

# Mediation and Domestic Violence

A Summary of Issues Raised During  
The January 13, 1999 Meeting in Washington, D.C.

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## Editor's Note

On January 13, about 30 experts in different fields gathered to discuss a controversial subject, mediating between individuals who have a history of domestic violence as victim and abuser. The daylong meeting was organized by the Vera Institute of Justice in cooperation with the Violence Against Women Grants Office and the Violence Against Women Office and was facilitated by Vera's director, Christopher Stone. The meeting began in the morning with a round of introductions, followed by three broadly-framed conversations, and ended late that afternoon with a round of concluding remarks. During the lunch hour Susan Hanks, who coordinates special services for the Judicial Council of California, presented her work on mediation and domestic violence on behalf of California's family courts.\* The day's events were taped and later transcribed.

This document does not capture all aspects of the meeting, nor does it necessarily present information in chronological order. The transcript serves that purpose. Rather, this is an attempt to present the most salient issues raised on January 13 in a clear and engaging manner. Summary comments are often supported by direct quotations from participants. Including their words not only adds detail and texture to the report but also illustrates an important feature of the group that was convened. Rather than a unified body, it really was a collection of distinct voices. It would be misleading, therefore, to attribute opinions or conclusions to the group as a whole. At the same time, linking an opinion to one participant should not suggest that he or she was the only person to support that point. Others may have made similar remarks or, perhaps, concurred silently. Agreement among participants, as well as disagreement, is noted only when it expands a particular issue.

Jennifer Trone  
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\* Susan Hanks's presentation is not summarized in this report since comprehensive materials describing her work were provided during the meeting.

## I. Introduction

Frustration with our adversarial systems of justice is increasing. People see cumbersome, inefficient systems that are too often unrewarding for everyone involved. The good news is that some people have channeled their frustration into creating alternative approaches to resolving conflict. Community policing is one example. Community-based courts, prosecutors, and public defenders are others. Aspects of the restorative justice movement are also linked to these frustrations. On the civil side, we have even more experience in this area. Family courts have been using mediation in lieu of litigation to settle divorce and child custody disputes for more than two decades, and its use is increasing.

Support for these practices obviously varies, but it always breaks down around issues of domestic violence. The desire to move away from legalistic, remote, and adversarial models toward practices that feature flexibility and collaboration collides with an opposite instinct to apply formal, less malleable tactics when it comes to vindicating the rights of victims of domestic violence.

The meeting I moderated on January 13 was in large part prompted by this breakdown. It was also inspired by some optimism—that after twenty years of experience there must be valuable lessons learned when mediation has encountered domestic violence. In collaboration with the Violence Against Women Office and the Violence Against Women Grants Office, Vera invited a diverse group of practitioners—people who are experts in domestic violence, mediation, or both—to educate one another about the state of the field and future trends. They included some of the most knowledgeable victim advocates, professional mediators, attorneys, judges, and police officers working on these issues today.

I'm always disappointed when observers frame this issue as if work on it has just begun, so it was reaffirming to be reminded by the participants, many of whom are longtime compatriots, of their ties to the work since the 1970s. By way of introduction, Deputy Assistant Attorney General Noël Brennan recalled her experience running the first mediation services in Washington, D.C., and facing questions about whether to mediate cases with a history of domestic violence and, if so, what were the appropriate protocols. Other participants offered similar personal and historical reflections. Change in this field over time is one of the major themes to emerge from the meeting.

Rather than push for resolutions on this complex issue in a single day—an impossible task—we encouraged participants to think expansively about mediation in

the context of domestic violence—what it commonly means and what it might mean. We wanted to air all the contradictions and discontinuities, to discuss formal as well as informal practices. We covered a lot of ground in a single day. It was a challenge for participants to listen carefully and select insights and experiences that would move the conversation forward. I hope this summary is strong evidence of their hard work and important contributions to this evolving field and debate.

Christopher Stone  
Director, Vera Institute of Justice

## II. Mediation: Definitions and Issues

“Mediation means different things to different people. Mediating when? With whom? About what? For a long time, I assumed that I knew the answers to these questions, but I’m not so sure anymore. It’s important to flesh out answers, which is why this conversation is so important.” – Bonnie Campbell

“The dilemma facing many tribes is how to hold community members accountable for their violence in the absence of court structures, hence the attraction of family group conferencing, peacemaking, and perhaps mediation. I’m here to find out what mediation is and what will it mean for the tribes, and to contribute where I can.” –Eileen Hudon

Moderator Chris Stone began the first session by challenging participants to question their assumptions about what defines mediation and possibly expand these definitions. He contrasted this with efforts to arrive at concise, narrow terms, “that impossible work taken up by so many of the committees you’ve been on,” he said. Stone continued:

Most generally, mediation is just an interaction among people. It could be an alternative to something else, like going to court, but it doesn’t have to be, and indeed when the Attorney General was having a conversation that eventually led to this meeting, she was thinking of mediation as an alternative to nothing, thinking that there are many moments in peoples’ lives when there is conflict and concern about domestic violence, and nothing is being done. A friend of my family lives in a small community with her former abuser. He’s on probation, following a conviction and jail term for assaulting her. They’re not supposed to see one another, and they usually don’t, but it’s a small town. You could say that his probation officer and maybe even some of his friends and hers occasionally mediate this non-relationship in an attempt to prevent future violence.

In response to his challenge, participants began to unravel the elements that define mediation and take up the issues each raises.

## Goals and Players

Many participants shared working definitions of mediation based on assumptions about the goals of the process and who is involved.

Reaching agreement vs. improving communication. Susan Herman finds it helpful to distinguish between mediation—where she believes the objective is to reach an agreement about future behavior—and other interventions that involve a third party as a go-between, such as a dialogue in which the two participants come to understand each other’s perspective. A couple of professional mediators said that this distinction is not always true. In some cases, the goal is to encourage and facilitate communication between the parties, not necessarily to reach an agreement. They call this approach “transformative mediation”. According to Lynelle Yingling, this approach is becoming more popular among professional mediators. The U.S. Postal Service is currently testing it, and a study about that work is forthcoming.

Sharon Zingery practices more than one type of mediation, depending on the circumstances, but feels most accomplished in her work when clients have a “transformative” experience that changes how they will work together in the future. “They may not reach an agreement and may still have to seek counsel,” says Zingery. “On the other hand, when people do reach agreement, sometimes I feel hollow afterwards. They have a written piece of paper about what they plan to do, but I don’t trust it will make a difference.” Carrie Menkel-Meadow is critical of the transformative model—which some say is too close to therapy—in the context of domestic violence. So are many of the other participants: “The real question,” says Susan Hanks, “is whether mediation will successfully control and limit future behavior. If they have a transformative experience in the process, that’s terrific, but what we’re really focusing on is behavior.” Hanks believes that the safety risks to survivors of domestic violence make achieving meaningful agreements particularly important in these cases.

*With or without lawyers?* Laura Martinez, a lawyer, sometimes uses mediation to “narrow down the issues, resolve some, so that we’re only going to court on the major ones.” While Martinez comfortably calls this work mediation, Barbara Hart thinks it more closely resembles “facilitated settlement” (also called “negotiated settlement”). Unlike Susan Herman, Hart believes that reaching agreement is rarely a feature of mediation. That lawyers or other accredited legal representatives play major roles in what Hart calls facilitated settlement is probably why she believes these sessions are more “results-oriented” than mediation. Whatever term is appropriate, it is interesting to note that at least in Austin, Texas, where Martinez works, the cost to participants varies



depending on how much legal professionals are involved. She says that sessions run primarily by litigants with attorneys present would cost each participant about \$35. If their lawyers ran the session, they each would pay more than \$150.

Measuring success. While many courts focus on getting agreements as a way to move cases out of the system, making this the standard for success has serious implications for participants, especially victims of domestic violence. Why? Because the easiest way to reach agreement, say mediators, is to leverage against the weaker party. “This happens to some extent anyway,” says Linda Girdner, “but one can try to control it by thinking more broadly about how to define success.” Opening up communication, clearly defining areas of disagreement, and narrowing down these issues all could be considered successful results of mediation. If genuine, these outcomes would benefit individuals and court systems.

### **The First Principle: Voluntary Participation**

In Texas, according to Laura Martinez, if a couple agrees to pursue alternative dispute resolution by signing a statement and one or both individuals later want to opt out, they have to file a motion with the court. Filing a motion is a real obstacle for people without lawyers, and many low-income individuals lack representation. Combine this with the fact that judges in Texas often view mediation as a way for them to decrease the amount of time they spend on any one case, and there is a lot of systemic pressure on people to mediate.

It is reasonable to demand that people have a right to choose whether or not they want to mediate but much harder to make voluntary participation a reality. According to Barbara Hart, many women, even those with financial means, have no real alternative to mediation—the court process is too arduous, or in some places, like Alaska, there literally are no other options. “That’s the indictment of this legal system,” says Hart, “not that mediation has blossomed, but that absolutely nothing other than mediation has blossomed for those people that mediation endangers.” Even if there were sound alternatives, Hart believes that most judges are not informed enough to determine which cases are good candidates for mediation and which need judicial oversight. Loretta Frederick agrees. “I’ve seen extreme disinterest around the country on the part of judges to comply with exceptions [to mandatory mediation] that we build into the law,” comments Frederick. Exclusions are meaningless, says Fernando Mederos, when they depend on women to invoke their rights. For example, Mederos says that while half the women on welfare in Massachusetts are survivors of recent domestic violence, only two or three percent seek the benefits extensions they are entitled to. While everyone worries

about victims who are forced to mediate, some people are also worried about victims who are denied this option. “I’ve worked to avoid automatically excluding women from a process [mediation] that might serve them better,” says Sharon Zingery.

Cases from hell. “Whenever I talk about the controversial aspects of mediation, I always ask, *As compared to what?*” comments Carrie Menkel-Meadow. Barbara Hart estimates that nine out of every ten family law cases are settled in “awful” ways—“sloppy settlements by people who aren’t trained properly or properly directed by statutes and policies...and battered women are not invited to participate in designing outcomes or remedies for their cases.” Merry Hofford agrees: “By the time they call us, their cases are so convoluted and screwed up. They span five different states and numerous courts and judges. I’ve come to the conclusion that the problem is poor representation, either in mediation or not in mediation.” While the sorry state of family law practice makes Hart view mediation as a case of “the emperor’s new clothes,” others, including Donna Edwards, see mediation as a possible opportunity to make some needed innovations in this legal arena. “For me, personally, over the last several years, looking at the number of cases coming through, the inefficient resolution of those cases, and a real sense that nobody is being satisfied in the system we’ve created,” says Edwards, “perhaps it is a good time to challenge some of my long-held [negative] views about mediation.”

Judge Susan Carbon agrees that some of her colleagues on the bench view mediation cynically, as docket control, but maintains that others genuinely want to reverse commonly-held views that divorce and custody disputes are less important cases. She believes that some women, even victims of domestic violence, may get more out of mediation than they would from a traditional court process—if there is a reliable way to empower a victim to act in her own best interests. “It’s the theory that you are the best judge of what’s best for you, not a judge who doesn’t know you or your family,” she says. In her view, mediation gives people more opportunity to participate in the process—just what Barbara Hart believes is necessary to improve the process.

*Better education.* Sharon Zingery says that one of the biggest obstacles to ensuring voluntary participation is educating victims so that they can make an informed choice. This sounds easy, but Zingery says often it is not. “An orientation session isn’t enough.” No matter how hard she tries to explain the process, some people cannot see the possible benefits until they experience it: “People come in quite resistant, which would really upset the advocates, but afterwards tell us that they loved it, want more, that it was the best thing for their family, but would never have opted for it.” Zingery

would like to see the field focus on developing better educational materials and approaches.

### **Balancing Power and Rights**

Many victim advocates believe that courts have the ability to balance or “redistribute” power and rights but are doubtful that mediation can do the same: *How can mediation balance two peoples’ rights when that balance did not exist before? How can they reach a mutual agreement when mutuality never existed?* “If it were as simple as negotiating about things, then she probably wouldn’t have been victimized, and he wouldn’t be in a treatment program for batterers,” comments Oliver Williams. Several people, including Williams, say that batterers are often “in denial” and that most are “really good manipulators.”

Screening. The professional mediators maintain that such challenges do not make mediation impossible, at least not in every case that involves domestic violence. Thorough premediation assessments of participants, however, are crucial: to “know what different people can tolerate and what’s best for them,” says Sharon Zingery. “When I started working at Marriage and Family Counseling Service, we were not allowed to see clients separately,” recalls Zingery. “Now we must screen each person separately, and there have been other significant changes.” In addition to screening instruments, some jurisdictions also run criminal records checks. While Linda Girdner has observed movement on the issue of screening, she believes that many mediators still resist this preparatory step. Reasons vary, but Girdner believes that mediators who are still wed to strict notions of neutrality view screening as antithetical to this principle.

According to Girdner, good screening reveals three categories of people: those who would benefit from mediation as it is commonly practiced, those who clearly would be harmed by mediating, and those who would benefit from mediation under special conditions. She cautions that not everyone who wants to mediate has the capacity. Mediators should assess both the victim’s and batterer’s ability to engage in the process “fairly, voluntarily, and in good faith.” Some people, and Chic Dabby is one of them, strongly believe that mediation will always privilege the batterer. “Women who enter these situations are afraid. They feel like they have to be on their best behavior, that they can’t ask for too much...and we don’t get to their feelings by determining if there is ‘good faith’ or ‘capacity’ to mediate.”

Even if one believes in Girdner’s criteria, making these decisions is not always easy or straightforward. Some victims who clearly lack the capacity to mediate desperately want to, because they think it will mollify their abuser and thereby ensure

their own safety. “We know there are mediators who are taking cases partly because he is a scary guy and they don’t know how to refuse the case or terminate a session without feeling like they are getting her into more hot water,” comments Girdner. She believes that better training for mediators would help enormously, but also recognizes the need for more support from judicial systems. Too often judges who are focused on agreement and settlement do not understand why mediators reject certain people or terminate services when victims want mediation. As a result, they often send these cases back to the mediators.

Shuttle mediation: one balancing tool. Since the 1970s, mediators have adapted their techniques to bring more equity to situations where one participant has very little or no power. “Shuttle mediation” is one adaptation. In shuttle mediation, couples never meet face-to-face. The mediator talks with each person individually and then relays those concerns to the other person. The process continues until the session ends.

In thinking about this balancing act, Jacqui Clark says that it is important to look beyond the mediation process to the law. For example, statutes in Maine are unclear on whether a history of domestic violence should influence a custody decision. “That’s a problem,” says Clark, “for battered women in litigation and for women in mediation.” Laura Martinez believes that achieving balance depends on forcing men to deal with their violence and its consequences. She often begins a mediation session by showing the batterer pictures of the victim taken immediately after an assault. She believes the photos can set a tone for the discussion, remind the batterer about the possibility of criminal consequences and civil damages and, often result in the victim getting much of what she wants. As the victim’s advocate, Martinez can take such an approach. Mediators, however, are in a different position.

### **The Role of Mediators: Neutral or Not?**

Long assumed to be neutral facilitators, mediators are struggling to define a role for themselves beyond neutrality. In fact, few if any mediators ever were entirely neutral, and many people now refer to the role as “impartial”. Like all people, personal biases creep into their work. Probably too often, according to Linda Girdner, people practice “muscle mediation,” in which they guide the parties to particular outcomes, such as co-parenting and joint custody, because these agreements reflect what the mediator thinks is best for the post-divorce family. They are often unaware of the risks of joint custody for survivors of domestic violence.

As more judicial leaders openly condemn domestic violence, however, more mediators are adjusting their techniques to support these views. “Neutrality is not the

point. It's access and fairness," says Susan Hanks. "Neutrality implies that we don't have a stance about family violence, which we do, otherwise it wouldn't be illegal." Judge Mary Ann Grilli says that in her jurisdiction, participants preparing for mediation must attend a comprehensive orientation program that includes information on the state's position on domestic violence. At the end of the afternoon, Linda Girdner lamented that the group did not focus on the mediator's role in assuring safety and accountability long after the session ends. "It does no good to create a safe process if the outcome puts survivors and children at risk," she says. Several people note the need for post-mediation support services.

But a crime has been committed. Does the fact that a crime has been committed make it impossible for a battered woman and her abuser to mediate about anything, and by extension, impossible for the mediator to be impartial? When this question was raised, Susan Herman reminded the group of the long history in this country of alternative dispute resolution in both misdemeanor and felony crimes. According to her, most victims report being satisfied with the process and the outcome, at least immediately afterward.

Participants also were quick to say that many domestic violence crimes are never prosecuted, which, according to Jill Davies, raises questions about the role of mediators. They need to believe women who claim abuse while also respecting the due process rights of their partners. In what can turn out to be a "he said, she said" scenario, Davies challenged the group to think about whether we expect the mediator to be a trier of the facts. "In some ways, advocates want mediators to say, 'I believe you. I don't believe you. You're a good person; you're not,' and that's often legally inappropriate."

### **Who Are These Mediators: Training and Professional Standards**

"Who is this mediator animal?" one participant asked, and then added that in most states there are no professional standards. Everyone agreed that the level of skill varies wildly, and many mediators still receive no formal training on domestic violence. "We wouldn't be having this conversation if most of the mediators working today were well-trained, both in mediation and in domestic violence," says Merry Hofford.

Jacqui Clark believes that mediators should be held accountable for their practices but adds that courts have a share of that responsibility: Courts must create training, protocols, and institutional support that enable mediators to do their job properly. Several other participants, including Linda Girdner and Barbara Hart, stress that courts should be held accountable for the quality of the mediation services in their jurisdictions. But, as Judge Susan Carbon points out, judges and court administrators

need training themselves. She hopes this will happen once there is more consensus about what constitutes good practice.

### **Different, But Not Separate**

Carrie Menkel-Meadow identifies the “myth” that mediation stands on its own, separate from the other justice processes. “I am a strong advocate of viewing and using mediation as part of a comprehensive process, so that if we’re going to mediate custody and property, it may occur after a court order, a temporary restraining order, a protection order, a finding of criminal liability, and then one starts with a baseline measure of you’ve done a wrong thing. There are criminal ramifications that may flow therefrom, and, at the same time, we’re going to try to develop parenting plans, safety plans, all within this larger process. People need to think of mediation not as an alternative separate from, but along a continuum.... We no longer call it ‘alternative’ dispute resolution, because of fears of false polarization. It’s now called ‘appropriate’ dispute resolution.”

Thinking of mediation as part of a larger process, however, does not negate its unique qualities. “Courts have limited remedial imaginations,” says Menkel-Meadow, “not because judges don’t have imaginations, but because statutes and cases restrict what judges can do. The purpose of the appropriate dispute resolution is about treating people individually, tailoring solutions.” Jacqui Clark finds real reasons to tailor both the process and the outcome: “These aren’t just batterers and victims, they are also people who are husband and wife, parents together, some of them are long-term friends, and some of them are killers. So there’s a huge range and for us to be talking about victims of violence as if they were all the same critter, that’s not accurate.”

Mediation may be more tied to courts than some people understand, but according to Barbara Hart, any separation between the two is problematic. Hart explained: Because mediation happens outside the courtroom and because there is no consistent way of documenting the process—if documentation is required at all—there will never be an equivalent of case law in mediation, a natural text to shape the future of the practice and the rights and responsibilities within it.

### **Cross-Cultural Challenges and Opportunities**

Very early in the day, Carrie Menkel-Meadow defined what in her view is the central challenge facing this field and the justice system generally: the great difficulty of creating practices that are effective in different cultures. “We’ve seen a lot of practices evolve in the last 20 years,” says Menkel-Meadow, “and the crucial issue is trying to

generalize from one case to another. How can we take what's good in one place somewhere else?"

Later on, Chic Dabby offered an example of how mediation often fails outside the mainstream: "I work with families from India, Pakistan, Bangladesh, Sri Lanka, and it's not unusual to have sisters-in-law, mothers-in-law, brothers-in-law, participating in the violence. We had a case where the victim had restraining orders out against 14 members of her extended family, and she lost custody of her child. It was granted to her husband's family." In other words, mediation, as it is normally practiced, cannot deal with divergent manifestations of conflict and violence—in this case, with multiple perpetrators.

Similarly, work with lesbian and gay couples may fail if mediators come to the table with traditional roles and values or with stereotypes in mind. Laura Martinez says it is important to hire bilingual mediators and considers the use of translators to be a poor solution. Ideally, mediators should have some personal experience—or at least know and understand—their clients' cultural backgrounds.

On a more positive note, Eileen Hudon wonders whether mediation and other forms of alternative dispute resolution might work well in small communities, like some of the Native American ones she assists. Many of them lack formal institutions to regulate offenders' behaviors, but individual community members often are more willing than residents of large communities to monitor the activities of batterers and apply pressure to hold them accountable for their behavior. Several participants speculate that African-American communities in large, urban settings may embrace mediation for a very different reason: as a way to bypass traditional justice system responses and perhaps even mend the mistrust of criminal justice system common within these communities.

### **A Field in Flux**

"Every issue raised about mediation in domestic violence cases is an issue in mediation generally," says Carrie Menkel-Meadow, a legal scholar and expert on mediation trends. According to her, there are ongoing, widespread debates about appropriate neutrality, or what she calls "lack of bias"; how to balance power, although she thinks the notion of "balance" may not be useful; and the role of lawyers. For example, lawyers and other accredited representatives are being trained to be effective advocates in mediation just as they would be in court. Some mediators support these efforts, while others worry that the lawyers will destroy the process by introducing adversarial behaviors. For Menkel-

Meadow, the disagreements and wide-open questions within the field are evidence of its complexity, its evolution over the past couple of decades, and its promise.



### III. Issues Related to Child Custody Disputes

“We have to constantly think about the people who are not in the room—the children.” –Judge Mary Ann Grilli

“So many women are penalized because the onus of protection is on the mother. We need to put the same onus on the father.”  
–Chic Dabby

From the perspective of the family courts, the reason for mediating custody is to come up with a parenting plan that covers custody and visitation. This plan would then become an order of the court. In some jurisdictions, the plan is automatically accepted by the court. In other places, judges and the attorneys representing both parties have the right to review and contest aspects of the agreement.<sup>1</sup>

#### **Separating Hard and Soft Issues**

Judge Mary Ann Grilli believes that mediation around child custody and visitation is a “very different animal” compared with mediation around other issues related to divorce. “I used to mediate divorce cases, but I wouldn’t do the custody and visitation issues. That’s a mental health process. There are very, very few lawyers who have the training or skill to do that.” “Why is it okay to mediate property and taxes, you know, all the dry stuff, but not custody?” Susan Herman asks. “Some people would say,” she continues, “that if they can’t talk honestly with each other about custody, then they may not talk honestly about anything.”

Carrie Menkel-Meadow says that one of the consequences of separating hard and soft issues is that they become ranked. Consequently, the soft ones—around custody—get handled by people with better skills and credentials, while the property issues are mediated by someone with very little training. “It was mind-boggling for me to imagine what it’s like for parents and children to go through two totally different systems,” she says. Menkel-Meadow also notes that separating the issues makes it easier for men to leverage custody to win more of the property.

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<sup>1</sup> Linda Girdner is completing a lengthy curriculum for mediators on domestic abuse and custody mediation funded by the State Justice Institute. A shorter version for court administrators, judges, and others will also be available. They are designed to help people implement sections of the Model Code of the National Council of Juvenile and Family Court Judges.

According to Laura Martinez, when her clients mediate, custody is never on the table because she knows that with evidence of domestic violence they can win on that issue in court. If custody is not in dispute, though, then her clients often mediate around related issues: possession schedules, exchange sites, even provisions about what will happen when the father has custody, and, if the father is a substance abuser, what type of therapy will be sought to resolve those problems.

In jurisdictions that have dedicated domestic violence prosecutors and courts, observes Donna Edwards, many permanent decisions about custody and visitation are based on decisions made much earlier and much more hastily when a victim is applying for an order of protection. Laura Martinez is afraid that courts will begin referring people to mediation to come up with a parenting plan at this early stage when most victims are not capable of weathering the process.

### **Missing the Child's Voice**

“Listening to this dialogue, I think we’re doing to children what we used to do to the female victims, treating them as property,” says Judge Susan Carbon. Several participants emphasize the need to think about how to include the perspective of children in the mediation process—not in the room during the mediation, but somehow. Susan Hanks believes that in all custody disputes, mediators should talk with parents afterwards about how to explain the situation to their children.

Accounting for the needs of children is necessary in any divorce, but it is particularly crucial in cases that involve domestic violence, because the children are also victims—directly, if they have been abused, or indirectly, as a result of witnessing abuse. Susan Carbon warns against assuming that parents can accurately represent and ensure the best interests of their children under these circumstances and questions whether lawyers or others should be appointed to represent these children. Jacqui Clark says that in Maine, where she works, mediators are expected to ensure what is best for children while also remaining impartial, which, according to her, is a “very, very difficult role.”

Advocates have long been concerned about penalizing women in an effort to protect children. This “either-or” mentality makes it difficult for them to work closely with child protection services, but still absolutely necessary. Chic Dabby says that part of the solution lies in expecting the same responsibility from fathers, holding male parents to the same standards of care. “What does it mean,” she wonders, “when people say, ‘Just because he’s a bad partner doesn’t mean he’s a bad parent?’” Eileen Hudon concurs that we need to take a closer look at a father’s responsibility. She suggests that

abusive men may have a restitutive responsibility to their children as a result of exposing them to violence. She hopes, at the very least, that abusive men are not allowed to walk into mediation with a “clean slate.”

For Susan Hanks, thinking about harm to children reminds her of the intergenerational aspects of domestic violence: “We rescue little boys from violent situations, but we punish men for acting like victims when they grow up. Certainly, people who behave violently need to have limits and be controlled, but they also need our empathy and understanding. Unless our practices and outcomes reflect this, we will never interrupt the cycle of violence.”

### **Mediation, Arbitration, or Some of Each**

Years ago, it was common for mediators to get people to agree that if they could not reach agreement, the mediator would then arbitrate the case. Susan Herman assumed that practice had long died out, but, according to Loretta Frederick, it happens all the time. Mixing the two roles is “antithetical to everything mediation is about,” says Herman. In other words, it corrupts a process that intends to give decision-making power back to individuals and opens up the possibility of using information revealed during an attempt to reach agreement against one or both parties. Although not related only to custody disputes, the danger of blurring mediation and arbitration is clearly illustrated in this context.

Loretta Frederick offers the example of “visitation expeditors,” a new term used in some states for someone who both parties agree will mediate disputes over whether, for example, one parent can visit with the child on Wednesdays instead of Thursdays. Often, according to Frederick, this person becomes the arbiter of all disputes, big and small, and in the end regulates the entire visitation agreement. She sees this as an example of someone who initially acts a mediator and over time becomes the decision-maker. She sees parallels in custody evaluations. The evaluator sits down with both parties, facilitates a joint discussion about their disagreements, watches how the parties interact, and then advises the judge how to rule on custody. In her view, both these situations illustrate a dangerous blurring of the role of a good mediator with that of an arbitrator. It’s an example, in her view, of how the world at large thinks mediation is anything that involves a discussion between two parties, a definition she considers to be much too broad.

## IV. Informal Mediation: A Role for Law Enforcement Officers?

“When we sit down with these people, we’re not counselors, mediators, or arbitrators. We’re essentially doing the right thing, and that is to talk to them. In the past, once we determined it wasn’t a criminal matter, boom, we were out of there.” –Captain Pete Helein

To begin the afternoon session, moderator Chris Stone asked the group this question: When officers respond to a domestic call and there is not probable cause to make an arrest, what else could they do? Is there a mediation role they could play in this situation?

### **A Problem and a Solution in Appleton, Wisconsin**

To flesh out the police situation he briefly described, Chris Stone read from materials provided by the the Appleton Police Department. The documents describe a problem and their solution. The problem, in their view, was a clash between mandatory arrest and community policing philosophies. Implementation of mandatory arrest laws spurred resentment from officers, particularly over the issue of limited discretion. As a result, officers began to view their role very narrowly: If only he had physically hurt her, then I could do something. The Appleton materials also describe a great deal of confusion over how to implement primary physical aggressor and dual arrest policies as well as frustration with the high number of repeat offenders and restraining order violations.

Their solution: a radical shift, to view “verbal-only” domestic calls as important crime-prevention opportunities and to augment arrests with the same crime prevention strategy. Their strategy features: community education—If you hear domestic violence or see it, call us; giving women information about local resources; and finally, something that Pete Helein calls “debriefing,” which basically refers to a conversation between the officers, the victim, and the offender. Pete Helein tells patrol officers that what they say can make a huge difference in people’s lives simply because they represent a system and therefore have credibility.

“We talk to them about what has happened and where this is headed if it continues,” says Helein. “We talk about the effects on the children. We also say that it’s not up to the victim to decide whether we’ll make an arrest next time; that’s our decision. We try to get them to understand that they are in the middle of a crisis, not at the end of it, and it’s up to them which direction they’re heading.”

The number of verbal-only calls has risen, according to Pete Helein, because they have tapped into the community. Scott Gibson, a police officer in Virginia, agrees: “It’s a way to reach people earlier and affect others who never fully enter the system.” Gibson says that his department receives about 5,000 domestic violence calls a year but makes only about 1,200 arrests. He explains that many women refuse to tell officers what they need to know to make an arrest because the victims are not ready to go that far. The single biggest impact on these reluctant victims, according to Gibson, has been the move to bring shelter counselors to the scene. There is a big difference between a professional, experienced counselor and a “22-year-old officer who has had six months experience and is still learning how to work the radio.”

The Vancouver Police Department, where Keith Hammond works, is doing some of what Pete Helein describes: extensive domestic violence training for patrol officers, so that they understand the dynamics of these situations and can do more than just walk away when arrest is not an option. “Even just to say, ‘What’s happening to you is wrong, and there’s a way out. Here’s where to go for help,’” explains Hammond. Laura Martinez agrees with Pete Helein and Scott Gibson that the key is “getting women hooked into the system and giving them the tools they need to get out.” In Austin, Texas, where she works, a victim services representative—who is an employee of the police department—accompanies patrol officers on every single domestic violence call.

### **Distinguishing Between Mediation and Education**

What patrol officers do in Appleton, says Pete Helein, is not mediation. But as Chris Stone points out, to a lay observer the conversation might look a lot like mediation: There are two people in conflict and a third person who acts as an intermediary and who has some authority. “So the question is,” says Stone, “do we train it up, ban it, or have them do something else?”

“There’s been a lot of thinking over the past twenty years about the appropriate role of police officers who respond to domestic violence calls,” says Susan Herman. Herman sees a critical difference between sorting through issues in order to establish safe behaviors, which she believes is not a role for law enforcement officers, and educating people about where conflict can lead: injury, arrest, incarceration, even a death. It’s the difference, in her view, between formal mediation and learning mediation skills to become a better parent, park ranger, or police officer.

We’ve been talking about comprehensive policing for 25 years,” says Barbara Hart, “and that’s what this sounds like. To have it reframed as ‘mediation’ is a profound political error. Peggy McGarry agrees: “Let’s call it good police work, because that’s

what it is.” Laura Martinez agrees but for a different reason: “Once we call it mediation, it opens up the option for some officers to go back to what was being trained twenty, twenty-five years ago.” Terms aside, several participants raised concerns about what patrol officers are actually saying to victims and batterers, and whether they are delivering these messages to both parties at the same time.

### **Talking Together or Separately?**

“I think it is very, very difficult to give messages to a victim with the batterer sitting next to her,” says Jill Davies, “particularly if you are talking about children. It’s very hard for the battered mom not to hear that as a criticism of her parenting.” Her point: Afterwards, does the woman feel like she has more or fewer options? Davies is even more concerned about what officers say to batterers and worries that, at the end of the conversation, the batterer may feel like the officer is on his side, accurately or not. More generally, Davies wonders how officers identify the victim. “You get to a house. There’s been an argument. No signs of physical injury. How do you know who’s the victim? Police walk into some really complicated situations. We can’t assume that they will always be able to pick out the victim. I have the same concern when advocates intervene in ambiguous situations.” Davies worries that in these situations, officers will treat both people the same, which can be really damaging to victims.

Fernando Mederos warns officers to be very careful about what they say. Talking about the man’s criminal history is one subject Mederos thinks officers should avoid. (Pete Helein had said that while officers cannot convey criminal history information to victims, they often ask men this question in front of the women.) “I worry about getting into that kind of information,” he says, “because later he may retaliate or hurt her because he feels like, now she really is going to leave me. I really support speaking to people separately.” Sharon Zingery agrees that it is important to avoid shaming or blaming either partner in front of the other because such comments may further disempower victims and prompt batterers to retaliate. As for what to say to men on their own, Mederos advises sticking to the criminal consequences. “That’s the message that men say gets across to them,” he says, “not, look at what you’re doing to the family, but look at where you’re going. You’re going to jail.”

The issue Susan Carbon had raised—whether officers regularly give victims information about their partner’s criminal history—provoked several follow-up questions and comments about why we protect certain information. Judge Carbon later said that “by hiding behind a cloud of confidentiality, we’re doing a disservice to victims.” Scott Gibson notes a movement in the Virginia legislature to post criminal

histories on the Internet. “In my brief experience with this issue,” comments moderator Chris Stone, “I’ve learned that it plays out very differently in communities of color, particularly in heavily-policed African-American communities where criminal records are practically ubiquitous for reasons beyond human behavior. So is this a straightforward issue? Would more accessibility to records be a good thing for everyone?”

Oliver Williams acknowledges this problem—the over-representation of African-Americans in voluntary and involuntary government systems—but answers Stone’s question by underscoring the need to document and address domestic violence in other types of communities. Fernando Mederos notes the steep challenges to that effort. According to him, “privileged white men” are able to keep their names and bodies outside the system. Mederos still sees reluctance among judges to give professionals a criminal record. And while the catchment area for the treatment program he runs includes middle and high-income communities, judges only refer low-income men.

Loretta Frederick asks, “Is there anything that an officer would want to discuss with the victim and abuser together? And if the answer is no, that would get us over this hump of having someone look at this and call it mediation, and it would get us over this dangerous hump of worrying about officers who are trying but don’t quite get it and lapse into suggesting future behavior.” Pete Helein believes that one message that should be delivered to both people at once concerns the role of the police, that the decision to arrest is the officer’s choice, based on the law, not the victim’s. If this message is relayed individually, a batterer may later distort the message, claiming that the officer said something different to him.

### **Do Scripts Help?**

One participant asks: Would it be helpful to give officers specific guidelines about what to say, especially what they should always say and what they should never say? While Carrie Menkel-Meadow agrees that scripts can be helpful, she worries about becoming too rigid: “Good professional behavior is the teaching and learning of judgement. . . . To pick up on Loretta’s [Frederick] point, the best things you can say to someone in a training session are ‘Why are you saying that? What are you trying to accomplish?’ Always think about your purpose or goal before you say something and then decide what’s the best way for you to do that as an individual.” Jill Davies agrees: “There are many circumstances in life when an informal conversation is very appropriate. So while we’re going forward on a very strong public policy message of no tolerance, I hope we

don't lose the human side of this. I mean I hope we don't script ourselves too tightly.” Pete Helein believes that one of the most effective training approaches is bringing in survivors to talk with officers about what worked, what didn't, and what they wish the officers would have done. “It had a huge impact,” says Helein, “even among reluctant officers.”

While a victim may feel momentarily empowered while the officers are in her house, Linda Girdner doesn't believe this shift is a lasting one. For a number of years, Susan Herman helped run the Victim Services/New York City Police Department's Domestic Violence Prevention Project. The project features officers and nonprofit victim advocates who make follow-up calls. According to Herman, those interventions have been scripted to the point that people can be trained. The main point of the conversation is for the abusive partner to know that he can be arrested and for the victim to know that the household is being watched and that help is available in the community. “I believe with every part of me that's a fabulous program, and it should continue. Every single cop and advocate I spoke with felt that they were doing incredible work, saving lives. Yet so far there's not one shred of hard evidence that what they're doing is valuable.” Her main points: Some degree of scripting can guide interventions, and lack of outcome research should not be mistaken for lack of value. Additionally, Herman mentions research suggesting that the same script is heard very differently by different populations. In elder abuse, for example, that intervention has actually increased risk for victims.

### **An Intervention Continuum**

Years ago, as a shelter worker, Jacqui Clark mediated “going home” agreements without formal training in mediation. “I can laugh about it now,” says Clark, “but we were having a fair amount of success with these discussions and reaching agreements about how to create safety back home.” Whether or not a parallel role exists for law enforcement officers—and many participants believe this is not an appropriate role for them—Clark's recollection is a good reminder of the wide spectrum of work in this field. It spans patrol officers who do quick, street-level violence prevention every day, crisis mediators who work in housing projects, and very complex, costly, and protracted formal mediations conducted by retired judges, lawyers, and other professionals.<sup>2</sup> “It's difficult,” admits Clark, “but people need to be precise about what part of the conflict resolution world they are describing. There's a difference between volunteerism,

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<sup>2</sup> For more information about the range of mediation practices, Carrie Menkel-Meadow suggests reading Deborah Kolb's book *When Talk Works*.



paraprofessional work, conflict skills, conflict interveners, and professional mediators who are trained and supervised, and what those individuals do differs.” CPR certification provides a useful analogy for Clark. “Nobody thinks they will take over the work of cardiologists. There is a role for all levels of conflict skills, but we need to be clear that you don’t send somebody with a CPR card to do open-heart surgery.”

## IV. Conclusion: Frustration, Hope, and Future Trends

“I would have hoped that in ten years we would have come to more resolution than it appears we have.” –Lynelle Yingling

“We’re not where everybody wanted to be by now, but things have changed. It’s a moving target, and I want to encourage people to be flexible about how they view what the solutions are.”

–Carrie Menkel-Meadow

The day’s conversation was a valuable and rare learning opportunity for everyone, yet because it was also open-ended, some long-time professional mediators left feeling frustrated. These individuals are intimately familiar with changes in the field over time. For them to bring a group of skeptics from outside the field up to speed was undoubtedly disheartening.

Despite a few emotional lows, however, commitment to moving the issue forward was the overriding sentiment expressed during the round of closing remarks. Recognizing the lack of common terms and consensus about practice, Donna Edwards said, “This discussion needs to continue, on the federal level but also within the state domestic violence coalitions... At some point, we have to come up with a commonly held definition of mediation and establish criteria for these practices, and then we will know when and under what circumstances it is appropriate to use mediation in cases involving domestic violence.” Carrie Menkel-Meadow put an optimistic spin on the “fuzzy” nature of the discussion by emphasizing that “It’s still not clear what people are for or against.” And Jill Davies gave a nod to progress when she said, “It seems clear that the conversation has moved from whether or not to offer mediation—it’s here to stay given the reality of court resources—to how to make sure that mediation does not endanger battered women and hopefully benefits them in terms of safety and other important goals.”

Several participants also made observations about future trends:

- Because the mediation field itself is very divided about some issues, Sharon Zingery believes that focused, national leadership is necessary to move the issue forward. Two things Zingery envisions are a central clearinghouse for information and more outcome research.

- Barbara Hart expects to see some demonstration projects accompanied by evaluation research. Hart hopes that future studies will compare mediation and traditional remedies, and will look at outcomes for individuals as well as how different practices affect justice systems.
- Judge Mary Ann Grilli looks forward to the day when family courts consistently collect reliable data, so that court officials and others are better able to reflect on and informally evaluate their own practices.
- Loretta Frederick is preparing to “take this discussion to the next level,” to consider whether or not victims and offenders should mediate about the violent act itself and the appropriate punishment. She thinks it is imperative that domestic violence advocates and others begin to think seriously about whether any of the principles and practices of restorative justice can be useful in domestic violence cases and, if so, how.
- Jill Davies believes that it is time to go back to the source, to ask battered women what they want. Davies suspects that women’s needs and desires may have changed. There is more awareness and understanding of domestic violence than ever before, formal and informal responses have improved, and, as a result, battered women have more options.

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