



## Mediating Criminal Domestic Violence Cases: How Much Is Too Much Violence?

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### **Abstract**

A dispute settlement service in North Carolina was asked in 2002 by the jurisdiction in one county to mediate cases involving charges of “assault on a female” brought to the district criminal court. Research was undertaken to compare domestic violence re-offending outcomes two years after mediation with outcomes two years after a court appearance or a prison sentence. For defendants without previous criminal convictions, the re-offending rate was significantly lower for those who went to mediation than of those who went to trial. The study indicates that the question of how much violence is too much violence for consideration for mediation could be less important than the characteristics of the parties and whether the defendant has a previous criminal record.

The issue of how to deal effectively with cases of domestic violence is one of the most divisive in criminal justice. Even the definition of *domestic violence* and the use of the term vary among researchers and professional agencies. The U.S. Department of Justice definition (2009), for example, covers a wide range of behavior, much of which is not direct physical violence:

*Domestic violence* can be defined as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.

Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.

- *Physical abuse.* Hitting, slapping, shoving, grabbing, pinching, biting, hair-pulling, biting, etc. Physical abuse also includes denying a partner medical care or forcing alcohol and/or drug use.
- *Sexual abuse.* Coercing or attempting to coerce any sexual contact or behavior without consent. Sexual abuse includes, but is certainly not limited to, marital rape, attacks on sexual parts of the body, forcing sex after physical violence has occurred, or treating one in a sexually demeaning manner.
- *Emotional abuse.* Undermining an individual’s sense of self-worth and/or self-esteem. This may include, but is not limited to, constant criticism, diminishing one’s abilities, name-calling, or damaging one’s relationship with his or her children.
- *Economic abuse.* Making or attempting to make an individual financially dependent by maintaining total control over financial resources, withholding one’s access to money, or forbidding one’s attendance at school or employment.
- *Psychological abuse.* Causing fear by intimidation; threatening physical harm to self, partner, children, or

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partner's family or friends; destruction of pets and property; and forcing isolation from family, friends, or school and/or work.

In a report for the National Institute of Justice and the Centers for Disease Control and Prevention on the National Violence Against Women survey, Tjaden and Thoennes (2000) defined domestic violence in terms of actual physical violence. The incidence rate of domestic violence would, therefore, vary greatly depending on which definition was used.

As there are two main approaches to domestic violence, the issue of definition is very important. On one side are those who support the Duluth model, which stresses the use of the criminal courts to punish offenders. This is the only way to deal with such violence in a patriarchal society. Edwards and Haslett (2003) comment that:

[T]his sociopolitical or feminist perspective on domestic violence, as articulated by (among many others) Duluth's Domestic Abuse Intervention Project (DAIP), forms the core of our understanding of our work in this field.

This perspective views abusive actions as arising out of a set of beliefs that are informed by patriarchal values and traditions. Abuse is seen as a deliberate strategy to gain power and control in a relationship. Abusive actions, therefore, arise out of an abuser's choice, not out of an uncontrollable impulse. They are greatly concerned about the issue of secondary victimization by any processes that involve the use of restorative justice or mediation. (p. 4)

On the other side are those that consider that a range of options should be provided to take account of the wide variation and needs of victims. The proponents of this view believe that mediation and restorative justice methods can be used in appropriate circumstances to handle domestic abuse. Katherine van Wormer (2009) has put forward this case from a "standpoint feminist" perspective. She argues that:

[T]he present system involving mandatory arrests and prosecutions of perpetrators of domestic violence has brought about unintended consequences to the extent that many victims are reluctant to call the police. Victim choice has not been a part of this process. The widespread dissatisfaction with the current system of mandatory law enforcement opens the door to a consideration of alternative forms of dealing with domestic violence. Restorative justice strategies have several major advantages—they take wrongdoing and its resolution beyond victims and offenders into the community. (p. 114)

In an editorial comment on a symposium on domestic

violence held by the Division of Forensic Psychology of the British Psychological Society, the division's chair, Jane Ireland, (2007) stated that:

[T]he evidence for domestic violence being a gendered form of aggression where men are primarily the perpetrators with women primarily victims (who may display aggression in self-defense) simply does not hold up. The evidence for this was always weak and more, I would argue, a reflection by groups of researchers who defined domestic violence in gendered terms. (p. 12)

In her opinion, a clear bias had crept into the area of domestic violence research, both in the definition of domestic violence and in the publication of studies.

The Johnson Foundation at Wingspread, Wisconsin, held a conference in 2007 with invitees representing the National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts. The aim of the conference was to see what common ground there was between the two sides at the time and whether an agreed statement could be reached at the end of the conference.

In their report on the conference, Steegh and Dalton (2008) record that no agreed statement was reached but that some common ground was established. Participants generally recognized that not every case of domestic violence was male initiated and that the ultimate obligation of the court system was to address each case on its own merits.

### **Mediating Domestic Violence Cases in North Carolina**

Carolina Dispute Settlement Services (CDSS), a community mediation center serving three judicial districts comprising six counties, began routinely in 2002 to mediate criminal domestic violence cases in one of those districts. That same year, those cases constituted 50% of the CDSS's district court work for that particular judicial district. This was unusual in that many counties in North Carolina prohibited the mediation of domestic violence charges.

The CDSS was aware of the research and literature surrounding domestic violence (Edwards & Haslett, 2003; Fritzler & Simon, 2000; MacRae, 2003; Pranis, 2002; Presser & Gaarder, 2000; Sherman, 2000). Violence against women is pervasive in our society, and it cuts across cultural, racial, and occupational levels. It affects women of all ages and incomes. For some victims of domestic abuse, the violence is episodic and of low intensity; other victims experience severe and frequent abuse, whereas still others endure low-intensity violence with regularity. But the experience of the CDSS is that in some cases, which party gets labeled the victim is very much dependent on who gets to the magistrate's office first to file a charge or who has

physical injuries when the police arrive.

The manner in which a charge of “assault on a female” comes into district court is similar to any other criminal charge. If the police believe there is enough evidence, they may write a warrant themselves; alternatively, one or both of the parties can attempt to convince a magistrate that he/she has been a victim of a crime. Another factor that is often overlooked is which of the parties went to the magistrate or, if both parties went, who got there first.

The primary focus of the mediation is the criminal charge itself; dealing with the issues that may have precipitated or exacerbated the alleged violence (e.g., separation, divorce, or child custody) are secondary considerations. This does not mean that the act of violence itself is the subject of the mediation; rather, mediators focus their efforts on helping parties understand their behavior and what they can do differently in the future. The kinds of counseling or treatments that will need to take place to stop violent behaviors are put in place.

The issue of what level of violence to accept in a case was difficult to verbalize. Initially, the assigned cases from the district criminal court in North Carolina involved low levels of violence; it soon became apparent, however, that the referred cases had clearly increased in gravity. There was also the potential danger and the possible perception that mediation would be seen as a major backward step by victims and victim advocates in their efforts to get domestic violence cases treated seriously by the criminal justice system. The CDSS, therefore, made a thorough examination of what policies could be put into place to protect the parties, the integrity of the process, and the mediators themselves.

In his powerful book, *The Little Book of Restorative Justice*, Howard Zehr (2002) states that “domestic violence is probably the most problematic area of application, and here great caution is advised” (p. 11). The CDSS reviewed its processes to check that “great caution” was a key factor and to determine what procedures needed to be enhanced when criminal domestic violence cases were being mediated.

In criminal district court, there is the presumption of innocence until guilt is proven. The domestic violence cases that were mediated, however, were processed through careful screening procedures to ensure that the defendants were prepared to acknowledge responsibility not only for their behavior but also for the criminal charge itself. This admission of the event on the part of the defendant is the key to a successful session. It allows the case to take on characteristics similar to the victim-offender process using restorative justice.

As is the case with other mediated criminal cases, a successful mediation will result in the charges being dismissed.

The first step taken by the CDSS was to assess its mediators for their suitability to handle cases of “assault on a female” and to decide on the type of mediator training that

would be required. All staff (paid) mediators engaged in this kind of work had to have family mediation certification from either the North Carolina Dispute Resolution Commission or the National Association of Conflict Resolution as Advanced Family Practitioners. In addition, staff mediators had to complete a minimum 20-hour victim-offender mediation training course. Volunteer mediators were required to complete a minimum 20-hour mediation course, be under the direct supervision of a staff mediator, and co-mediate domestic violence cases with a staff mediator.

Of the staff and volunteer mediators assigned to domestic violence cases, some held advanced degrees in mental health service areas and some had specialized in work with sex and other violent offenders. A mandatory six-hour training in domestic violence was implemented for all staff and volunteers in order to be assigned to domestic violence cases. Speakers from the victim assistance coordinator’s office as well as a local domestic violence program and a shelter were brought in. Advanced mediator techniques, featuring methods for recognizing and dealing with power imbalances and the dynamics of control and coercion, were taught. The essential use of private caucuses was stressed both for screening cases and for negotiations in the sessions. Caucuses enable time out from the mediation process and for clarification to be given. The emphasis was on making sure that the violence itself was not the subject of the mediation, but rather that durable agreements would be built on (a) the recognition of the harm that had been caused, (b) the perpetrator accepting responsibility for violent actions, and (c) plans for altering harmful behavior in the future. Information and handouts on local support groups and treatment programs were also discussed.

The CDSS undertook a thorough examination of its screening procedures. In this particular district, the victim assistance coordinator was the first to review a case under consideration for mediation. Issues that affected the decision were as follows:

1. Was it a first offense?
2. Did the victim sustain physical injuries; if so, how serious?
3. Was a weapon used?
4. Were children present at the time of the incident?
5. What was the defendant’s attitude?
6. What did the victim desire?

If the victim assistance coordinator was satisfied that the case was appropriate for mediation, the recommendation went to the district attorney for approval. Next, it was decided that the mediators’ discretion would determine whether a case was acceptable, as the mediators would do for other types of cases. In the vein of Justice Potter Stewart (1964), who said, “I cannot distinctly define pornography but I know it when I see it,” trained mediators knew what

constituted too much violence when they saw it and would recommend against using mediation.

On the day of the hearing, the mediators would review the charges and meet with the complainant and the defendant separately, asking each party what they hoped to achieve in their mediation session. The mediators needed to be confident that both parties had a clear understanding of the benefits and limitations of mediation. The CDSS fully accepted the concern that the process of mediation itself could not provide a balance of power in a situation where one did not exist.

The mediators would repeat many of the same questions previously covered by the victim assistance coordinator to see if there was consistency in responses. The mediators endeavored to assess the level of power imbalance between the parties and the ability and willingness of the female victim to negotiate on her own behalf.

Actual safety and the sense of safety for the victim were critical factors. Complainants were asked if they wanted to be in the same room with defendants and were always given the option of having a support person or victim advocate in the session. Defendants were asked how they would feel about a complainant having a support person present in the session. The mediators took great care in observing the defendant's words, actions, and nonverbal cues in assessing their willingness to evaluate honestly their own behavior and take responsibility for their actions. The last threshold for the case to pass was again the mediator's discretion to decide whether it would be safe to proceed.

The logistics were reviewed: where would the mediation sessions take place, what security measures should be in place, and who should be present? All criminal charges handled by the CDSS are mediated in the local courthouse for the relevant district. All parties pass through the security checkpoint, which includes a metal detection device, on entry to the courthouse. Mediations were held in conference rooms adjacent to the courtroom so that bailiffs would be within shouting distance in case of problems. Typically, the mediation sessions took place at the same time the court was processing other cases, so both the judge and prosecutors were available and defense attorneys were generally accessible.

Complainants were offered the option of mediating face-to-face with defendants or using separate rooms with the mediators carrying information back and forth. The complainant and, if one was requested, her support person, would be offered the option of leaving several minutes before the defendant to eliminate any incidents of unwanted contact.

After reviewing all of the areas of concern, the CDSS proceeded with confidence that "great caution" had been exercised in the design of a process that prioritized safety. Questions such as which cases to take, how much was too much violence, and how many previous offenses were too

many had to be decided on a case-by-case basis. It was not always possible to think of everything. The CDSS later discovered that it was the rules protecting the integrity and confidentiality of the mediation sessions themselves that posed the greatest risk to the victims.

At the time, in the early 2000s, in the Standards of Professional Conduct for Family Mediators (standards to which all the CDSS mediators subscribed) confidentiality was nearly absolute. The only limitation was the statutory duty to report certain kinds of information in regard to abuse or neglect of children, the elderly, and the disabled.

So, for example, when a man made a serious and credible threat to kill his ex-wife in a caucus mediation session, the mediator was barred from disclosing the information to *anyone*—including the ex-wife and law enforcement. The mediator sensibly decided to breach the confidentiality of the session in order to give the ex-wife the information and resources she needed to be safe. This probably saved her life (she was relocated to a different state with a new identity). The state commission responsible for drafting and overseeing the standards of conduct in mediations immediately modified the standards to include a duty to disclose credible threats to persons and/or property.

In 2004, the CDSS received a request to study our criminal domestic violence mediation cases from Nicholas McGeorge, a British forensic psychologist and former principal prison psychologist. He represents the Quakers at the UN Commission on Crime Prevention and Criminal Justice and helped in the drafting of the *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*. When he is in the United States, he is a volunteer mediator with the CDSS district criminal court program.

The CDSS Board of Directors decided to proceed with the study because the organization felt assured of the integrity of the mediations and had confidence in the mediators. Earlier internal evaluations showed that mediators focused on addressing the needs of both victims and offenders, achieved individualized outcomes, and promoted the self-determination of the parties. The hypothesis was mediation of criminal domestic violence charges reduces the recidivism of offenders compared to cases decided by court adjudication two years after case disposition in a select judicial district of North Carolina.

## Method

### *Sample*

Court lists of charges were checked for charges of "assault on a female." Existing records held by the district court clerk and the CDSS were examined. All mediated cases and court cases were taken chronologically from January 1, 2002, until

Table 1

Comparison of Outcomes for All Defendants Undertaking Mediation and Their Previous Criminal Conviction Status (*N* = 100)

Criminal Status	Not Re-Charged	Re-Charged	Re-Charged (%)	Total
Previous Convictions	31	14	35	45
No Previous Convictions	53	2	4	55

Table 2

Outcomes and Co-Habitation Status for Defendants With Previous Convictions Undertaking Mediation (*N* = 45)

Co-Habitation Status	Not Re-Charged	Re-Charged	Total
Living Apart	13	8	21
Living Together	18	4	22
Unknown	—	2	2

Table 3

Outcomes and Co-Habitation Status for Defendants With No Previous Convictions Undertaking Mediation (*N* = 55)

	Not Re-Charged	Re-Charged	Total
Living Apart	13	1	14
Living Together	40	1	41

Table 4

Outcomes of Cases Going To Trial\*

	Cases	Total (%)	Re-Charged	Re-Charged (%)
Guilty	39	36	16	41
Not Guilty	4	4	3	75
Conditional Dismissal	6	5	2	33
Voluntary Dismissal**	59	55	14	24

\*Half the adjudicated cases took more than eight months to come to trial.

\*\*Voluntary Dismissal was based on a lack of evidence predominantly because of the failure of the victim to appear.

Table 5

Comparison of Outcomes for All Defendants Being Adjudicated at Court and Their Previous Criminal Conviction Status

	Cases	Re-Charged	Re-Charged (%)
Previous Convictions	33	15	45
No Previous Convictions	16	6	38

Table 6

Outcomes for Defendants With No Previous Convictions Either Found Guilty by the Court or Taking Part in Mediation

	Court Trial (%) N = 16	Mediation (%) N = 55
Not Re-Charged With Assault on a Female	10 (62.5)	53 (96)
Re-Charged With Assault on a Female	6 (37.5)	2 (4)

Table 7

Outcomes for Defendants With Previous Criminal Convictions Either Found Guilty by the Court or Taking Part in Mediation

	Court Trial (%) N = 33	Mediation (%) N = 45
Not Re-Charged With Assault on a Female	18 (55)	31 (68)
Re-Charged With Assault on a Female	15 (45)	14 (32)

100 cases of “assault on a female” and 108 court cases had been completed.

*Previous convictions*

Criminal convictions other than motor vehicle crime:

There were 100 cases with mediated agreements and 108 cases that went to trial.

*Procedure*

The following case elements were collected:

1. Disposition of the case (i.e., mediation: agreement/no agreement and court: guilty/not guilty/dismissed).
2. Relationship of the parties involved (i.e., either living

together, or living apart).

3. Age and gender of the parties involved.
4. Defendants’ previous criminal convictions—other than motor vehicle charges.
5. Subsequent convictions for “assault on a female,” charges within two years following court outcomes and mediation.

No identifying details about individuals were used in any report or article based on the study. The measure of significance of outcomes between the groups was based on Fisher’s exact test.

## Results

### *Re-charged*

Defendant charged with "assault on a female" within two years.

### *Not re-charged*

Defendant not charged with "assault on a female" within two years.

### *Previous convictions*

Criminal convictions other than motor vehicle crimes.

There were 100 cases with mediated agreements and 108 cases that went to trial.

This study shows that for the mediated cases the re-offending rate for defendants without previous criminal convictions was significantly lower ( $p > .0$ , Fisher's exact test) than for defendants with a criminal record (Table 1).

For defendants without previous criminal convictions, the re-offending rate of those who went to mediation was significantly lower ( $p > .01$ , Fisher's exact test) than of those who went to trial (Table 6).

For defendants without previous convictions who went to mediation, their re-offending rate (there were only two such cases) is not affected by whether they were living with their spouses/partners and those that were not (Table 3). Neither was there any significant difference for such defendants with previous criminal convictions (but re-offended at a higher rate; Table 2).

For defendants whose cases were adjudicated by the district criminal court, there was no significant difference in their re-offending rate between those who had previous criminal convictions and those that had none (Table 5).

## Discussion

The outcome measures were used to determine whether mediation or adjudication was more effective in reducing recidivism within a two-year period among those men charged with "assault on a female" in the designated county's criminal district court.

Although cases were not assigned to mediation on a random basis, it appears from the study that mediation had a significant effect in reducing repeat offenses. The seriousness of the assaults is not known. As more than half the victims did not attend court and there was no trial, there is no basis for deciding whether there was a difference in the overall level of violence between court cases and mediated cases. One of the mediated cases, for example, included a charge of assault with a deadly weapon.

Defendants with previous convictions for criminal

behavior of any kind were more likely to re-offend with assaultive behavior than defendants with no previous convictions. In mediated cases, defendants with previous convictions who were living apart from their assault victims were more likely to re-offend with another assault but with a new victim, clearly carrying their aggressive behavior from one relationship to the next.

There is no evidence that cases going to mediation give worse outcomes for victims than cases going to trial, irrespective of whether the defendant had a previous criminal record. If there is a tendency, it is for defendants with previous criminal convictions going to mediation to result in fewer assaults than for such defendants going to trial (Table 7).

An alarming note was that in more than half of the court cases, the charges were dismissed through lack of evidence, predominantly because the victim failed to appear (Table 4). Supporters of the Duluth model have long maintained that mediation sessions provide abusers with another opportunity for the victimization of the women, believing that court processes are more effective at putting an end to such behavior. It would be important to determine how much of victims' failure to appear in court was due to threats and intimidation by the defendant.

Four of the defendants were found "not guilty" by the court. Surprisingly, three of them were charged again with "assault on a female" within two years of their court appearance (Table 4). It seems possible that a finding of "not guilty" leads to further assaults on the victim. What would have been the outcome if these men had gone to mediation?

When domestic violence is present in a relationship, there is, without exception, a disparity of power. Actual acts of violence and coercion cannot be topics for negotiation in mediation. In many of these cases, however, the need to maintain contact between the abuser and the abused is often unavoidable, particularly if there are children involved. In addition, if a couple remains together (among the mediated cases, more than half did so) then decisions about the types of treatment and counseling for the parties are likely to be discussed. It is this ongoing contact between the parties that should be mediated.

Although the dynamics of domestic violence and the psychological trauma it causes are complex, mediation can provide choice for the victim, and provided she can represent her own interests, mediation can encourage her sense of empowerment and confidence that can assist her as she moves on with her life, as seen in a study of the Austrian mediation system (Pelikan, 2000).

The question of how much violence is too much violence or whether mediation is appropriate in all domestic violence cases becomes irrelevant.

One in every four women will experience domestic violence in her lifetime (Tjaden & Thoennes, 2000). In their study, they reported that most intimate partner victimizations

are not reported to the police. Approximately only one fifth of all rapes, one quarter of all physical assaults, and one half of all stalkings perpetrated against female respondents by intimates were reported to the police.

It would appear from these findings that it is likely that every family and community mediator has knowingly or unknowingly mediated at least one or more cases where domestic violence was present.

If this is in fact true, there should no longer need to be a debate on whether cases of domestic violence should be mediated; the reality is that they are. Nor should we be wrestling with the question of how much is too much violence. Mediators should be about the business of examining their professional responsibility, getting better trained, and putting policies into place that enable them to be of service in this critical social issue.

### Conclusion

The results show that there is no reason to have a blanket ban on the use of mediation in cases of domestic violence. Given appropriate screening of both victims and offenders, and the principle of voluntarism, mediation provides a significant reduction in re-offending when compared with criminal court outcomes. This finding reinforces the agreed statement from the Wingspread conference (Steeh & Dalton, 2008) that the ultimate obligation of the court system was to address each case on its own merits.

The procedures for mediation in North Carolina empower victims. Victims have the right to ask the district attorney to call a trial if the mediation agreement is not kept by the defendant.

The study also raises the issue about whether the level of violence should necessarily be a fundamental criterion in deciding whether a case goes to mediation or to trial at court.

Finding out whether victims do not appear in court because of threats from defendants, why some convicted offenders do not re-offend, and what aspects of the profile of men with previous criminal convictions can be used to predict successful outcomes for mediated cases are all areas for further investigation.

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