at 603. It is apparent from studies that "Divorcing couples indicated that their interactions with each other improved following mediation, an outcome that commentators attribute to mediated agreements that help structure future contacts." *Id*.

50. Knowlton & Muhlhauser, *supra* note 39, at 259. It must be remembered that appropriate dealing with the relationship of separated couples generally requires use of interdisciplinary tools (e.g., tools from the field of psychology and social work). For this reason as well, mediation is perceived as more appropriate than the judicial process. And see Carrie Menkel-Meadow, *Symposium on Alternative Dispute Resolution: When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1902 (1997).

51. Susan Zaidel, THE GUIDE TO MEDIATION AND DIVORCE SETTLEMENTS 39 (2001).

position.[52] In divorce cases, the main advantage of this interests-based focus over the position-based focus, or rights-based focus, of the judicial process is that the mediator is more likely to focus upon the concealed needs and interests of the parties and their children. In this manner, shared interests are often discovered, particularly regarding the children's welfare, which may constitute a basis for a mediation settlement.[53]

In the following section we will examine whether the picture changes when the element of violence is introduced.

B. Divorce Mediation Where Violence is Involved

On the face of things, all of the advantages of the mediation process in divorce cases—enumerated in the previous section—exist, and even more so, in divorce cases involving violence. The increased popularity of ADR methods, such as mediation in custody disputes involving domestic violence, is due to ADR's less adversarial nature, the enhanced ability of parents to keep their children out of the conflict, the protection ADR affords for the parents' rights, negotiation that is client-centered, and the focus of ADR on settlement without court involvement.[54]

However, the issue of divorce mediation in the presence of domestic violence is one of the most controversial issues in the academic literature. There are those who believe that mediation will never be appropriate when violence is involved, others who believe that mediation can appropriately address the parties' needs even in such cases, and there are some who support adopting it as mandatory.[55] Below is a survey of the academic discussion of the subject, the position of the opponents, followed by the position of the proponents. In the following chapter (Chapter Five), a third position will be proposed by the author of this article: the adoption of med-arb.[56]

52. Roger Fisher & William Ury, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

53. Ver Steegh, *supra* note 5, at 173.

54. Jeske, *supra* note 1, at 659.

55. *See* Ver Steegh, *supra* note 5, at X. Alongside these, there are also intermediate approaches.

56. *See infra* Med-Arb – The Proposed Solution.

(a) The Opponents' Position

> I was forced to sit down with a man who for the past twelve years has abused me, intimidated me, controlled me by threats and scare tactics, emotionally tore me down and whom I truly fear.[57]

The quote above is an authentic description of a victim of violence who experienced the mediation process on the way to getting her divorce. The opponents of mediation in divorce cases involving violence assert that these matters are not appropriate for mediation.[58] Physical violence and destructive patterns of handling conflict are repeatedly singled out in the academic literature as cases in which mediation is contraindicated. Mediators actually dealing with such cases also feel that mediation is not appropriate for couples that had physical violence or abuse in their homes. Similarly, mediation is not appropriate in a situation in which both sides are not free to express themselves and to make decisions without pressure or threats.[59] The main reasons for opposition to mediation in such cases are presented below.

i. The Component of Danger

The assertion is that the mediation process inherently endangers the woman.[60] The danger of serious, even life-threatening physical harm is at issue.[61] The very fact that the violent husband knows the precise time when the wife will be present at mediation meetings exposes her to serious

57. Andree Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 279 (Spring, 1992).

58. Kara Utzig, *Comment: Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 CIRCLES BU. W. L. & SOC. POL. 51, 52 (1999). "Opponents argue that one should never mediate divorce matters when domestic violence is present." *See also* Gagnon, *supra* note 58, at 279; Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J 1545 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

59. Zaidel, *supra* note 52, at 65.

60. *See also* Maxwell, *supra* note 5, at 337; Landrum, *supra* note 10, at 438–44.

61. Maxwell, *supra* note 5, at 346. "Addressing the ethical and legal considerations of intervention with victims of domestic violence, Dutton (1992) cautions that 'a breach of confidentiality when working with a battered woman could place her at risk for serious physical injury or death.'"

danger.[62] This danger may also await the mediator. Those raising this assertion point to legislation in twenty states of the United States that explicitly forbid the use of the mediation process in divorce cases involving violence.[63] The argument is that mediation is not equipped to provide the woman with the protection she needs in the course of the process itself or afterwards.[64] The periods of the most serious violence occur in response to the victim's attempt to leave the violent husband. At that point, the husband becomes desperate, feels his loss of control over his victim, and as a result is "pushed" to the use of desperate measures, in an attempt to retain his control over the wife. While the courts can issue protective orders where there is threat of violence from the husband, such tools are not available in the mediation process.[65] Additionally, one should remember that it is not always possible to evaluate, in advance, the existence of present danger or its extent. Even the most violent of husbands is almost always equipped with a "public face."[66] A mediator can never acquire precise information regarding the conduct of the violent husband the moment the mediation session ends.[67]

Studies have found that mediation is less successful in preventing repeat violence than is the traditional judicial process. While 17% of violent husbands resorted to violence again after a mediation process, only 10% of violent husbands who had gone through a legal process, such as arrest, returned to the use of violence against their wives or former wives. Studies point to the fact that the phenomenon of violence after a mediation process is more common as opposed to violence after a judicial process.[68] It seems that judicial processes permit the operation of two mechanisms of deterrence: preventing the violent husband's access to his wife and an effective sanction. Mediation does not permit this deterrent. The assertion, therefore, is that in comparison to the judicial process, the mediation process puts the woman at a greater risk of physical harm. Moreover, the final product of the mediation

62. Utzig, *supra* note 58, at 56–57. And Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 HARV. WOMEN'S L. MEDIATION Q. 319, 320 (1997).

63. Utzig, *supra* note 58, at 56.

64. Rogers, *supra* note 35, at 365–66.

65. *See* Loomis, *supra* note 2, at 366. *See also* Penelope Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1221 (1999) ("The risk of violence escalates when the abused wife attempts to break the abuser's control by leaving him.").

66. *See also* Thompson, *supra* note 10, at 616. Batterers are often skilled at manipulation and may charm outsiders. *Id*. Indeed, people outside a battering relationship generally characterize batterers as 'generous, caring, and good,' since batterers typically act violently at home and calmly in public. *Id*. To an outside observer, therefore, a batterer may seem more "dominant, charming, agreeable, and socially facile in comparison to his less assertive wife." *Id*.

67. Maxwell, *supra* note 5, at 345.

68. Loomis, *supra* note 2, at 366.

process, i.e., the settlement, cannot provide a solution based on real protection of the woman. The mediation settlement is not equipped to provide the necessary protection to the woman from the violent husband. This is as opposed to all of the enforcement measures of the criminal and civil justice systems against violent husbands who do not abide by court orders issued against them.[69]

This reason for opposition may be summarized by the words of Knowlton & Muhlhauser.[70] The authors assert that just as a violent husband does not belong in therapy groups for married couples, he similarly does not belong at the mediation table. As long as the component of violence is in the picture, having him participate in a mediation process means compromising the safety of the wife in a very real way. Such a compromise is, of course, unacceptable.

ii. Disparity of Power between the Parties

> By definition, when domestic violence is present in a relationship, there is a disparity of power.[71]

> . . . [A history] of domestic violence has the potential to create insurmountable power imbalances.[72]

Once violence enters into the picture, the parties cannot approach the mediation table on an equal basis. Violence, by its very definition, includes a component of disparity of power and imbalance between the violent party and his victim.[73] The presumption is that disparities of power between the parties in mediation are likely to lead to negative results, which would not be the same in a judicial process, as set forth below.[74]

1) One of the serious concerns noted in the academic literature is that the victim will act out of fear and tend to make too many concessions due to

69. Pearson, *supra* note 62, at 320.

70. Knowlton & Muhlhauser, *supra* note 39, at 268.

71. Maxwell, *supra* note 5, at 345.

72. Landrum, *supra* note 10, at 437.

73. Utzig, *supra* note 58, at 53–54. Most of those who write on the subject of domestic violence identify it as a means to exercise power and control over the victim. The assertion is that a process that brings the parties (the violent party and the victim) to the table as equals, is defective and the last thing that is appropriate in view of the existing dynamic, as stated, in such a relationship. *See*, Knowlton & Muhlhauser, *supra*, note 39, at 267.

74. Landrum, *supra* note 10, at 438.

the power disparity.[75] The assertion is that a mediation settlement based on fear lacks the necessary element of truly free consent, and, is consequently defective and inappropriate.[76] If the victim and her violent husband arrive at a divorce settlement in a mediation process, the probability increases that provisions will be included that are unfair to the woman, with respect both to child custody and to financial matters.[77] One must remember that the violent husband is likely to frighten his wife with the use of verbal or non-verbal threats of future violence, as a way of achieving a power advantage. In such a relationship, even without an outright threat, the wife is likely to feel impotent in terms of standing up for her interests.[78]

The wife's fear is even likely to bring about concessions in advance regarding relevant topics such as financial matters.[79] Alternatively, the fear may cause the wife's "agreement" to discuss matters that are normally subject to a "procedural veto" in this type of dispute (e.g., the husband's visitation rights or joint custody of children, which present a real danger to her and the children). Beyond the wife's rights, which are likely to be infringed upon, the rights of the third party—the children—should be taken into account. A defective settlement that is arrived at due to disparity of powers between the parties, fear and negation of the truly free will of the wife, may have dire implications for the children as well.[80]

2) Moreover, it must be remembered that abuse is also likely to include financial abuse,[81] when the husband has absolute control of all of the financial means and deprives the wife of any information concerning their financial circumstances or access to means of payment. Disparate financial power such as this[82] is likely to bring the wife to the mediation negotiations

75. Pearson, *supra* note 62, at 320.

76. *See* Maxwell, *supra* note 5, at 338.

77. Bryan, *supra* note 66, at 1224. *See also* Landrum, *supra* note 10, at 438–39.

78. Landrum, *supra* note 10, at 438.

79. Bryan, *supra* note 65, at 1225.

80. *See* Knowlton & Muhlhauser, *supra* note 40, at 268. According to Knowlton & Muhlhauser, there is documentation to the effect that mediation settlement agreements generally involve custody arrangements, including broad visitation rights. *Id.* Studies reveal that about seventy percent of the children in families in which the mother is the victim of violence by her husband are also the victims of physical abuse. *Id. See also* Pearson, *supra* note 63, at 320 ("Many mediation critics are troubled by the conjoint and compromising nature of the mediation process and fear that mediators favor joint custody arrangements, which often run counter to what is best for the victim and children.").

81. Utzig, *supra* note 59, at 65; *see also* Bryan, *supra* note 66, at 1220 ("Although most husbands exercise the lion's share of control over marital finance, abusive husbands typically exercise extreme financial control."); R. L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner* 29 FAM. LAW QUARTERLY 187, 189 (1995).

82. *See* Bryan, *supra* note 66, at 1220 ("Moreover, her abuser likely has compromised her work performance and participation, making her a difficult employee. After separation, she may still

table in the first place, not as a matter of free choice, but rather in the absence of an alternative, for lack of financial resources to hire a trial attorney.[83]

3) The violent husband weakens the wife, which is sometimes manifested by a isolation of the woman from the outside world. With the objective of retaining his total control over her and maintaining her absolute dependence (physical, emotional,[84] financial, etc.) on him, the violent husband often isolates his wife from any outside environment whatsoever. Professionals talk about the fact that in an ironic manner, it is precisely in such a situation that the wife often develops absolute and exclusive dependency upon her violent husband. This is a direct result of years of isolation from the outside world, of prohibitions and distance from relatives and friends, sanctions for leaving the house without the husband's approval, etc. All of these strengthen the violent husband's means of control over the wife and, in a paradoxical manner, heightens the wife's dependence on him, increasing the disparity of power between them and the absolute denial of her freedom of choice.[85]

4) At times the disparity of power between the parties is so great that it is no longer possible to speak only of denial of the wife's free choice or of her independence, but rather of annulment of her very being**.**

The husband at times sets forth rules of expected conduct that he later uses to justify the physical abuse (i.e., in the case that his wife has violated one of his rules). In this situation, the wife is likely to develop an all-consuming obsession with doing the husband's bidding and satisfying him, in order not to give him any further excuse to take out his anger on her. Since the reason for his outburst is likely to be a minor, unimportant detail, and since the warning she gets is often very short (if there is any warning at all), the wife tends to develop obsessive behavior in the guise of ensuring the husband's continual happiness, regardless of whether such behavior is rational. In effect, she is likely to enter into the mold of wiping out her own identity and desires.[86] This "programming" to acquiesce to and satisfy all of

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have difficulty locating employment and earning the funds she needs to hire a lawyer. Finally, the battered wife may lack the financial knowledge necessary to accurately assess her financial needs and develop a realistic post-divorce financial plan.").

83. Utzig, *supra* note 59, at 62–63**.**

84. *See* Bryan, *supra* note 66, at 1222 ("Additionally, a batterer frequently isolates his victim from family and friends, depriving her of the emotional support she might need to confront him.").

85. *See also* J. M. Truss, *The Subjection of Women… Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1167–68 (1995).

86. Loomis, *supra* note 2, at 362.

the violent husband's needs and demands, while canceling out herself, is so deep that at times it does not end with the signaling of the end of the marriage in the mediation process. In other words, mediation that signals the end of the marriage cannot be "relied" upon to bring about a change in this way of behavior and thinking that has accompanied the wife throughout her entire married life. A woman who believes that she has survived until this point due to her obedience to the husband's rules and satisfying his needs is likely to find it difficult to identify her own needs (as is necessary in the mediation process).[87]

5) In addition, as Rogers states:

> Feminist scholars have long recognized that because of the female experience in our society, women may perceive situations of inequality as intimating violence where it may seem an unlikely consequence to a male perceiver. A study of mediation participants in South Australia showed that female victims tended to be frightened by the presence of their offender, and even female victims of property damage feared retaliation by offenders. Another study of participants in divorce mediation showed that 44% of the reasons given by women who rejected mediation services offered to them centered around their mistrust of, fear of, or desire to avoid their ex-spouse.[88]

In view of all of the above, the assertion is that in a situation where there is such a disparity of power and in view of the psychological-emotional state of the wife (and as a result of it), the wife is not capable of negotiating in a mediation process,[89] and even if she does so, the quality of the settlement arrived at is pre-determined.

This reason for opposition may be summarized by stating that mediation and the existence of a relationship characterized by violence are mutually exclusive.[90] While the mediation process relies upon the basic assumption that the parties have relatively equal bargaining power, in divorce cases involving violence, the point of departure is precisely the opposite. Here, there is a presumption of a disparity of power and lack of balance between the parties. The assertion is that this substantive contradiction will of necessity sabotage the success of the mediation process.[91]

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87. Bryan, *supra* note 65, at 1221; *see also* Thompson, *supra* note 10, at 617.

88. Rogers, *supra* note 36, at 366–67.

89. Loomis, *supra* note 2, at 359. *See also*, Bryan, *supra* note 66, at 1222 ("Many abused wives are also averse to risk, feel guilty about fracturing the family, suffer low self-esteem and depression, have low expectations, feel terror, have difficulty concentrating, and are frequently passive. *Each of these characteristics severely compromises a person's ability to negotiate effectively*.") (emphasis added).

90. Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, MEDIATION Q. 317, 320 (1990).

91. Thompson, *supra* note 10, at 617.

iii. The Mediator's Limitations

Various scholars throughout the world, as well as people working in the field (such as attorneys who represent women who have been victims of violence in divorce cases in the courts), raise concerns regarding the quality of the handling of such cases that can be provided by mediation.[92] These concerns are raised both with respect to the various mediation programs (under the auspices of the courts as well as community or other kinds of mediation) and with respect to the mediator himself. The doubts relate to the very ability of the programs as well as the mediator to identify and screen cases involving violence and to handle them appropriately. One of the assertions is that mediation programs often operate under time pressures and deal with a heavy caseload. Community mediation programs are based, for the most part, on the work of volunteer mediators who have received only minimal training. These conditions make the handling of divorce disputes involving violence nearly impossible, and in any case certainly inappropriate, therefore carrying with them the potential for disastrous results.[93] The mediator himself is even likely to fail to identify the extent of the violent party's influence on the victim during the mediation itself, right under the nose of the mediator. Often a violent husband has the ability to control his wife with a word, a movement or a hint of a movement, noticed or understood only by himself and his wife (like a code or hidden threat of violence).[94] The wife may then easily agree to terms that will put her and her children's lives in danger, simply in order to get out of the room.[95] It must be remembered that violence is the name of the game.

Up to this point, we have presented the assertions regarding the limitations of the mediator, stemming from a lack of knowledge, time, and professional experience and skills. However, there is another central limitation, touching on the very essence of his position—neutrality.

One of the basic principles of the mediation process, which allows the mediator to carry out his role successfully, is his duty of neutrality.[96] The mediator must serve as a neutral and independent third party, who does not

92. Pearson, *supra* note 63, at 320.

93. *Id.*

94. *Id*.

95. Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. Ill. U. L.J. 559, 572 (2002).

96. Karen A. Zerhusen, *Reflection on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169 (1993) (noting that "[i]mpartiality is key to the mediator's role").

take a position in favor of either party, does not express identification with any party, and does not deal with blaming one party or the other. The mediator does not "represent" any party in the mediation process but rather acts as a neutral third party.[97] This neutrality is a central and important characteristic of the mediator's role and one of the central keys for his success in the process. It builds the trust between the parties and the mediator, and as a result, the parties' reveal their real interests, desires and weaknesses. The assertion is that the mediator cannot remain neutral, on one hand, and on the other hand appropriately handle a divorce dispute in which violence is a factor![98] If he intervenes on behalf of the victim, he will breach his duty of neutrality (at least in the eyes of the violent side). However, when he remains neutral, he contributes to the continued disparity of power and the violence towards the victim.[99] Therefore, there are those who assert that since it is not in the mediator's authority to act as a balance between the powers and as a factor stabilizing the inequality so as to benefit the victim-wife, it is preferable for her to opt for a judicial process, in which the judge is better placed to act to protect her interests.[100]

iv. Additional Reasons for Objection

Additional reasons for objection to the use of mediation in divorce cases involving domestic violence cited in the scholarly literature with less frequency are that it "preserves the power paradigm," "it cheapens and distorts the phenomenon of domestic violence," "it creates a clash between concepts," and "the feminist argument."

The argument that mediation "preserves the power paradigm" argues that when there is an element of violence and control in the relationship between the parties, a process like mediation only reinforces the mode of behavior of manipulator and manipulated and essentially creates the optimal

97. Roger Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 223–24 (1982).

98. *Id.* at 362–63 ("The role of the mediator is to remain neutral and refrain from placing blame on either party. This creates problems when mediation is used to resolve cases that include domestic violence. The problems arise because it is psychologically essential that victims understand that they are not responsible for the abuse. Because of the nature of mediation, this places the mediator in a difficult position because the mediator must not condemn either side in order to ensure fairness"). *See also* Thompson, *supra* note 10, at 617–18; Landrum, *supra* note 10, at 438.

99. Landrum, *supra* note 10, at 441. "If a mediator is truly going to balance the bargaining power differential, the mediator may have to compromise her neutrality, at least in the eyes of the batterer. It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator attempts to ignore or fails to give credence to the allegations of abuse, the victim may feel that the mediator is on the abuser's side, destroying the victim's belief that the mediator is neutral." *Id.*

100. Loomis, *supra* note 2, at 368.

conditions for the manipulator to continue to control with even greater force.[101] It is precisely mediation, a volitional process throughout, that is likely to contribute to preserving the pattern of perpetrator-victim, by granting a platform to the party using force. Because he is a professional manipulator and has many masks (as is generally the case), the violent party is likely to turn out to be an excellent "player-controller." One of the common ways by which the violent party succeeds in 'controlling' the mediator is that the violent party is the one who participates the best in the mediation process. The victim usually is not prepared to speak openly, to share child custody, and to compromise regarding visits or provision of information. The violent party, on the other hand, is prepared to share child custody, as well as to discuss the various options of visits, even if this is solely in order for him to continue his contact with his wife, or in other words, to continue to manipulate and instill fear in his wife. Simultaneously, his willingness to compromise and to discuss the various options makes him look like the preferable candidate to get custody of the children.[102] Therefore, not only is the strong party the dominant one, trying to impose his opinion on the weaker party, he even succeeds in recruiting the mediator to his side! In other words, he uses the mediation process and the mediator to make a determination regarding the relation of powers for his benefit—the benefit of the violent party.[103]

The reason of "cheapening and distorting the phenomenon of domestic violence" raises the concern that dealing with family conflict involving violence in the mediation process will encourage relating in a forgiving manner (even if only for the sake of appearances) to the serious phenomenon of domestic violence. In other words, the concern is that the phenomenon will be made to appear less serious. A mediation-compromise approach, according to this argument, does not impose the full weight of responsibility and liability on the violent party, because mediation by its very nature refrains from making a judgment regarding either party or from assigning blame.

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101. Utzig, *supra* note 59, at 57.

102. Wheeler, *supra* note 95, at 570. This argument is closely connected to the third reason for opposition of "*The Mediator's Limitations*" discussed above. *See also* Thompson, *supra* note 10, at 618.

103. Loomis, *supra* note 2, at 356. "Due to the nature of domestic violence, a man enjoys significant control over a woman, which provides him with advantages in a mediation session. In the end, the wrong party is punished. Batterers walk away with little or no repercussions from the crime they commit, while the victims essentially bargain away their safety as well as other important issues within the mediation, such as custody, visitation, or support." *Id.*

Additionally, mediation is even likely to contribute to a distorted perspective regarding the phenomenon of domestic violence: The phenomenon of domestic violence is not caused due to conflict of any kind between the husband and the wife. Focusing on the conflict as the "source" of the problem (as mediation does), creates a mistaken representation for which wife is also responsible (to some extent) for the abuse.[104] In addition, the critics make the point that the failure to impose legal sanctions on a batterer conveys a message to society that domestic violence is merely a private matter and not a crime.[105] There is no excuse for coming to terms with anything that will contribute to cheapening or distorting the phenomenon of domestic violence, and certainly this cannot be accepted with respect to a process such as mediation, that presumes to educate the entire society[106] through the introduction of more correct patterns of thought.

A further reason for opposition is "the clash between concepts." The autonomy of free will (of the parties to mediation) is one of the fundamental principles of the mediation process.[107] "Violence," on the other hand, as it is broadly defined, includes any act that causes the victim to do something that she does not want to do, or to refrain from doing something that she wants to do, or causes her to be subject to scare tactics and threats.[108] In other words, the negating of free will. We have here two conflicting concepts. Therefore, these two concepts (violence and mediation) are mutually contradictory and cannot co-exist. When the nature of the relationship between the parties raises questions regarding the genuineness of the free will of each of the parties (with respect to their very participation in the process or any other substantive decision that has to be made in the course of

104. *Id.* at 363–64. *See also* Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 866 (1985).

105. Holly Joyce, *Comment*, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. L. 447, 453 (1997).

106. *See*, p. xii in the preface to Robert A. A. Baruch Bush & Joseph P. Folger, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). It must be remembered that one of the primary objectives of mediation is its use as a tool for social change, through, among other things, the education of individuals (the parties to the dispute) who go through the process. In the opinion of Bush & Folger, mediation is likely to contribute to changing the face of the entire society through changing the manner in which people approach a solution to conflicts and disputes in everyday life. Mediation is likely to develop integration between individuals, as well as developing a *social* conscience, and it is likely to provide tools and skills for the entire society through developing awareness and concern for justice, empathy, communication and *social* interaction. *See also*, John Lande, *Mediation Paradigms and Professional Identities*, MEDIATION Q. 19 (1984) (describing the mediation process as providing the parties with a system of positive values regarding the appropriate manner of dealing with others).

107. The "party autonomy" or "self determination." The principle of the parties' autonomy is constantly repeated, either directly or indirectly in the various definitions of the process in codes throughout the world and in the existing literature in the field.

108. Utzig, *supra* note 59, at 53–54. *See also* Loomis, *supra* note 2, at 355.

it) this is predictive of failure of the process and ineffectiveness of the settlement arrived at through it.[109]

A further reason for opposition is "the feminist argument." Feminism contributed to the fact that domestic violence was removed from the private sphere, became the subject of legislation, and entered into public discourse. It also helped mold the way it is dealt with, including by the courts.[110] "The private is public" is the central argument of second wave feminism.[111] The feminist demand is, therefore, to turn the "private" into the "public" and to expose "private" oppression to public criticism in order to expand the scope of social and legal protection of women.[112] According to this approach, the state must be pro-active and must use its power in a positive manner in order to eliminate the existing power gaps within the family as well. Therefore, feminism rejects the theories of "the private family." Quite the opposite, it

109. Zaidel, *supra* note 52 at 65. *See also*, Loomis, *supra* note 2, at 364. A further expression may be pointed to regarding a further clash between the concepts. The mediation concept speaks of two parties with relatively equal power, or powers that can be balanced. When dealing with a relationship involving chronic violence, the concept is that of controller-controlled, with a total imbalance of power (generally through physical, psychological, and mental control of the victim). It would be illogical to assume that once a victim avails themselves to mediation, the victim can leave behind years of internalizing their inequality, suddenly adopt the values of mediation, and independently handle negotiations on an equal footing as an individual with equal rights. *See* Loomis, *supra* note 2, at 364. A further mediation concept is the existence of trust between the parties and the mediator. This assumption is baseless in most cases where dealing with divorce involves domestic violence. In such cases, the mediator will often encounter difficulty in developing trust in the abusive party. The issue of trust also involves the victim. Often the victim finds it difficult to develop trust in the mediator. Many victims of domestic violence have been ignored by their surroundings and they have experienced much disappointment from the public justice system and from public institutions in general. The mediator, in the eyes of the victim, is perceived as part of these institutions. In such a case, there will be no trust, which is a fundamental part of mediation.

110. Pearson, *supra* note 62, at 320.

111. *See* Orit Kamir, BROADCAST UNIV., *Feminism, Rights and Law in Israel* (2002), 46 [Hebrew]. In traditional patriarchal society there is a conceptual difference (supported by political and legal means) between a person's privacy and the public realm. The essence of this difference is that in the private realm a person is entitled to do as he wishes without the state or society being entitled to intervene. In patriarchal societies, women are perceived as belonging to the private realm. According to feminist assertions many of the patterns of thought and behavior of these traditional societies are built into our society to this day. Feminist ideology asserts that under the guise of this distinction between the private and the public realms, the state, through its stance of non-intervention, supports negative phenomena, which happen within the private realm, behind closed doors. In other words, this distinction between private and public realms serves to cover up the fact that within the private realm women suffer from oppression and violence on the part of men (including domestic violence) and the entire society, including the state authorities, refrain from protecting them.

112. *Id*. *See also* Steegh, *supra* note 5, at 180–81.

openly calls for state involvement in the family and the application of justice to the private realm as well.[113]

Mediation, to a great extent, does the opposite. In other words, it transforms what is "public" into the "private." It may be said that the justice spoken of in the mediation process is individual justice. In other words, as distinguished from the judicial process, in which the results are determined according to the application of the law—legal norms of a general objective nature based upon principles considered important by those determining such norms—in the mediation process, the settlement agreement between the parties is fashioned according to individual norms, chosen by the parties, which are consistent with their personal feeling of justice (e.g., accepted custom, the rules of the market, ethical rules, religious law, etc.). This often happens as a result of the parties intentionally ignoring the general law (of course, where the law is dispositive and not cognitive). Here the feminist argument comes into play. According to the feminist argument, there are certain issues, such as family disputes on a background of violence, when it is not acceptable to permit the individual sense of justice of the parties to determine how they will end. The feminists did not struggle to transfer such issues from the private to the public realm and to enact general objective norms regarding them only to have such norms ignored and to return these issues to the private realm or to the realm of the individual sense of justice of any particular person.[114] The opposition to mediation based on this reason argues that it is unacceptable to allow the violent party to be protected from public scrutiny and legal sanctions. There is the additional concern that by virtue of transferring the handling of the subject of domestic violence from the court to the privacy of the mediation process, new legal precedents will not be established.[115] However, one of the answers to this concern is that the mediation process does not render the criminal justice system obsolete. If a victim of violence so desires, she may file a claim, request a protective order and still choose the mediation process.[116]

(b) The Proponents' Position

Those who support mediation in divorce cases involving violence assert that the mediation process should not be automatically ruled out for every

113. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV.. 1497, 1501 (1983).

114. *A fortiori* when such person is the violent party. Ver Steegh, *supra* note 5, at 180.

115. Ver Steegh, *supra* note 5, at 181.

116. Regarding the feminist assertion of proponents of mediation in divorce cases involving domestic violence. *See infra*, "V: 'Giving a Voice' and Empowering the Woman – the Feminist Argument."

divorce case in which there is some kind of domestic violence. Cases involving extreme levels of violence will indeed not be suitable for mediation,[117] but in general the mediation process does have advantages over the judicial process even in divorce cases involving violence.

i. Elimination of the Component of Danger

Proponents of the use of mediation in divorce cases involving violence argue that "litigation is also dangerous."[118] In effect, this proposal centers on the argument that there is relatively greater security provided by the judicial system when compared to the mediation process. Proponents say that this proposition is fundamentally erroneous.[119] Pearson, for example, notes that notwithstanding the fact that legal intervention is the option preferred by lawyers, many lawyers admit that in many cases domestic violence remains hidden from them in divorce cases that they handle and therefore, the danger is identical in the judicial and the mediation process.[120]

Moreover, there are those who assert that the judicial process is even more dangerous than mediation. In the judicial process in general, particularly in the legal pleadings, the parties (under the influence of their attorneys) usually take extreme positions with the objective of portraying the opposing party in the most negative light possible. This is likely to escalate the danger when the violent husband discovers that a complaint of violence has been filed against him or when he is served with a complaint including allegations that he used violence.[121] The argument is that the judicial process contributes to the escalation of the conflict between the parties and enhances the danger awaiting the wife from the violent husband.[122] In the field, there is increasing evidence showing that the use of legal sanctions

117. *See* Thompson, *supra* note 10, at 622. This is the accepted position among most of the proponents of mediation in divorce cases involving domestic violence. *Id.*

118. Thompson, *supra* note 10, at 620. *See also* Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 259 (2001) (arguing that critics of mediation err in "comparing the best possible litigation scenario (where truth is found and justice served) to the worst possible mediation scenario for cases involving domestic violence (joint sessions with an untrained mediator").

119. Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 896 (2003). Quite the opposite, the assertion is that the mediation process is safer. *Id*.

120. Pearson, *supra* note 62, at 331.

121. Utzig, *supra* note 58, at 58.

122. *Id.*

does not prevent the continued use of violence. Quite the contrary, in certain cases, criminal charges were identified as increasing the chance that the violence would recur and continue.[123] The argument is that the judicial system, in effect, encourages the husband to deny his abusive behavior because his lawyer will assist him in denying the crime.[124] In mediation, on the other hand, the privacy of the process and the neutrality of the mediator increase the probability that the violent party will abandon his methods and will agree to accept help. Since the neutral role of the mediator does not require him to be a judge who makes determinations regarding past events, he can focus upon the future and measures to remove any possibility of future violence. The argument of the proponents of mediation is that for this reason some of the violent parties are likely to react in a more constructive manner when they feel that they are being listened to, they are being dealt with fairly, and the expectations regarding their future behavior are being developed.[125] Researchers Ellis and Stuckless report that volitional multi-session mediation is more effective in preventing future violence than lawyer negotiations.[126]

In the same vein,

> While there is substantial concern that pursuing restorative justice would jeopardize a victim's future safety, because the offender will not be incarcerated, a particular restorative justice outcome might require the offender to experience psychological care, or other remedies that might diminish this concern, including productive community involvement.[127] Of course, there must be special safeguards and screening techniques to make sure that such a process does not further jeopardize a victim's safety.

Supporters of mediation argue that in comparison to the judicial process, mediation limits the component of danger and is likely to make a greater contribution to preventing violence by the former spouse.[128]

123. Ver Steegh, *supra* note 5, at 181.

124. *Id.*

125. *Id.* at 181–82.

126. DESMOND ELLIS & NOREEN STUCKLESS, MEDIATING AND NEGOTIATING MARITAL CONFLICTS 61–62 (1996).

127. Rogers, *supra* note 35, at 368.

128. Pearson, *supra* note 63, at 331. "Overall, the investigators conclude that, compared to lawyer negotiations, mediation makes a greater contribution toward preventing the abuse of separated women by their ex-partners." *Id.*

ii. The Mediator's Skills

As opposed to those that argue of "the mediator's limitations" in dealing with situations of family disputes involving violence, as discussed above,[129] those supporting mediation argue that "there is no guarantee that judges or attorneys are more educated about domestic violence than mediators."[130] Indeed, quite the opposite, the judicial system often fails victims by using their reactions to violence, such as frequent moves to escape a batterer or demonstrating what appears to be an uncooperative attitude, against them.[131]

Similarly, proponents of mediation argue that parties with greater resources may have access to representation unaffordable by the other party, thus introducing disparities in bargaining power into the judicial process as well.[132]

Those supporting mediation propose the mediator's skills, acquired through specific training, are an answer to the assertions regarding his limitations.[133] In other words, the assertion is that proper training of mediators is likely to resolve many of the reservations expressed by the opponents to mediation in divorce cases involving domestic violence. For example, the reasons for opposition cited above regarding the power disparity between the parties or the limitations of the mediator[134] are likely, at least in some cases, to be mitigated if the mediator is appropriately and skilled to cope with such disputes. The mediator's skills and training are likely to assist him in identifying at the outset a component of violence in the relationship, and in ferreting out information likely to assist him in dealing appropriately with the problem within the mediation process. For example, the mediator is likely to reduce the disparity of power between the parties without infringing upon his duty of neutrality, by using questions to examine and confirm the suspicions of the weaker party. In addition, holding separate meetings (caucuses) with each party allows the mediator to receive direct feedback regarding issues of disparity of power and feelings of

129. Pearson, *see supra* note 63, at "*iii. The Mediator's Limitations.*"

130. Thompson, *supra* note 10, at 620–21.

131. *Id.*

132. *Id.*

133. *See, e.g.*, Knowlton & Muhlhauser, *supra* note 40, at 264. *See also* Pearson, *supra* note 62, at 324. *Contra* Bryan, *supra* note 66, at 1224–25 (stating, "Many mediators who claim knowledge about and sensitivity to domestic violence suffer from the same misperceptions of battered woman as judges, lawyers and mental health professionals.").

134. *See supra*, notes 73–101 and accompanying text.

security.[135] Additional tools at the disposal of the properly trained mediator include taking additional cautionary measures, such as receiving independent legal advice and to some extent an explanation of the laws, as well as concluding the mediation in favor of the weaker party, when this is necessary to protect her interests and no other alternative exists.

Indeed, training programs for mediators regarding divorce cases involving domestic violence are gaining popularity throughout the world.[136] The recommendation is for training that will also include information and advice regarding the means to ensure the process itself and the security of those participating in it (both at the time the process is being carried out and at its conclusion), as well as with respect to the option of involving external entities likely to contribute to a successful mediation.[137] The training is supposed to assist the mediator in understanding the dynamics of the violence in the family, learning unique techniques for dealing with such families, and dealing with the inequality of powers, means of disclosure, means of caution, constructing a safe program, and dealing with the attitude of the community to the subject. This guidance must be accompanied by requirements for a certain amount of experience in mediation under supervision.[138]

The Model Standards of Practice for Divorce and Family Mediators provides that a mediator must have knowledge of family law and the psychological impact of a family crisis on the parents and the children. In addition to special training in the mediation process itself, mediators must also undergo training and education in the field of domestic violence and the subject of child abuse and neglect.[139]

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135. Ver Steegh, *supra* note 5, at 186–87.

136. Pearson, *supra* note 62, at 324 (noting that according to reports from centers that provide training programs for mediators, seventy percent report that their mediators participate in interdisciplinary professional forums and training sessions dealing with domestic violence.)

137. Knowlton & Muhlhauser, *supra* note 40, at 265. If safety concerns emerge from the mediation process, particularly in post-dispositional cases, the mediator must have an immediate plan of action ready to assess the problem and must be ready to refer the case to the appropriate agency in order to diminish the harm to the parties or their children." *Id.*

138. Ver Steegh, *supra* note 5, at 190.

139. MODEL STANDARDS FOR FAMILY AND MEDIATION (1984). The Tenth and Eleventh Standards provide that a family mediator "must be familiar with" family situations involving child abuse or domestic violence. In cases of child abuse or neglect, the Tenth Standard requires the mediator to report the abuse to the appropriate authorities. In contrast, in cases of violence against a spouse, the mediator is required only to fashion the mediation process accordingly and there is no obligation to terminate the mediation proceeding. Both the Tenth and the Eleventh Standards require the mediator to be aware of the symptoms and dynamics of both forms of abuse and he is forbidden from continuing with the mediation if he does not have appropriate training. The Model Standards recommends broad training so that the mediator is able to discern that a particular family situation involves child abuse or neglect and to report this to the authorities and to fashion the

Empirical studies have given merit to the assumption of proponents of mediation that victims of violence are able to carry out negotiations efficiently instead of from a position of inferiority that is a result of power inequality between the parties engaged in mediation. These positive findings are attributed to the skills of the mediator regarding the mediator's ability to identify, screen, and gage the component of violence at the outset as well as appropriately deal with the problem of the power disparities and any other difficulties that such situation creates.[140]

iii. Screening and Adopting Appropriate Coping Strategies

Proponents of mediation in divorce cases involving violence assert that not all divorce cases involving violence are alike and that there are certainly many such cases that are can be dealt with appropriately through mediation.[141] The proponents of mediation object to the sweeping generalization that any dispute between a separated couple that involves violence is unsuited for mediation. According to these proponents, screening at the outset should be preferable to exclusion from the outset.[142] As a result of screening, disputes that are not appropriate for mediation will be removed from the agenda of the process (and the parties will be referred for different treatment), whereas those cases appropriate for mediation can receive appropriate treatment *within* the mediation process, from a wide spectrum of means of dealing with this issue, when the element of violence has been picked up in the preliminary screening.[143] The preliminary screening is meant to identify disputes that are not at all suitable for mediation! These include disputes in which the victim's consent is not genuine, but given only in order to mollify the abuser.[144]

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mediation process in accordance with such a situation. For a more expansive discussion, see Wheeler, *supra* note 96, at 568.

140. Ellis & Stuckless, *supra* note 126, at 80; Joyce, *supra* note 105, at 457.

141. Landrum, *supra* note 10, at 435–36.

142. *Id*. at 437. *See also* Maxwell, *supra* note 5, at 337. "Some proponents of mediation argue that mediation is appropriate in cases involving domestic violence if the type of domestic violence is taken into account and mechanisms to ensure a safe and fair settlement for the victim are provided." For a more expansive treatment, see Maxwell, *supra* note 5, at 345.

143. *See also* Utzig, *supra* note 58, at 337. Regarding the various methods of dealing with the issue, including screening that continues into the mediation process, and decision-making by the victim, see Ver Steegh, *supra* note 5, at 198–202.

144. *See* Utzig, *supra* note 58, at 60–63. The abuser shows contempt for the victim's words, feelings, desires and acts and refuses to recognize her worth even after the mediator speaks with him regarding the effect his behavior has on the victim. The abuse (in any of its forms) continues in the

A number of possible means of dealing with violence within the mediation process (to the extent that an element of violence has been identified during the screening but the case was not disqualified from being handled in mediation), are enumerated in the literature: the use of separate legal advice for each party (with the attorney for the victim being someone who has expertise in both the mediation process and the subject of domestic violence);[145] the participation of additional experts in the process (including professionals and therapists);[146] screening that accompanies the entire mediation process;[147] frequent use of caucusing (with the content remaining confidential from the other party);[148] the presence of armed guards during all of the mediation sessions alongside the accompaniment of a security guard to the parking area; the use of co-mediators (two mediators, one male and one female); the use of separate waiting areas and separate entrances for men and women; stopping the process when necessary; and, referring the victim to appropriate shelters or to programs for advice and assistance that specialize in domestic violence, when problems of security arise. The mediator always has the option to receive assistance from the court through referral of the parties for emergency interrogation or through evaluation of the case and its legal aspects.[149]

> Additionally, knowledgeable mediators and mediation program administrators may also introduce both victims and abusers to other community and professional resources available to them. For example, some mediation proponents believe that the mediation process, because of its privacy and the role of the neutral mediator, actually encourages the abuser to admit his actions and seek help.[150] Mediators can educate participants about a variety of options that may be available, including: batterers' treatment and anger management programs; alcohol and drug treatment; dual-diagnosis consultants and

course of the mediation meetings and the violent husband refuses to respect the safety boundaries that were determined in advance. The parties (or one of them) insist on carrying weapons; the parties (or one of them) are under the influence of drugs or alcohol; one of the parties breaches the rules that were determined in advance for the process and refuses to recognize that this breach constitutes a problem. Such disputes are categorized, even by proponents of mediation, as permanently disqualified for the mediation process. Among the existing means of screening are screening through the use of questionnaires, screening through the use of caucusing, screening through non-verbal hints, etc. *See* Utzig, *supra* note 58, at 60–63. For further discussion, *see also* Jeske, *supra* note 1, at 694–95.

145. *See* Maxwell, *supra* note 5, at 346. The idea is that the victim can receive advice and legal defense to the extent that she needs them.

146. *See* Utzig, *supra* note 59, at 65. The experts are likely to meet with each party separately. *Id.*

147. Loretta M. Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523, 526 (2008) (arguing that the mediator should think of screening not as a one-time process, but rather as an ongoing need).

148. Loomis, *supra* note 2, at 365.

149. Pearson, *supra* note 63, at 326–27.

150. Landrum, *supra* note 10, at 462–63.

> treatment; victim support and treatment; posttraumatic stress groups; therapy; .†.†. supervised access and exchange facilities; reunification therapists; parenting coordination; assistance in implementing court-ordered parenting plans; treatment for traumatized children; parenting without violence classes; parenting education, skills training, and coaching; custody evaluation; child protection services; protective orders; removal of weapons; criminal penalties; court orders with triggers; suspended or supervised visitation; case management; interpreter services; housing and employment assistance; immigration services; establishing child support and paternity; child care; and advocacy.[151]

iv. Efficiency

The fact that the mediation process is less expensive and quicker than litigation[152] has additional value in divorce cases involving violence, and this is a significant advantage a victim of domestic violence, who is naturally interested in concluding the dispute as quickly as possible (and at minimal financial cost).[153]

v. "Giving a Voice" and Empowerment of the Woman—the Feminist Argument

> The mediation process, which is less adversarial than court proceedings, is characterized as more potentially empowering to the battered woman than the formality of the courtroom setting.[154]

Current critical feminist insights regarding the law assert, as mentioned above,[155] that the judicial process does not faithfully fulfill its function of "giving women a voice" and therefore, a better alternative for dispute resolution is necessary. In comparison to the legal process, which is geared towards the competition and struggle identified with the male style, the mediation process is perceived as the "home court" of women. One of the advantages attributed to mediation from the feminist perspective is empowerment of the woman who participates in mediation, in view of the opportunity it gives her to express herself and to address the emotional aspects of the dispute (because women tend to speak about feelings with

151. *Id.*

152. *See* Utzig, *supra* note 59, at 58. *See also* Knowlton & Muhlhauser, *supra* note 40, at 261 ("[M]ediation offers an alternative that is quicker and less expensive than the traditional adversarial method.").

153. Particularly if she is a victim of financial abuse.

154. Jeske, *supra* note 1, at 686.

155. *See supra* notes 39–40 and accompanying text.

greater ease). One must remember that one of the elements that a battered woman needs, perhaps more than anything else, is a voice. By giving her a voice, the mediation process may return to the battered woman the power taken from her in the destructive relationship and restore in her the confidence that comes from controlling her own life. A process that provides her with a platform for expressing her feelings, fears and desires, a process that listens to her description of the situation and her perception of matters through her prism contributes to the empowerment of the victim.[156]

Moreover, the very ability to choose the process for dealing with her affairs is likely to contribute to the empowerment of the victim, thereby helping her to progress beyond the position of the "victim" by enabling her to have "more of a voice in what happens to her future."[157] As Sandra Zaher explains, "mediation can empower the powerless by enabling them to speak in their own voice and assert their own interests, perhaps for the first time."[158] John Haynes, the founding president of the Academy of Family Mediators, has argued that mediation can encourage both the victim and the abuser "to focus .†.†. on where they are going in their lives as separate, whole, independent people."[159]

Indeed, in the field as well, women who went through mediation for divorce disputes report that the mediation enabled them to voice their concerns and to express their point of view. Studies demonstrate that these women feel that they had an equal amount of influence on fashioning the terms of the settlement agreement at the conclusion of the mediation process. Battered women note that the mediation empowered them, enabling them to stand up for themselves and to take responsibility for their decisions, actions and future, to present their position and to solve their problems.[160] One study shows that only 15% of battered women left the mediation process before its conclusion.[161] In a process that places the parties at the center and which emphasizes the "empowerment"[162] of the parties, it is not surprising that women feel this "empowerment" more

156. Knowlton & Muhlhauser, *supra* note 40, at 256 ("Several commentators, however, have argued that mediation is a vehicle for empowerment and an appropriate mode of intervention even when domestic violence has occurred."). *See also id*. at 266-67 ("Well-trained mediators can and frequently do develop processes and establish guidelines that *empower and enlighten the victims* in domestic disputes.") (emphasis added).

157. Landrum, *supra* note 10, at 445.

158. *Id.* at 447.

159. *Id.* at 447.

160. Thompson, *supra* note 10, at 622.

161. *Id.*

162. Bush & Folger, *supra* note 107, at 85 (defining "empowerment" as "the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems.").

strongly.[163] Victims of violence are particularly likely to benefit from this empowerment, which constitutes part of the process of healing from the crisis that they went through.[164] An attorney who works in the field of family law aptly summarizes this point:

> Well-trained mediators can and frequently do develop processes and establish guidelines that empower and enlighten the victims in domestic disputes. Such mediators balance power and ensure that a safe and supportive environment is established .†.†. These types of mediators are much more likely to validate the parties' feelings and perceptions and they provide a better balance of power among the parties than any courtroom process that I have observed in my fifteen years of clinical practice.[165]

C. The problems of the current situation

Two central problems are raised both by the scholarly discourse and the existing practice with respect to divorce cases involving violence. In this section we will deal with each of them and in Chapter 5 we will propose med-arb as an answer to both of these problems.

(a) "Practical Problems"

Scholars have proposed the adoption of mediation as a process for dealing with divorce cases involving violence was raised in the scholarly literature[166] in view of the disappointment in the ability of the judicial

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163. Ryna Bogoch, Ruth Halperin Kaddari & Yael Ronen, *Gender, Mediation and Divorce Proceedings*, 7 HAMISHPAT 335, 350 (2002). Indeed, women report a greater sense of security in dealing with their ex-husband following mediation than following legal proceedings, and more so than that felt by men who participated in mediation. On the other hand, there are those who believe that it is **legal proceedings** that are more empowering than mediation. While the mediator views his clients as people dealing with a problem and therefore in need of assistance, in the view of the lawyer, the client has rights and he is to be served and his demands are to be fulfilled. As against the findings to the effect that women feel more empowered in the mediation process, the assertion is raised that in any event such empowerment is only in the short term, since the mediation is focused and too short-lived to have a long-term effect. *See* Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, LAW AND INEQUALITY 21, 22 (1984) ("Finally, critics claim that mediation is detrimental to the interests of women, who, being less empowered, need both the formal legal system and aggressive legal representation to protect existing rights and pursue new legal safeguards."); *see also* Grillo, *supra* note 59, at 1550 (explaining that the mediation process **does not** give proper expression to the "woman's voice," but rather depresses and silences it, thereby disappointing women and not serving as the feminist answer that is so badly needed).

164. Especially if the violence also included rape. *See* Rogers, *supra* note 36, at 357 ("Regaining self-control is an important step in the recovery of rape victims.").

165. Knowlton & Muhlhauser, *supra* note 40, at 266–67.

166. *See supra* notes 16–26 and accompanying text.

process to deal with divorce cases in general, and particularly with those involving violence. However, we cannot ignore the fact that adopting the mediation process to deal with these cases is not free of doubts and creates new problems, which cannot be completely resolved through use of the solutions suggested by its proponents.

One of the solutions proposed by the proponents of mediation to deal with the problems created by the use of mediation in divorce cases involving violence is screening.[167] However, this solution is far from perfect and may frequently result in disappointment. Firstly, the findings point to the fact that only about 80% of mediation programs formerly attempt to identify violence and only about half of such programs conduct personal interviews in addition to filling out questionnaires.[168] Secondly, Thompson notes:

> [S]creening mechanisms are frequently inaccurate. Many such mechanisms place the burden to screen on judges, but typically cases are sent to mediation before judicial intervention occurs. Further, most screening mechanisms require one of the parties to disclose the abuse, but batterers have no incentive to disclose abuse that they perpetrate. The burden of disclosure falls on the victim, who may be reluctant to disclose the abuse for the same reasons she is reluctant to seek intervention.[169]

It must be remembered that identifying violence is more a case of artistry than of information because the judgment of the evaluators is an important factor,[170] and therefore, some mediators are of the opinion that screening cannot achieve precise outcomes. In effect, the studies show that as few "as five percent of mediation cases are excluded because of domestic violence."[171]

Additionally, Greenberg notes:

> There is no foolproof screening for domestic violence.†.†. Screenings, such as those designed by Tolman, Ellis and Girdner have limited efficacy. Different domestic violence screenings are designed for specific types of violence, excluding the identification of others beyond their scope. Most are not calibrated to account for the range of cultural expressions of violence.[172]

Another solution offered by the proponents of mediation for dealing with its disadvantages is training the mediator and ensuring that he has the requisite skills to deal with these cases.[173] According to their assertion, only

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167. *See supra* iii. Screening and Adopting Appropriate Coping Strategies.

168. Steegh, *supra* note 5, at 194.

169. Thompson, *supra* note 10, at 621–22.

170. Ver Steegh, *supra* note 5, at 194.

171. Thompson, *supra* note 10, at 599–600.

172. Greenberg, *supra* note 13, at 609. *See* Landrum, *supra* note 10, at 451 ("[S]creening programs that focus solely on past physical violence may miss other types of abuse such as verbal threats and intimidation, psychological abuse, and economic control over the other person.").

173. *See supra*, "*ii.The Mediator's Skill.*"

mediation carried out by a skilled and experienced mediator who specializes in the subject of domestic violence, understands the unique dynamic of such cases, and uses special techniques to deal with them will be able to address many of the assertions of the opponents of mediation.[174] Indeed, many mediation programs provide training for mediators to recognize signs of domestic violence and be able to manage situations where it becomes an issue. However, in some states there is still no requirement for special training for mediators. In effect, only 70% of the mediation programs that were surveyed report that mediators participated in training programs regarding domestic violence.[175]

Moreover, the concern is that training the mediator, regardless of how extensive such training may be, will not enable him to discern all of the signs of control and exploitation in the couple's relationship.[176] More importantly, the assertion is that no person can be talented enough so as to put the victim in a position of equal power opposite the exploitative and violent party, no matter the degree to which the mediator is attuned to the dynamics of the relationship. Similarly, although the Model Standards provide that mediators should undergo training that includes familiarity with family law and insight about how family issues can affect all members of the family, "there is no specific description of what appropriate training in domestic violence issues might entail."[177] The effectiveness of existing mediator training programs should be studied in order to ascertain how much training is necessary, at what frequency mediators should be required to undergo additional training, and the topics that should be included in the training programs.[178] Until such time, according to this assertion, relying on the mediator's training and skills is simply insufficient.

Landrum summarized:

> Many mediation programs provide training for mediators to recognize signs of domestic violence and be able to manage situations where it becomes an issue.†.†. . In spite of the fact .†.†. that legislatures and courts have developed a variety of "solutions," very few

174. Including,the disparity of power between the parties, the safety problem, etc. *See* Ver Steegh, *supra* note 5, at 187–88.

175. *Id*. at 189–90.

176. As Landrum notes, "There may be subtle indicators - or sometimes overt signs - that the abuser is still intimidating the victim to get what he or she wants from the mediation, and if the mediator is not vigilant he or she will miss those signals." Landrum, *supra* note 10, at 440.

177. Landrum, *supra* note 10, at 455.

178. *Id.* at 456.

> empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence.[179]

Holding caucuses is another proposed solution to the problems that mediation is likely to create in divorce cases involving violence.[180] Proponents of mediation assert that holding separate meetings enables the mediator to bring about a more equal balance of power between the parties. One reason for this is the mediator's control of the information (both information provided to the other party and information that remains confidential) germane to the process. In addition, Ver Steegh notes that "[s]eparate caucuses give the mediator a chance to obtain direct feedback on power and safety issues."[181]

Opponents of mediation assert, however, that caucuses do not provide an effective solution: "There are significant flaws, however, in using caucuses in mediations involving domestic violence. Most notably, the use of caucuses assumes that a short discussion with a victim will uncover and rectify years of being silenced."[182] Additionally, "[a]lthough mediators claim that they can balance power, perhaps by meeting separately with each spouse, the extreme power disparities between an abused wife and her violent husband defy balancing.[183] It seems, therefore, that the solution of caucusing is indeed limited.

A further solution that mediation proponents promoted to address the difficulty of disparity of power between the parties and the question of the fairness of the mediation agreement expands the boundaries of the mediator's role in divorce cases involving violence and redefines the mediator's duty of neutrality. Landrum has analyzed the debate:

> Some victims' advocates take a more extreme stance about the role that the mediator should play in these mediations, arguing that the mediator should not really be neutral at all—instead, the mediator should be responsible for ensuring that the victim gets a fair settlement. One of the problems with this approach is that it puts the mediator in a difficult position. On the one hand, one can see the obvious benefits of focusing on the needs of the victim of violence in mediations, but at the same time the mediator no longer functions as a neutral party.
>
> In addition, one scholar advocates the mediator being the monitor of whether or not the abuser complies with the agreement afterwards. However, that approach to mediation would place so many responsibilities on mediators that it might be difficult to find mediators willing to take on these responsibilities. First, there would be concerns that such requirements might create a standard of care for mediators that would open them up to a lawsuit for negligence or mediator malpractice. In addition, having to monitor

179. *Id.* at 428.
180. *See* Ver Steegh, *supra* note 5 and text accompanying note 136.
181. Ver Steegh, *supra* note 5, at 187.
182. Loomis, *supra* note 2, at 365.
183. Bryan, *supra* note 66, at 1223.

> whether an abuser is complying with an agreement puts an additional burden on the mediator and might place the mediator, as well as the victim, in an unsafe position. Finally, such high expectations of the mediator's role in the process would put a lot of stress on the mediators who might worry that they would not perform their role well. As a result of these potential issues, programs have not usually placed such responsibilities on the mediator, but mediators still struggle with how to remain neutral in this context.[184]

Another solution that has been proposed in the scholarly literature for dealing with the failures of the mediation process, especially the "danger component,"[185] 'is online dispute resolution (ODR**)**. ODR is simply any form of ADR that takes place through use of the internet. Online mediation enables the parties to be physically separated, unlike traditional mediation where the physical presence of the parties and mediator is central to the process.[186] Where there is a basis for concern that mediation in the presence of both parties would jeopardize a victim's safety, the elimination of the potential for physical contact through the use of ODR might enable the use of mediation.[187] However, this solution is also not perfect[188] and is intended primarily to deal with the danger component while not resolving the other disadvantages created by the process.[189]

The practical problem can be summarized, therefore, by the statement that with respect to divorce cases involving violence, the mediation process includes inherent disadvantages, for which complete solutions have not yet been found by the proponents of mediation.

The med-arb process, as presented in the following chapter,[190] is likely to address and resolve many of these disadvantages.

(b) 'Conceptual Problems'

The general answer of mediation proponents to the inherent disadvantages of the process, which cannot be completely resolved (as enumerated in the previous section)[191] is the existence of the option to return to a judicial proceeding. This answer is insufficient and indeed adds a conceptual problem to the issues already presented because mediation is

184. Landrum, *supra* note 10, at 441–42.
185. *See supra*, "*i. The Component of Danger.*"
186. Jeske, *supra* note 1, at 667–78.
187. Rogers, *supra* note 36, at 368.
188. *Id*. at 379.
189. *See supra* (a) The Opponents' Position.
190. *See supra* Chapter Five.
191. *See supr*a (a) Practical Problems.

suggested to victims of domestic violence as a means of avoiding the judicial process in dealing with their divorce action. How, therefore, can the judicial process, with all of its disadvantages and limitations (from which the victims have escaped) be proposed as a remedy for the weaknesses of the mediation process?!

Moreover, the existing discourse deals only with what is worse than what, and therein lies its weakness. In other words, with respect to divorce cases involving violence, many agree that "[n]either the traditional legal system nor the mediation alternative provides a perfect solution for battered women."[192] Rather, while proponents of mediation point out the weaknesses of the judicial process in dealing with the issue, the proponents of the judicial process point out the disadvantages of mediation. One can ask, "what if they are both correct?" What if, indeed, both of these processes have serious disadvantages that cannot be overcome in terms of the manner that they deal with divorce cases involving violence? Is there no third solution that is more appropriate? Why limit the discussion to a choice of either—or (mediation or litigation)? Is this really all we have to offer to victims of violence—a bad process or one that is even worse? This article proposes a third course, med-arb.

CHAPTER FIVE: MED-ARB—THE PROPOSED SOLUTION

This article proposes med-arb as a solution for divorce cases involving violence. We emphasize that the proposal is to adopt med-arb only for those cases that are appropriate for mediation (i.e., excluding cases involving serious violence or other circumstances that disqualify the case from going to mediation,[193] and only when the victim is interested in such a process).[194]

In recent years, various mechanisms have been developed in the literature and in the field to improve mediation as an alternative tool for

192. Thompson, *supra* note 10, at 620.

193. *See id*. at 623 ("[V]ery severe domestic violence cases may also be uniformly inappropriate for mediation. Nancy Ver Steegh argues that because abuse differs in severity, 'the existence of violence creates a red flag for the mediator signaling a need for a closer look at the victim's ability to negotiate and the level of the abuser's denial and control.' She suggests that a mediator exploring negotiation ability and levels of denial and control might look to such factors as use of weapons, the victim's fear of retribution, the batterer's failure to take responsibility for his actions, and the couple's inability to separate its interests.'"). *See also* Ver Steegh, *supra* note 5, at 196.

194. Thompson, *supra* note 10, at 622–23 ("[M]ediation should never occur against the wishes of a victim. Mediating a domestic violence case against the wishes of a victim undermines her ability to protect herself and denies her capacity for self-determination."). With respect to med-arb, this article requires the victim's informed consent. *See infra* notes 241–43 and accompanying text.

divorce cases involving violence,[195] including screening (preliminary and secondary), training of mediators, using caucuses and tools of ODR, using of parenting coordination or parenting education, using of separate legal advice for each of the parties, participation of additional experts in the process (such as professionals and therapists), including the presence of armed guards in the course of the mediation sessions, and terminating the process where necessary, referring the victim to an appropriate shelter or to advice and assistance programs that specialize in domestic violence. This article does not propose doing away with these mechanisms or substituting others for them. Med-arb is proposed only as an addition to what currently exists. One of the scholars has correctly noted that "[w]e should be using every tool at our disposal to identify and help victims of domestic violence."[196]

We shall now examine the possibility for the implementation of an additional tool—med-arb.

A. The Substance, Development and Sphere of Application of Med-Arb

Med-arb is a combination of the words "mediation" and "arbitration." It is a hybrid, two-stage process for dispute resolution, combining mediation with arbitration. Classic med-arb is carried out by one neutral mediator, who was agreed upon by all of the parties, and who, only if the mediation does not succeed, will then wear the hat of an arbitrator will carry out arbitration between the parties, rending a binding arbitration award with respect to all of the issues that were not resolved in the course of the mediation process.[197] The goal of med-arb is to combine the advantages of mediation and arbitration in one forum. Med-arb attempts to combine the consensual nature of mediation with the component of "finality of the judgment" of arbitration. By agreeing to med-arb, the parties express their prior consent to attempt to arrive at a volitional agreement during the first stage—mediation—and if this is not successful (or is only partially successful because some issues continue to be disputed) accept the binding award of the mediator-arbitrator in the second stage. The two stages of the process are clearly separated from one another.[198] There are those who call med-arb "mediation with muscle" or "mediation with a bite" since it prevails

195. *See supra* iii. Screening and Adopting Appropriate Screening Strategies.

196. Jeske, *supra* note 1, at 671.

197. John Blankenship, *Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, 42 TENN. BAR J. 28, 28 (2006).

198. *Id.* at 29–30.

over what is considered, in the opinion of various scholars, to be one of the central weaknesses of the mediation process: the mediator's lack of authority to impose a binding award on the parties.[199] The mediator-arbitrator, on the other hand, is chosen by the parties and their attorneys. He must have experience in carrying out mediations and arbitrations as well knowledge of the dispute subject. Clearly, this complex role must be filled by someone the parties (and their attorneys) trust. Additionally, prior to the beginning of the process, the mediator-arbitrator must apprise the parties of the risks involved in the use of the process and have them sign a waiver of the right to replace the mediator-arbitrator (or disqualify him) and of the right to appeal his award. The med-arb agreement also includes the basic rules of the process and details of the issues to be deliberated.

Med-arb originally appeared as a reaction to the need for resolution of labor disputes through binding arbitration in place of strikes and lock-outs of factories.[200] At the beginning of the 20th century there were two main methods for a neutral person to make a decision. The first—"the independent chairman method"—developed in 1911 in a factory in Chicago.[201] The second method—"the arbitrator method"—developed in 1903 in the wake of the protest of coal miners.[202] In effect, the theoretical underpinnings of med-arb can be found somewhere prior to World War II, and its formal structure was formed in the wake of the bombing of Pearl Harbor in December 1941.[203] The term "med-arb" was coined in 1970. Sam and John Kagel, the first ones to develop this process, used it for the first

199. *Id*. at 30. In other words, does not have the "muscle" of the mediator-arbitrator.

200. *Id.* at 32.

201. *See* Barry C. Bartel, *Med-Arb as Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 669 (1991). The method included "a go-between with authority" to render a final and binding decision. *See id.*

202. *See id*. In the wake of the protest a council was established to deal with workers' protests and to arrive at settlements. Where the council did not succeed, the dispute was transferred to a neutral arbitrator. The arbitration method was essentially legal in its nature, with the council holding a formal hearing and afterwards transferring all of the evidence to the arbitrator.

203. *See id.* at 670; Blankenship, *supra* note 198, at 32. Officials from the Departments of Labor and Commerce met in order to prepare a recommendation to President Roosevelt regarding a method that would ensure stability in the industrial work place. The group recommended preventing strikes by settling disputes through peaceful means. In the wake of its recommendations, President Roosevelt established the National War Labor Board (NWLB) which was an important step in developing arbitration in the area of labor disputes. The impression that was created, that the Board was setting in place binding arbitration, is not precise. Quite the opposite, the council of managers primarily used a method of mediation, and the arbitration was volitional. The director of the Institute for Labor Relations and Social Security at New York University at the time declared: Those who served as arbitrators at the time put a greater emphasis on arriving at a "fair" or "just" solution than a "legally correct solution." The arbitrator took upon himself the role of a mediator and was more of a "friend" of both parties than a "judge." This arbitration process could be more accurately termed "med-arb." Blankenship, *supra* note 198, at 32.

time to settle a nurses' strike in a San Francisco hospital. According to the Kagels' model, the parties waived their right to strike and undertook a commitment to accept the final settlement. In this manner authority was accorded to the mediator-arbitrator to arrive at a settlement if the parties failed to arrive at a settlement by themselves.[204]

Until this point med-arb developed in four central arenas: labor disputes,[205] international arbitration,[206] corporate disputes, and family and estate disputes. Various countries, such as China, Germany, and Switzerland, use various forms of med-arb in international disputes.[207] Countries such as Brazil, China and Hong Kong have even enacted arbitration legislation including provisions relating to med-arb. In the arena of corporate disputes, med-arb has proven itself to be effective for certain kinds of disputes. A survey of ADR habits among conglomerates that was conducted in 1997 demonstrates the importance of med-arb in this sector. Forty percent of those participating in the survey responded that they had participated in med-arb processes.[208] In internal corporate disputes, such as conflicts between shareholders, med-arb has also been found to be

204. *Id*. The agreement that was arrived at promoted stability in employee–employer relationships in industry. *Id.*

205. In the arena of labor disputes med-arb is very developed, since it equalizes the power of management and the workers through compromises and concessions. In other words, it developed due to a particular quid pro quo dynamic. The idea is that management agrees to set up a grievance procedure ending in binding arbitration, while the workers give up their right to strike. In the arena of labor disputes med-arb has been successful precisely in resolving disputes regarding contractual interests in the areas in which the right to strike is limited or denied altogether. *Id.* at 32–33.

206. Med-arb has had a great deal of success in the international arena as well. In inter-cultural commercial disputes, an integrated method with two phases, like med-arb, is preferable, in that it is more successful in overcoming cultural differences. Beyond the cultural differences, med-arb saves time and money and preserves the business and social relations, which are so important in international relations. *See* Carlos de Vera, *Arbitration Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 154 (2004).

207. Blankenship, *supra* note 198, at 33. One case that received international publicity in the wake of the successful use of med-arb was the dispute between IBM and Fujtisu. In this complicated dispute regarding intellectual property rights, with hundreds of millions of dollars at stake, the two arbitrators who were appointment by the parties, within a forum of three arbitrators, carried out the mediation with the parties and afterwards used several innovative methods of ADR to settle the dispute, finally resolving the dispute. According to the scholars, this case illustrates the potential contained in med-arb when used as an effective tool to identify and clarify facts in dispute, thus contributing to reducing the number of issues in dispute and saving resources of time and money. This dispute also illustrates the importance of the openness of the neutral third party to all of the possibilities for more effective fashioning of the process for the needs of the parties. *Id.*

208. *Id.*

appropriate.[209] The integration of the cooperative aspects of an agreement with the finality of the process that med-arb accords, has been found to offer many advantages in the context of corporate disputes. Med-arb prevents harm to the corporation; it creates incentives for the parties to behave with less hostility, to be more creative, and to develop mutual trust.[210]

In the fourth arena of family disputes, which is the area relevant to this article - med-arb is developing because the judicial process cannot provide an appropriate solution due to the emotional nature of the disputes, and the long-term and expensive qualities of the disputes. The legal system is perceived by many experts as escalating the dispute and contributing to long-lasting hostility.[211] Med-arb is perceived as appropriate in disputes of this nature since it saves time and money, is carried out privately and is suitable for sensitive subjects, as it encourages the building of relationships instead of destroying them and escalating conflict. The additional value of med-arb over the mediation process (which also has these advantages) is that it contributes to the finality of the deliberations and the determination. Although in the arena of family disputes med-arb is still in its initial stages, and there has not yet been any in-depth study regarding its application, voices regarding its alleged advantages are already being heard.[212]

Despite studies alleging the relatively slow development of the med-arb process and the narrow sectors that it serves, there are not many categories that are automatically and absolutely excluded from it. The question of whether or not it is appropriate depends on the circumstances and the parties involved in the specific dispute. It is possible to assume that in view of the trend of development of the ADR movement and due to the increasing tendency of the courts to refer disputes in that direction, the med-arb process will also increase in popularity and will become an effective and preferred tool for conflict resolution.[213]

B. The Advantages of Med-Arb, its Disadvantages and Means of Dealing with Them

The international scholarly discourse regarding med-arb points to the inherent advantages of the process alongside its alleged disadvantages. These must be taken into consideration if the thesis of this article in favor of the adoption of med-arb as a solution for divorce cases involving violence is

209. *Id.*

210. *Id.*

211. Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. ON DISP. RESOL. 871, 871–72 (2007).

212. *Id.* at 873–74.

213. Blankenship, *supra* note 198, at 33.

to be accepted. What is interesting is that the same characteristic of the process—its hybrid nature which combines mediation and arbitration—serves both the proponents and the opponents of the process. While this hybrid nature is presented by the proponents as the central advantage of the process, the critics of med-arb assert that by combining mediation with arbitration into one process, the relative advantages of each of these processes alone is lost. The critics assert that this combination creates both practical and ethical problems, as detailed below.

(a) Efficiency and Finality of the Proceedings as Opposed to Impairment of Neutrality

Efficiency is perceived as one of the obvious advantages of med-arb. The dual role of the mediator-arbitrator makes the process more efficient than separate mediation and arbitration processes since the single mediator-arbitrator does not have to begin from the starting point and the same issues do not have to be raised again.[214] Unlike mediation alone, in med-arb, the mediator-arbitrator can use his understandings of the relationship between the parties and their interests that he acquired during the mediation process in reaching a suitable solution during arbitration. Moreover, the finality of the proceeding is one of the prominent advantages of the med-arb process. Unlike "pure" mediation, the med-arb process, like arbitration, ensures a final determination. The settlement agreement that the parties reach at the end of the mediation stage of the process is binding and can be legally enforced. The certain knowledge that the dispute will end constitutes an enormous advantage from the perspective of the parties and in terms of the process.[215]

However, just as it contributes to efficiency, the duality of the role of the mediator-arbitrator also leads to criticism regarding the potential impairment of his neutrality. In pure mediation, confidentiality is one of the basic principles of the process. There are legislative enactments that regulate the behavior of the mediators and even impose serious restrictions on the use that may be made of information disclosed during the process.[216] In the arbitration proceeding, the arbitrator must base his award solely upon facts that are considered relevant to his award. By contrast, in med-arb, the

214. De Vera, *supra* note 207, at 156.

215. Blankenship, *supra* note 198, at 34–35.

216. De Vera, *supra* note 207, at 157–58.

mediator-arbitrator is exposed to a variety of information during the mediation stage. This includes confidential information pertaining not just to the case but also regarding the parties' interests, that is not disclosed in the course of ordinary arbitration, such as intimate, emotional or personal information, which is not relevant in the strictly legal sense,[217] as well as privileged information provided to the mediator-arbitrator, without the presence of the other party, in the caucuses that take place during the mediation stage.[218] While this does not create a problem for the mediator in a pure mediation proceeding, which does not end with an award by the mediator, in med-arb the exposure to this kind of information is likely to sway the mediator-arbitrator in favor of one party and to adversely affect the results of the proceeding[219] since it is not realistic to expect him to block out (consciously or sub-consciously) all critical information provided during the mediation stage. The concern is therefore that the mediator-arbitrator will be unable to remain neutral when he must render his award during the arbitration stage insofar as he has information from the earlier mediation stage, which would never have been disclosed in a pure arbitration proceeding. The response of the proponents of med-arb is that such information is likely to influence only a mediator-arbitrator who is, in any event, weak, i.e., who is not sufficiently skilled, professional or experienced. Confidential information disclosed in the course of the mediation is not more dangerous in arbitration than in a situation in which a judge or arbitrator (in arbitration that is not part of med-arb) must ignore evidence that they heard but later determined was inadmissible.[220] Additionally, it is possible to leave freedom of choice in the hands of the parties and their attorneys. They will choose a mediator-arbitrator whom they trust and consider to be professional, skilled and experienced at exercising his authority appropriately (and who will not abuse it).

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217. *Id.*

218. Blankenship, *supra* note 198, at 35.

219. Moreover, the other party does not know what was said in the caucuses, and therefore he is unable to refute the information during the arbitration phase. This is considered to be a serious breach in terms of justice and the fairness of the process. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAWYER 71, 71 (2009).

220. *See* Vorys, *supra* note 212, at 895–96 (presuming that a judge or arbitrator has the ability to ignore inadmissible evidence and to give it no weight in their final decision); Blankenship, *supra* note 198, at 35-36. Although it is possible to argue with this presumption, both intuitively and empirically (see the studies of Jerome Frank: Jerome Frank, *The Judging Process and the Judge's Personality, in* Law and The Modern Mind 100–18 (1930); JEROME FRANK, Court On Trial-Myth and Reality in American Justice (Princeton, 1949)), still, the proponents of med-arb argue that it is not appropriate to demand (or expect) more from a mediator–arbitrator than what is demanded from a judge.

Moreover, one must remember that the parties are entitled to fashion the proceeding as they see fit, and they have the means to use protective measures or various models of med-arb in order to deal with the issue of confidentiality. The parties may choose the model of med-arb according to which a different person serves in each role of mediator and arbitrator. Proponents of med-arb assert that the model of "same-neutral med-arb" (using the same person as mediator and arbitrator) is not mandatory. There is no necessity that the mediator also serve as the arbitrator in the case. The parties may decide on a different model of med-arb, such as "opt-out med-arb," in which, at the conclusion of the mediation stage and prior to the beginning of the arbitration stage, each of the parties is entitled to request that someone else be appointed as arbitrator. In this manner, many of the concerns and ethical dilemmas regarding the issue of neutrality of the mediator-arbitrator are likely to be resolved.[221]

(b) Flexibility of the Process as Opposed to Impairment of its Fairness

The flexibility of the process is one of its most significant advantages, and there are those who believe that med-arb is the most flexible of all of the existing ADR processes.[222] The med-arb process is considered flexible since it enables the transition from mediation to arbitration, a return to mediation and again going on to arbitration. Even at the arbitration stage the arbitrator can go back to his role as a mediator in order to deal with specific issues. All of this is according to the med-arb model that the parties choose at the outset of the process.[223] The combination of arbitration and mediation

221. However, there is other criticism of this differential model. The argument is that where the mediator and the arbitrator are not the same person, this will adversely affect the two phases, both in terms of the parties' conduct and that of the mediator. The assertion is that in this model the parties were more hostile and suggested fewer new alternatives for dealing with dispute and even the mediator was less active and less involved. *See* Vorys, *supra* note 211 at 894-895.

222. Gerald F. Phillips, *Same-Neutral Med-Arb: What Does The Future Hold?* 60(2) DISP. RESOL. J. 24, 29 (2005). Clearly, a model similar to this one is likely to make the med-arb process more expensive.

223. Blankenship, *supra* note 198, at 33. The frequency of these transitions and their timing is also a function of the parties' choice. There are various options, as Blankenship notes: "This is an interesting process in which there is an opportunity to conduct a separate mediation during an ongoing arbitration. It is possible for the mediation to occur at any time during the arbitration, i.e., between the hearings, and on more than one occasion. The ability to mediate at different times, on more than one occasion or not at all, makes this med-arb format extremely flexible and creative, especially, if the same neutral is used throughout, though the parties are obviously free to use a separate neutral to mediate by having a mediator "on call," so to speak." *Id*. at 32.

enables the parties to fashion a process that is custom-made for the circumstances of the dispute between them and to choose a suitable neutral mediator-arbitrator as they desire. In addition, the flexibility of this process can also be seen in the broad spectrum of solutions that it provides to the parties, insofar as it is an outgrowth, to begin with, of mediation. This spectrum is broader than what is likely to be available in a regular arbitration process on its own.[224]

It is precisely in this context that one of the criticisms voiced in the scholarly literature asserts that there is a potential for impairing the integrity of the process, because in arbitration the arbitrator is supposed to make his determination solely on the basis of the evidence presented in the hearings at which both sides were present. In this manner, each party can object to the evidence submitted by the other party. Critics of med-arb believe that the very existence of such a possibility is inconsistent with one of the basic requirements of a fair process.[225] When the mediator-arbitrator considers this information in the context of his award in the arbitration proceeding, it is as if he is allowing false testimony to influence his award. In other words, the rules of admissibility and procedural defenses available to the parties in proceedings based upon a judgment (such as a judicial proceeding or even the partial defenses that the parties are likely to adopt in an arbitration proceeding in spite of the basic exemption from both the substantive and procedural law in the arbitration proceeding) are not available to them due to the unique character of the med-arb proceeding. In response, the proponents of med-arb assert that the concerns regarding the inherent harm to the propriety of the med-arb process are exaggerated, if not utterly baseless. While it is true that the normal procedural defenses are not available to the parties, they are replaced by other defenses such as: the full disclosure to the parties at the outset of the proceeding regarding the nature of the proceeding (including its weak points) and the role of the mediator-arbitrator; informed consent or waiver; correct fashioning of the proceeding in order for it to accommodate the choices of the parties and the particular circumstances; and, their and their attorneys' choice of a neutral mediator-arbitrator, who is

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In addition to the option of a transition in med-arb from arbitration back to mediation **at any time during the arbitration,** there are scholars who do not rule out the option of going back to mediation even at the stage of rendering the arbitration award! Gerald Phillips, who serves as a mediator-arbitrator in Los Angeles, demonstrates a case in which after he had not succeeded in mediating a dispute until its conclusion, the arbitration phase began, and after he had made the arbitration award regarding the granting of a permanent injunction to the plaintiff, he went back again and assisted the parties as a mediator regarding the terms of the order. The parties were extremely satisfied with the outcome. *Id.*

224. Phillips, *supra* note 223, at 25.

225. Blankenship, *supra* note 198, at 36.

trustworthy and skilled.[226] According to the proponents of the process, even if the propriety of the proceeding is not necessarily completely protected, it is still sufficient in order to substantially limit the danger as well as to actualize the right of the parties to self-definition and to choose a proceeding whose advantages far outweigh its alleged dangers.

(c) Incentive for Settlement as Opposed to Coercion

Studies show a further advantage of the med-arb process is that it provides an incentive for the parties to reach a settlement agreement.[227] There are proponents who believe that the authority of the mediator-arbitrator in effect reduces the risk that issues will remain unresolved after the stage of mediation, when he will have to render an arbitration judgment. In other words, the presence of the mediator-arbitrator and the threat of an arbitration judgment create a tremendous incentive for the parties to resolve their difficulties in mediation.[228] A further positive influence of med-arb is the conduct of the parties during the phase of mediation. Aside from the incentive to reach a settlement agreement, med-arb also provides an incentive to behave honestly and fairly during the stage of mediation, knowing that if they fail to reach a settlement agreement they will forfeit their control of the outcome.[229] There are even those who assert that using direct "force" serves as an incentive for the parties to relate with greater seriousness to the mediation stage and to cooperate in the hope that they can impress the mediator-arbitrator.[230]

However, and precisely on this point, criticism is raised with respect to the coercive aspect of the process, which is the product of the "power" of the mediator-arbitrator. The assertion is that the authority accorded to the same person who is trying to mediate between the parties to render a coerced judgment, as well his ability to threaten terminating the mediation process at any time (e.g., if the parties are not making progress and in order to move onto the arbitration phase), grants him a great deal of power. The critics assert that this combination is likely to result in the mediator-arbitrator forcing his opinion on the parties, and that the end result of the mediation

226. Regarding informed consent see *infra* notes 241–43 and accompanying text.

227. Blankenship, *supra* note 198, at 34.

228. *Id.*

229. *Id.*

230. Sherry Landry, *Med-Arb: Mediation with a Bite and an Effective ADR Model*, DEF. COUNS. J. 263, 266 (1996).

phase is likely to be a forced settlement agreement, thereby compromising the volitional nature of the process and the parties' participation and genuine satisfaction.[231] The assertion is that the component of coercion in the med-arb process is an inherent flaw in the process, and that the agreements that the parties arrive at during the mediation phase are the product of pressure applied by the mediator-arbitrator and therefore they cannot be volitional.[232] According to one response voiced against this alleged disadvantage, empirical studies of the med-arb process have demonstrated that most of the mediators-arbitrators who were observed were not especially directive during the mediation phase. They concentrated their pressure tactics at the end of the sessions, more as a last ditch effort to rescue a failed mediation than as a policy of aggressive facilitation.[233]

Another response to the allegation of coercion is that a certain degree of coercion in the med-arb process is not necessarily undesirable. Quite the opposite, it can even be beneficial as long as the participation in med-arb is not coerced.[234] In other words, as long as the parties understand the med-arb process and are aware of its characteristics, and as long as they choose volitionally to give the mediator-arbitrator the authority attributed to his position, the potential disadvantages of the process are likely to disappear, and they are even likely to become advantages. There are those who assert that the "muscle" that the mediator-arbitrator has is likely to encourage more effective and productive mediation precisely because the parties are aware of his authority and of the possibility that he will use his authority if they do not themselves arrive at a solution of the conflict.[235] In other words, their knowledge regarding the mediator-arbitrator's muscle is likely to positively influence their productivity during the mediation phase of the process. It is precisely in divorce cases involving violence that the correctness of this assertion stands out, as shall be discussed below.[236]

(d) Conduct of the Parties to the Proceeding

Another contention against med-arb relates to the conduct of the parties. The critics assert that during mediation the parties will be afraid to disclose

231. Bartel, *supra* note 202, at 679.

232. Blankenship, *supra* note 198, at 36.

233. Vorys, *supra* note 212, at 895.

234. Blankenship, *supra* note 198, at 36. *See* Bartel, *supra* note 202, at 681–82.

235. Vorys, *supra* note 212, at 895. *See also* Blankenship, *supra* note 198, at 36 (describing that some degree of pressure is productive and can become advantages, as long as the parties understand the process and its characteristics and choose of their own free will to give the mediator–arbitrator the authority and power included in this role).

236. *See infra* notes 251–52 and accompanying text.

information that they would disclose in a pure mediation proceeding, because of the arbitration proceeding looming in the future. They assume that unlike mediation, which requires openness and sincerity, the arbitration proceeding requires parties to act in a calculated manner. Unlike the mediator, who builds the process in reliance upon the openness of the parties, their true intentions, their interests, their preferences, and their business background, the arbitrator is supposed to render a judgment between them. Because the parties are aware of the judicial power of the mediator-arbitrator, and out of their fear lest at the stage of the ruling he uses the information that they disclosed during the mediation stage against them, they will refrain from fully cooperating during the mediation stage.[237] Countering this contention, the proponents of med-arb assert that there is no empirical basis for this concern, and that quite the opposite, there are empirical studies that point to the openness of the parties in the med-arb proceeding.[238] Other criticism relating to the parties' conduct in the med-arb proceeding, concerns the manipulative behavior of the parties. The assertion is that if one of the parties wishes to end the mediation phase and to go on to the arbitration phase, he is likely to force this on the other party through his lack of cooperation in carrying out the negotiations during the mediation phase. Such manipulation can also be used in pure mediation in order to bring the proceeding to its conclusion, but the studies show that the risk that such manipulation will occur is greater in the med-arb proceeding.[239] Proponents of med-arb respond by stating that the volitional nature of the proceeding demonstrates that the parties are familiar with the process, trust the mediator-arbitrator and intend to cooperate with him, and that they understand that a lack of integrity on their part or any other manipulative strategy is first and foremost harmful to themselves, insofar as these are strategies that harm the proceeding itself. If this answer is insufficient, and the concern regarding manipulation still exists, the parties are likely to include in the med-arb agreement a provision pursuant to which each party must disclose before the other party and before the mediator-arbitrator all relevant information and must refrain from strategies of disinformation.

One of the solutions scholars have proposed as a general solution to the criticism of the med-arb process and to address many of the disadvantages

237. Blankenship, *supra* note 198, at 36-–37.

238. *Id.* at 37. For a more expansive treatment see Neil B. McGillicuddy et al., *Third-Party Intervention: A Field Experiment Comparing Three Different Models*, 53 J. PERSONALITY & SOC. PSYCHOL. 104, 110 (1987).

239. Blankenship, *supra* note 198, at 37.

attributed to it is prior to starting the proceeding, the parties sign an informative document regarding the risks and ethical dilemmas involved in such a hybrid process. In California, the ADR Practice Guide includes an informative document of this nature. The parties who sign it prior to beginning the med-arb declare that it has been brought to their attention that the mediator-arbitrator may be influenced by the confidential information brought before him during the mediation phase and that: "The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side."[240]

Similarly, in this document, the parties undertake not to sue the mediator-arbitrator or to attack the results of the med-arb on the basis of these risks. My proposal is, therefore, that the parties sign a med-arb document that will attest to their informed consent to the process and to the mediator-arbitrator's consent to serve at the outset as a mediator, and to act according to the principles of med-arb detailed above and set forth in such a document. The importance of this document is in its assurance that if the parties are interested in the med-arb process, it is only after all of the risks and ethical dilemmas that may arise during this hybrid process were brought to their knowledge and understood prior to giving their informed consent to them.[241] The document is also important because it affords protection to the mediator-arbitrator due to the parties' waiver of the right to file an action against the mediator-arbitrator, and limits the mediator-arbitrator's liability to instances in which he has breached his duty to act with neutrality and in good faith. The parties similarly waive the right to challenge the results of the med-arb—both the mediation settlement agreement and the arbitration agreement—as part of strengthening the objective of finality of the process.

The proposed med-arb document[242] (which can be conditioned upon, changed and fashioned according to the needs of the parties in any given case) should include the following basic elements:

> (1) The consent of the parties to use the med-arb process and the services of the mediator-arbitrator (specified by name), who they chose to resolve the dispute between them.
> (2) Definition of the role of the mediator-arbitrator as a mediator in the first phase of the proceeding, who will assist the parties in arriving at a mediation settlement to resolve the dispute between them, without his having the authority, during the mediation phase, to

240. Phillips, *supra* note 223, at 27.

241. For a similar idea regarding the adoption of "informed consent" with respect to the mediation process see Orna Deutch, *'Informed Consent' in Mediation*, 3(1) SHA'AREI MISHPAT 47, 57–59 (2002).

242. For a similar model see Phillips, *supra* note 223, at 31.

render any binding determination or decision whatsoever regarding the subjects of the dispute between the parties.
(3) A declaration from the mediator-arbitrator regarding his commitment to act in good faith and to be neutral, independent of any of the parties and without any personal interest in the dispute.
(4) A clarification that the mediator-arbitrator is a neutral third party and is not the attorney of either of the parties, alongside his commitment not to render professional services or legal counsel to any of the parties in any matter related to the dispute that is the subject of the med-arb.
(5) A clarification that any matter in dispute between the parties and that is not resolved in the mediation settlement will be transferred to the mediator-arbitrator (whose name was specified at the beginning of the document) and that his decision shall be binding and enforceable.
(6) The mediator-arbitrator is exempt from liability for any act of commission or omission relating to the med-arb proceeding or stemming from it, with the exception of his duty to act in good faith.
(7) A declaration of the parties that they will not raise any assertion or claim against the results of the med-arb (the mediation settlement and the arbitration award) or the mediator-arbitrator pertaining to the fact that the mediator also served as the arbitrator (in proceedings in which this is indeed the case).
(8) A declaration of the parties that the mediator-arbitrator informed them of the disadvantages of the process including the risk that the mediator-arbitrator (where this is the same person) in rendering his arbitration award may be influenced (consciously or sub-consciously) by confidential information that he received during the mediation phase, including the caucuses as well as the possibility that the arbitration award will be influenced by information that the parties (or one of them) disclosed to the mediator-arbitrator during the mediation phase and that they would not have disclosed to an arbitrator in a pure arbitration proceeding.
(9) A declaration by the parties that they are represented by their attorneys and that they are free to consult with them at any point in the proceedings, and that the mediator-arbitrator informed them that they are entitled to choose two different people to serve as mediator and arbitrator if there are issues that have not been resolved in the mediation settlement at the conclusion of the mediation phase.

To conclude this section, all of the disadvantages of med-arb are connected to one another and they all stem from the same root: the same neutral figure removes his mediator hat upon conclusion of the mediation phase and puts on the hat of an arbitrator. According to the proponents of med-arb, the solution to concerns and ethical dilemmas arising from this situation is not to reject med-arb entirely as a process, but rather to make intelligent use of the flexibility and possibility for modifications accorded to the parties and their attorneys. In other words, the underlying assumption is that the parties need to be free to fashion the proceeding in a manner that will meet their specific needs, and that their right to self-definition takes

precedence over rigid procedures and formats. The med-arb proceeding, according to its proponents,[243] encourages creativity and it is designed to be attentive to the needs of those availing themselves of it. If the parties (with the assistance of their attorneys) fashion the proceeding in a creative manner, they are likely to discover that it is flexible, rich with opportunities, and suitable for use in spite of their initial concerns. For example, there can be various models for the med-arb process,[244] such as the opt-out med-arb discussed above, which provides an answer to much of the criticism voiced against med-arb.[245] Professional and experienced mediators-arbitrators provide additional protection to the parties by assisting the parties in choosing a model of med-arb that will neutralize most of the risks for them and alleviate their concerns. Similarly, it is possible to set forth in the preliminary med-arb agreement between the parties various conditions that will alleviate the specific concerns of the parties in a given case. Further, proponents argue that prior informed consent of the parties to the proceeding (especially its results), which makes clear the risks and the roles of all of those involved, is an answer that serves to overcome the various disadvantages attributed to it and to provide appropriate protection to the parties.

Brewer and Lawrence summarize this issue: "In our view, when consenting adults make such judgments with an informed understanding of the advantages and the possible disadvantages of the medarb process, they should be free to contract for the dispute resolution process that seems best to them."[246]

C. The Potential Contribution of Med-Arb to the Issue of Divorce Mediation in the Presence of Domestic Violence

(a) Med-arb as a Real Remedy: Addressing the Practical Problem

The mediation process, as stated above, in dealing with divorce cases in the presence of violence presents (or is likely to present) various disadvantages, which, in many cases cannot be completely resolved, even

243. Blankenship, *supra* note 198, at 40.

244. For various models of med-arb see *id.* at 30–32.

245. Like the assertion regarding coercion or the use of excessive force by the mediator, or the lack of neutrality on his part, or the apprehension of the parties about demonstrating openness and cooperation during the stage of mediation, because of the knowledge that the same neutral person will also serve as the arbitrator at the conclusion of the mediation phase. *See supra* note 222 and accompanying text.

246. Thomas J. Brewer & Lawrence R. Mills, *Combining Mediation and Arbitration*, 54(4) DISP. RESOL. J. 32, 36 (1999).

through the spectrum of solutions offered by its proponents, as we termed this above, "the practical problems."[247] In many cases, med-arb is likely to address these advantages, as detailed below:

> (1) Solutions such as screening disputes, ensuring the mediator's skill, caucusing, and expanding a new definition of the mediator's "duty of neutrality," etc. were proposed to address the failure of "disparity of power between the parties."[248] With respect to "the fairness of the mediation settlement,"[249] solutions are limited and questionable.[250]
>
> It seems that med-arb is likely to provide a better solution. Firstly, the mediator's duty of neutrality in the classic mediation proceeding (which the opponents of mediation fear will be breached if the mediator intervenes on behalf of the victim) no longer constitutes a problem in the case of med-arb. The mediator-arbitrator is likely to terminate the mediation phase of the proceeding when he feels parties are arriving at a settlement that is unfair to the victim or are making decisions that do not reflect an appropriate balance of power between the parties. During the arbitration phase, the arbitrator relies upon his discretion to render the award only as for those matters, which include the balance of power that is appropriate in his opinion. In this manner, med-arb achieves both goals: it preserves neutrality during the mediation phase, and it preserves the fairness of the settlement and the victim's rights during the arbitration phase. In fact, what is presented in general med-arb literature as a disadvantage of the process—"a mediator with muscle"[251]—is not such a great disadvantage (if at all) regarding med-arb in divorce cases involving violence. In this type of case, a certain element of coercion in the process is not necessarily negative and can even be advantageous (in comparison to classic mediation).
>
> Secondly, even though it is not always possible to completely remove the imbalance of power between the parties, the mediator-arbitrator's options to intervene and render an award is likely to prevent the degree of power from being the dominant factor influencing the final results.[252] The very knowledge that the proceeding grants the victim an option for third-party intervention to render a determination gives the victim a power, which she does not have in the classic mediation proceeding. In other words, the weak party has an additional option to settle in med-arb. In this manner, med-arb contributes to resolving the problem of the disparity of power between the parties that exists in classic mediation.
>
> (2) The fact that the mediator-arbitrator is a mediator with muscle, as stated in the previous paragraph,[253] is likely to be an advantage in divorce cases involving violence with respect to another problem attributed to mediation—the component of danger.[254] This problem, as stated, cannot be completely eradicated, in spite of the attempts to do so

247. *See supra* (a) Practical Problems.

248. *See supra* ii. The mediator's skills.

249. Landrum, *supra* note 10, at 443 ("Victims' advocates and feminist scholars have also expressed concerns that a history of domestic violence can so taint a mediation session that any agreement arrived at is likely to be unfair to the victim.").

250. *See supra* (a) Practical Problems.

251. *See supra* notes 199–200 and accompanying text.

252. Vorys, *supra* note 212, at 882.

253. *See supra* note 236 and accompanying text.

254. *See supra* i. The Component of Danger.

> (such as the solution of ODR).[255] The mediator-arbitrator's muscle is likely to influence the violent party to restrain himself, because if he does not do so, there may no longer have control over the results once the mediation phase is abandoned for the arbitration phase, with the attendant binding award of the arbitrator. Med-arb is even likely to reduce the force of this problem when the victim asks to withdraw from the mediation proceeding after it has already begun. In the classic mediation proceeding, such a situation is likely to increase the danger awaiting the victim, both because of her refusal to continue the dialogue in the mediation setting, and because in most cases, the handling of the case is transferred to the court for a judicial proceeding. As stated above, some assert that it is precisely the judicial proceeding that escalates the conflict between the parties and in effect, increases the danger awaiting the wife from her violent husband.[256] In the med-arb proceeding, even where the mediation phase ends, the proceeding itself is not terminated and certainly **is not transferred to** the court; rather, the parties continue to the arbitration phase. Thus, the problem of the danger component is weakened.
>
> (3) An additional problem is the preservation of the power paradigm.[257] Some argue that mediation, being a volitional process throughout, is likely to contribute to preserving the mold of the abuser-victim relationship because it provides a platform for the aggressive party. Med-arb is not a volitional process all the way through, but rather, includes the coercive arbitration phase where needed, resolving this problem by definition.
>
> (4) The common denominator of additional problems existing in classic mediation—cheapening and distorting the phenomenon of domestic violence, as well as the feminist argument, as set forth above[258]—is the wrong message of tolerance that society supposedly transmits by allowing divorce cases involving domestic violence to be handled in a mediation process. As one of the scholars stated, this sends a message to the specific parties and to the general public that domestic violence is acceptable, and that it is the fault of both of the parties,[259] or it is simply a private matter between a man and his wife within the privacy of their own home.

Med-arb constitutes a balancing solution that is beneficial all around. It transmits a strong and uncompromising message in the form of the arbitrator's decision rendered by a third party, instead of the tolerant message that classic mediation transmits. It also contributes to the empowerment of the victim during the mediation phase and assists her "to have more of a voice in what happens to her future."[260] This addresses the feminist argument of the opponents of mediation with its own feminist argument.

However, this is not sufficient. In this article I argue that beyond dealing with the disadvantages of mediation, med-arb has distinct advantages of its own that have added value precisely in divorce cases involving domestic violence, as detailed below:

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255. *See supra* notes 186–88 and accompanying text.
256. *See supra* notes 122–25 and accompanying text.
257. *See supra* notes 102–04 and accompanying text.
258. *See supra* notes 105–07, 111–16 and accompanying text.
259. Landrum, *supra* note 10, at 445.
260. *Id.*

> (1) The first advantage is the finality of the proceeding.[261] This advantage of med-arb is of paramount importance especially in divorce cases involving violence—where one party, the victim, has an urgent need to dissolve the bond, whereas the other party, due to his desire to continue to control, is not necessarily interested in doing so. The fact that at the conclusion of the proceeding the connection between the parties will be terminated at the conclusion of the proceeding, whether through a mediation settlement or an arbitration decision, gives the victim a distinct advantage that classic mediation cannot promise her. If the classic mediation proceeding fails and does not end in a settlement, this forces the victim to go to the court in order to dissolve the bond, requiring her to start everything from the beginning.
> (2) The advantage of efficiency in med-arb,[262] expressed in findings in the field as well, is that it saves time and money as compared to independent and separate mediation and arbitration proceedings because the same person serves as mediator and as arbitrator, and due to the continuity between the two proceedings. Med-arb results in relatively quick results and the price that the parties are required to pay is fair.[263] The economic advantage for the victim in divorce cases is important because, in many cases, she was subject to financial abuse in addition to the physical or psychological abuse. Additionally, the speed with which the bond is dissolved is likely to have practical implications in terms of limiting the element of danger to the victim. This advantage is certainly significant for the victim of domestic violence seeking divorce.
> (3) A further advantage of the med-arb process is the flexibility of the process that enables a transition from mediation to arbitration, back to mediation, and so forth.[264] This advantage is particularly valuable in divorce cases involving domestic violence because the terms of the mediation settlement are likely to change according to the shift in circumstances: unexpected behavior of the violent party, a varying level of violence, a varying balance of powers between the parties, the confidence that the victim is likely to acquire or lose in the course of the proceeding, etc. As one of the scholars points out: "As a couple moves through the mediation process or other legal proceedings, the situation could quickly change." [265]

Therefore, preserving flexibility is of the utmost importance. The possibility of a prior agreement, in which the mediator will be authorized to go from the mediation phase to the arbitration phase and back again, is a special advantage that does not exist in the normal mediation proceeding. In the scholarly literature of recent years, it is repeatedly expressed that there is no one correct solution for every divorce case involving violence, and that

261. *See supra* notes 215–16 and accompanying text.

262. *Id.*

263. David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, 34 ALTA L. REV. 163, 164 (1995).

264. *See supra* (b) Flexibility of the process as opposed to impairment of its fairness.

265. Landrum, *supra* note 10, at 440 ("As a couple moves through the mediation process or other legal proceedings, the situation could quickly change.").

each case must be considered on its merits.[266] It should be remembered that at times this is even true of the same couple over the course of time. It certainly may be that a case (or certain matters at issue) that began in mediation is no longer appropriate for this proceeding. The transition between mediation and arbitration and back again, which is possible in a med-arb proceeding, is, therefore, a significant advantage precisely for divorce cases involving violence.

(b) Exchanging the Safety Net—Addressing the Conceptual Problem

As presented in the previous chapter,[267] the conceptual problem in the existing situation rests upon two parts of the argument.

One part of the argument points to the need to look for a third solution in divorce cases involving violence, in view of the problems arising from making do with the two customary alternatives—the judicial process or mediation. The argument is that in view of the substantive disadvantages of both of these alternatives, a third, more appropriate, alternative is necessary**.**

The answer to this can be found in the med-arb process and adapting it to deal with divorce cases involving violence. In other words, med-arb is likely to provide a third, more appropriate solution. Firstly, it seems that for the most part the med-arb process constitutes a more appropriate solution than the judicial process. As the advanced scholarly literature demonstrates,[268] in a comparison between the judicial process and the mediation process for dealing with divorce cases involving violence, it seems that the general balance tips towards the latter. Moreover, studies show that the rate of success of mediation in divorce cases involving violence is quite similar to the rate of success of mediation in other kinds of cases.[269] The data demonstrates a rate of success in dispute resolution that varies from 51% to 76%. Additionally, couples in both violent and nonviolent relationships report satisfaction from the mediation process, the settlement agreement that was reached, and the level at which agreements

266. Ver Steegh, *supra* note 5, at 147, 159–204; *see* Elayne E. Greenberg, *The Defining Ingredient : Transformative Mediation Ideology in Parenting Coordination Practice*, 271 (2011), available at: http://ssrn.com/abstract=1825435; *see also* Rogers, *supra* note 36, at 349 ("Recently, feminist writers have recognized the need to respond to gendered violence 'by providing multiple options for survivors [of sexual violence], rather than one single cookie-cutter response.'")

267. *See supra* notes 192–93 and accompanying text.

268. *See also infra* note 275 and accompanying text.

269. Ver Steegh, *supra* note 5, at 190.

were carried out.[270] Therefore, med-arb, which starts out as mediation, is certainly preferable to the judicial process.

In addition, in view of what is stated in section (a) of this chapter,[271] the med-arb process is certainly preferable to mediation because it addresses many of the disadvantages of the latter,[272] and offers distinct advantages especially in divorce cases involving violence, as stated above.[273]

The second part of the argument points to the problem inherent in viewing the judicial process as the "safety net" of the mediation process (when the inherent disadvantages of the mediation process that cannot be completely resolved, arise). In order to resolve one problem, another one has been created. In other words, mediation was initially proposed as an alternative to the judicial process in divorce cases involving violence, due to the limitations of the latter. How, therefore, can returning to the judicial process be presented as a remedy for the disadvantages of mediation? Is it appropriate for a limited process that was abandoned (at least partially) in favor of an alternative, to be used to correct the disadvantages of that same alternative?

The response to the first part of this argument can also be found in med-arb. Med-arb substitutes arbitration for the safety net of the judicial process offered in mediation**.** In med-arb, if the mediation phase fails, the parties automatically go on to the arbitration phase, which is structured within the process, and do not avail themselves of the judicial process. The victim knows in advance that even if the mediation does not succeed, then arbitration will serve as her safety net and she will not be forced to pay the price of returning to the judicial process (as a safety net). Such knowledge is likely to encourage her to try the mediation process without fear of the risk of failure, or the further risk accompanying such failure—the return to the judicial process.

Further, the importance of the safety net for the victim in the case of total or partial failure of the mediation cannot be overemphasized; to the safety net increases the spectrum of cases in which victims find the strength to turn to this process as the most appropriate means to dissolve their connection to their abusers. As the scholarly discourse instructs, there is a

270. *Id.* In one study, 80% reported satisfaction from the process. *Id*. Other studies found that women tended to have a greater level of satisfaction, and that couples felt that communications between them had improved. *Id*.

271. *See supra* (a) Med-Arb as a Real Remedy: Addressing the "Practical Problem."

272. *See supra* notes 248–61 and accompanying text.

273. *See supra* notes 262–67 and accompanying text.

preference for mediation when handling divorce cases with violence. As Greenberg notes,

> Critics of alternative dispute resolution, recounting horrors resulting from poorly trained neutrals, forced cooperation when it was unsafe to do so, and invalidation of the abuse experienced, have argued that alternative dispute resolution forums are dangerous options. And yes, just like in court, serious mistakes have been made. However, the concerns have been heeded, lessons have been learned, and modifications have been made to provide a safer, more responsive process.[274]

Therefore, good security net (in the form of the arbitration proceeding that comes at the end of the med-arb process) will be accorded to more victims if they have the courage to choose the more appropriate process—mediation—over the alternative—the judicial proceeding.

Moreover, instead of referring parties to the judicial process from the outset or as a result of the failure of the mediation, this article proposes the option of remaining entirely within the sphere of ADR by choosing med-arb. The med-arb process is composed both of mediation and arbitration, both of which are defined as types of ADR. As scholars note: "Empowerment and self-determination, hallmarks of alternative dispute resolution, are an appealing option for those who prefer to rely on their own decision-making capacities, in lieu of those of a judge."[275]

It would be impossible to exaggerate the importance of empowerment and the return of control over the process and over her life in general for victims of domestic violence.[276] The med-arb proceeding, therefore, opens the possibility of being totally removed from the judicial process and remaining within ADR**!** Even if the mediation phase fails, the victim will still remain within the field of ADR, under the umbrella of the arbitration process. Moreover, many victims do not wish to press criminal charges against their attackers due to concerns about privacy and the impact such a step will have on their family.[277] Victims of domestic violence might consider the med-arb process a way to address the problem without exposing themselves and their family to the polarizing dynamic inherent in the judicial process.

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274. Greenberg, *supra* note 13, at 617. In continuation of this line of argument, there are those who assert that advanced writing and thinking on the subject of divorce cases involving violence does not totally rule out the general mediation process for handling such cases, rather the opposite, they try to upgrade it, to improve it and to propose a number of options to the judicial process for handling such cases—"parent education," "parenting coordination," and upgraded mediation are several examples of such options. *Id*. This article seeks, therefore, to propose an additional option—med-arb.

275. *Id. See also* Jeske, *supra* note 1, at 703 ("Mediation is often cited as a means for parties to maintain a degree of control over outcomes of their dispute, as opposed to litigation.").

276. Greenberg, *supra* note 13, at 617.

277. *See supra* note 36 and accompanying text.

To summarize this point, med-arb offers a significant advantage by replacing the victim's safety net in those cases in which the mediation was unsuccessful. Instead of resorting to the judicial process in such cases, the victim has another avenue of protection—arbitration. In this manner med-arb addresses the conceptual problem, as presented in the previous chapter.[278]

CHAPTER SIX: RECOMMENDATIONS

This article proposes adopting med-arb as an additional tool for dealing with divorce cases involving violence. The recommendation is to apply med-arb only to those cases where there is informed consent of the victim to adopt it,[279] and only for those cases where a mediation proceeding is suitable (i.e., to the exclusion of cases of extreme violence).

Moreover, our proposal is to adopt med-arb as an addition to mechanisms (derived both from the academic discourse and from actual practice) that were developed and adopted in recent years in order to improve the mediation process and its results. These mechanisms—screening, training of mediators, adding security measures, caucusing frequently, integrating professionals into the process, etc.—have been found, despite their importance, to be insufficient in many cases, not to say disappointing. This article seeks, therefore, to add med-arb to the existing mechanisms.

We also propose on-going and empirical follow-up of the conduct, as well as the results of the med-arb proceeding in divorce cases involving violence. The idea is to try to examine the degree of efficiency of the process as well as its efficacy in such cases, through questionnaires and surveys of the parties who participated in med-arb proceedings.[280] The questions must be addressed to both parties as well as to the mediator-arbitrator, and they should include questions pertaining to the parties' level of satisfaction from the proceeding, its fairness, and the fairness of the result as they perceive it. The survey should include questions about the short and long term implications and the results of the med-arb (such as post med-arb violence or threats of violence), the victim's sense of security in the course of the med-arb proceeding, the transitions between the mediation and the

278. *See supra* (b) Conceptual problems.

279. *See supra* notes 236–42 and accompanying text.

280. *See* Landrum, *supra* note 10, at 468–69. My proposal is based upon a similar proposal to adopt such surveys in the mediation process.

arbitration phases of the process, the autonomy of the parties during these phases, regarding the degree of parties' cooperation, the degree to which the mediator-arbitrator conveyed neutrality, the degree of effectiveness of the results (the mediation settlement together with the arbitration decision), the procedures or mechanisms that should have been used in the process and were not, etc.

The promise that med-arb holds for divorce cases involving violence must be put to the test in the field. Naturally, the med-arb process not only offers the advantages of mediation and arbitration, but also brings with it the disadvantages of each. Nevertheless, the holistic approach has already instructed us that the whole is always greater than the sum of its parts.

CHAPTER 7: CONCLUSION

So, why should we be writing about domestic violence again?

We should write about domestic violence because of its growing phenomenon and seriousness, and in the name of truth, which requires us to state that the judicial process, in most cases, is not equipped to provide a solution in such cases. Mediation, which serves as an alternative to litigation, does not constitute a perfect alternative; there are still substantial disadvantages, which cannot be completely corrected, despite the developing literature in the field, and significant efforts for improvement in the field.[281]

Therefore, this article proposes a third option—med-arb. Along with the presentation of the med-arb process, its development, its advantages, and its implementation, this article has also presented its disadvantages and possible ways of dealing with them. One of them is prior informed consent of the parties to the process and its results, which, even if it does not necessarily provide 100% assurance of the propriety of the process, it can still greatly reduce its dangers and actualize the parties' right to self-determination and the development of their personal autonomy through the choice of a flexible process fashioned to meet their needs, the advantages of which would seem to greatly outweigh its disadvantages. Some of the disadvantages of med-arb (such as the element of coercion) are not necessarily a disadvantage when dealing with divorce cases involving violence, whereas some of its advantages (particularly the potential for self-determination and empowerment) are likely to accord added value in such cases and to make a significant contribution for the victims. This article proposes to carry out on-going, empirical follow-up regarding the process in the field and its outcomes.

281. As surveyed in this article. *See supra* notes 168–91 and accompanying text.

The importance of the trend, coming both from the academic world and from the field, seems to find more humane and appropriate solutions for divorce cases involving violence and the experience of pain for the victims and their children as far as possible. This article seeks to be part of this positive trend.