

A FEMINIST MODEL OF MEDIATION: USING LAWYERS AS ADVOCATES FOR PARTICIPANTS WHO ARE VICTIMS OF DOMESTIC VIOLENCE

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Women who are victims of domestic violence face many practical and process disadvantages in family law mediation. This article suggests a way of making mediation an equitable process for victims of domestic violence through ensuring that victims have a lawyer advocate to help them prepare for mediation, to help represent and protect their interests during the mediation and also to assist them with the terms and enforcement of a final agreement.

Introduction

There are many aspects of mediation that support an analysis of the process as a feminist approach to dispute resolution. This analysis might be used in terms of justifying the increased use of mediation in family dispute contexts where the number of women disputants is high. Women who are victims of domestic violence, however, face many practical and process disadvantages in family law mediation. Whilst feminist scholarship has enabled a better understanding of the negative impact of domestic violence on a victim's ability to participate effectively in mediation, the rates of participation remain high. Indeed the number of victims of violence in mediation appears to be increasing, and this will be exacerbated if the Government's Family Law Reform agenda for 2005 is put into effect.

This article considers some of the arguments for thinking about mediation as a feminist model of dispute resolution. The article contextualises those arguments in terms of their application to the participation of victims of domestic violence in mediation; and suggests a distinct model of family law mediation in matters where there is a history of domestic violence. This model centralises the role of a legal advocate for the victim.

1. Mediation: A Feminist Dispute Resolution Process?

Mediation can be defined as 'the intervention into a dispute or negotiation by an acceptable, impartial and neutral third-party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.' (Moore, 1986: 14). This traditional model offers a direct contradiction to some of the elements of the formal legal system that work to isolate and exclude women. With its emphasis on self-determination, party control and empowerment mediation can be said to reflect feminist values and beliefs.

Mediation can also be said validate women's emotions, their voices and narratives; and to recognize the agency and competency of women in making their own decisions. Mediation contradicts the ostracism women can experience from the abstract nature of formal public legal processes that focus on linear reasoning, and the application of objective, universalistic principles. And it can be seen as minimizing the divide between public and private life because the values of the individual and their personal context are integrated into the dispute resolution environment in a way that accords them priority and relevance.

Further, mediation can potentially save women from enduring the heavy individual costs (both financial and emotional) that almost inevitably result from bringing traditional rights based claims in court. The integrated approach offered by mediation also offers the possibility of avoiding or overcoming ‘the legal system’s historical tendency to classify women as a homogeneous class without recognition of their cultural, racial, ethnic, and economic diversity.’ (Herrnstein, 1996: 231). For many reasons then, and others not mentioned here, mediation can arguably be seen as ‘an ally of feminism’ (Lichtenstein, 2000: 30).

However, the limitations of mediation, particularly in disputes where there is a history of domestic violence, are widely acknowledged. There is a strong feminist concern about the participation of victims of domestic violence in the mediation process. This concern challenges the possibility of fair and just outcomes for victims of violence in mediation, and is explored further in the following sections.

2. Mediation: An Inappropriate Dispute Resolution Process Where There is a History of Domestic Violence¹

There is now wide acknowledgment that mediation is generally not appropriate where there is a history of domestic violence.² This

¹ The term ‘domestic violence’ is used here to refer to all forms of violence perpetrated against women in domestic relationships; for example, physical, emotional, financial, psychological, and social violence. The *Domestic and Family Violence Protection Act 1989* (Qld) defines domestic violence as wilful injury, wilful damage to property, intimidation or harassment, or indecent behaviour without consent committed against (or threatened against) another person if a domestic relationship exists between the parties: s.11. A domestic relationship is said to be present in a spousal relationship, an intimate relationship, a family relationship and an informal care relationship: s.11A. The *Family Law Act 1975* (Cth) defines family violence as ‘conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety.’: s.60D.

² Of particular importance in gaining this acknowledgment was: Astor Hilary for the National Committee on Violence Against Women *Position Paper on Mediation* AGPS Canberra 1991.

acknowledgement is found not only in the feminist literature on mediation, but also for example, in the practice directions of the Family Court of Australia. The Australian Law Reform Commission Reports on Equality Before the Law also discussed the pervasive nature of violence against women and acknowledged that a history of domestic violence often makes participation for women in alternative dispute resolution processes, such as mediation, inappropriate. It is important to acknowledge before embarking on a discussion of domestic violence in the context of mediation that violence against women manifests itself in many different ways and women’s experiences of, and reactions to, domestic violence are diverse. The intention of this article is not to homogenise women’s experience of domestic violence or their experience of mediation, but to identify issues of common experience or perspective that may compromise the effectiveness of mediation as an appropriate dispute resolution process for relationships where there is a history of domestic violence.

The key concern that arises in terms of mediations that take place when there is a history of domestic violence is that the positive claims about the process relating to self-determination, party empowerment and party control are all significantly undermined in relation to the victim’s participation. As a result, mediation can be a process that entrenches and exacerbates the patriarchal control and domination of women rather than providing any emancipation from it. It is exactly the party-oriented nature of the process that provides perpetrators with an opportunity to continue to exercise power over their victims and to extend that control, through their influence over the outcome of mediation, to future interactions between them. In this way, mediation places victims at grave risk of suffering injustice in terms of the process itself and its outcomes. Mediation, as a result, cannot be seen as contributing positively to the common feminist commitment to ending the perpetration of violence against women.

Therefore, notwithstanding the possible theoretical consistencies between mediation and feminist principles, mediation can in fact be argued as very dangerous for women who are victims of domestic violence. The nature and dynamics of a violent relationship make this the case, and there is a significant amount of feminist literature discussing process and outcome dangers for victims of domestic violence in mediation. Some of these issues, discussed briefly below, illustrate how the theoretical rhetoric of mediation becomes inaccurate when applied to disputes where there is a history of domestic violence, and in fact can result in the endangerment of victims and the possibility of unsafe and unjust mediated outcomes.

Perpetrators of domestic violence do not cooperate with their victims; they impose their interests over them, they coerce, intimidate, monitor and threaten, they devalue their victims and deny their own violence.

First, in wanting to create a level playing field for all parties through party empowerment and self-determination, the mediation process 'ignores the power differences between men and women that put women at a disadvantage in negotiating with men' (Lichtenstein, 2000: 20). When the dynamic of domestic violence exacerbates this imbalance, a level playing field is possible in rhetoric only. Further, mediation is a process that focuses emphatically on cooperative and consensual dispute resolution. A history of violence, however, will make such approaches inherently impossible. Not only is it very difficult for a victim confidently to represent her own interests against her abuser, but genuine consensuality is an approach that is diametrically opposed to patterns of dispute resolution used by perpetrators of domestic violence. As Hart has said, the idea of cooperative bargaining with a perpetrator of domestic violence is an oxymoron (Hart, 1990: 320). Perpetrators of domestic violence do not cooperate with their victims; they impose their interests over them, they coerce, intimidate, monitor and

threaten, they devalue their victims and deny their own violence.

Further, mediator assertions about being able to create a fair negotiating environment for victims of domestic violence, despite claims of neutrality, are unconvincing. This is not only because such claims are mythical, but also because they are problematically based on an assumption that a victim's violence-induced fearfulness can be addressed through simple process interventions such as allowing her a fair opportunity to speak. The reality is that these interventions, whilst not inappropriate, cannot reverse what might be years of dominance and control.

It is also an important consideration that many divorce mediations take place relatively close to the time of separation. This will be exacerbated by the Government's suggested Family Relationships Centres, because the Centres will promote the informal resolution of disputes as soon as possible after separation. This is a time when the victim is likely still to be experiencing strongly the impact of the perpetrator's violence and may be in increased danger of post-separation violence. Hart has noted that many mediators erroneously believe that victims of domestic violence are safe once they have separated from the perpetrator (Hart, 1990: 324).

Also problematic for victims of violence is the private nature of the process, which results in its having little accountability. Mediation occurs behind closed doors, with no public record of what was said, or of the outcome, and no real way to address any injustices suffered. Not only does the private nature of mediation preclude the process being held properly accountable for its participants' experiences of it, but it also removes the handling of important public issues, such as justice for victims of domestic violence, into the private sphere. The inherently political nature of domestic violence is therefore essentially lost in the privacy of mediation, and mediation's focus on promoting equality and cooperation between the parties can result in the

reframing of the politics of power as ‘individualised instances of mis-communication or misunderstanding’ (Lichtenstein, 2000: 20).

Added to these concerns is the fact that mediator training is not yet sufficient to allow for the safe participation of victims of domestic violence in mediation. Mediators may often not even be aware that there is any history of domestic violence. The onus is therefore on mediation service providers to improve training for mediators on issues relating to the participation of victims of violence, and also to improve intake processes.

3. A Mediation Model For Victims Of Domestic Violence That Centralises A Role for Lawyers

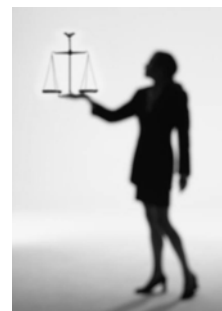
There are many reasons why a model of mediation that centralises a role for a lawyer advocate for victims of violence should be accepted. Lawyer involvement has the potential to help mitigate the disadvantages many victims face, and address issues such as an ignorance of the law, lack of assertiveness or confidence, lack of self-esteem and an inability to articulate persuasive and compelling arguments. Legal advocacy in mediation has also been found to correlate consistently with just and fair outcomes (Murayama, 1999: 52). These positive issues, and the model itself, are explored further below.

3.1 A Lawyer’s Pre-Mediation Role

The role of the victim’s lawyer advocate prior to the commencement of the mediation would be focussed on ensuring that the victim was not a participant in mediation if the risks were too great for her personal and emotional safety. If it is thought appropriate to proceed, the role is one of coaching her about the process and strategies for taking part. Therefore, the lawyer advocate would be assessing the risk mediation poses for the client, preparing the client with information about the mediation process, providing her with some skills for her participation, and beginning a process of generating satisfactory options for the resolution of dispute.

The lawyer advocate may also provide assistance with selecting an appropriate mediator or mediation service provider for the client, or negotiating that issue with the perpetrator. They would also perhaps have a role in negotiating the fact of their own presence in the mediation process.

The lawyer advocate’s risk assessment role involves weighing the victim’s capacity to engage in a face-to-face informal negotiating environment with the perpetrator against the reality of the availability of other options to her. This includes balancing her strengths against those of the perpetrator, and assessing the safety implications of participation in mediation.



Sordo suggests that ‘the most important aspect of preparing clients who have agreed to mediation is giving them sufficient information about the process and in particular its potential to settle their dispute’ (Sordo, 1996: 22). This sort of advice and information is particularly crucial to any fair participation in the mediation process by victims of domestic violence, and has inevitable consequences for a fair and just outcome. Preparatory information should also include an explanation of mediation’s philosophy, and an emphasis on the elements of that philosophy that might empower her. For example, that she should feel that it is appropriate to terminate the mediation if she feels unsafe, that she should feel that her voice is valued, and that she should feel confident, particularly with the support of the legal advocate, in contributing to determining the final outcome of the negotiations.

Coaching the victim about participation skills requires lawyers to have a good understanding of these skills themselves, as well as of issues relating to domestic violence. Susan Gribben writes that ‘a really good coach can be teaching assertiveness skills, increasing self-esteem, and also addressing safety issues’ (Gribben, 1994: 34-34); for

example, helping the client to adopt protective behaviours. The coaching process should also explore 'the likely reaction of the other party and ways of overcoming any objections' (Sordo, 1996: 23). The victim's intimate knowledge of the perpetrator, when combined with the lawyer's knowledge of negotiation stratagems, can allow for some specific preparations to be made about how to direct discussions towards the victim's preferred or best outcome.

Samuels and Shawn refer to the pre-mediation interaction between the lawyer and the client as 'the beginning of a relationship of trust and confidence' (Samuels and Shawn, 1983: 15). This trust and confidence is the important foundation to the lawyer advocate's next role in the model; namely as the victim's advocate in the mediation itself.

3.2 The Lawyer Advocate's Role as Victim's Representative in Mediation

As the victim's representative in the mediation process the lawyer advocate has a number of significant contributions to make, all of which focus on the protection of the victim's interests in the dispute and ensuring her safety and comfort in the process itself. Of course the lawyer advocate is there to be able to provide advice and clarification throughout the process, and also to redress inequalities in bargaining power by taking control of the content when necessary, or contributing to the way the process is managed. In this way the lawyer advocate can help to ensure that the victim's perspective is not subordinated to the perpetrator's. The lawyer would also assist the victim through ensuring that options generated in the process are thoroughly tested and 'reality checked'. Prior to the conclusion of an agreement the lawyer advocate would provide immediate legal advice and counsel.

Essentially the key role of the lawyer advocate is to assist the victim during the course of the mediation. This assistance will take various forms depending on the skills of the victim and her capacity in the mediation context to be confident about expressing

herself and articulating her own position under pressure. Where the victim feels she lacks confidence, the lawyer advocate may need to help with the expression of her position and her response to the perpetrators' communications. Where she feels able to contribute herself, the lawyer advocate can act as a supportive presence only. During the mediation, the victim can call on the lawyer advocate to clarify issues with the other party or with the mediator, suggest alternatives to proposals made by the other disputant, and help with the further development of her own proposals. In addition, the lawyer advocate would be able to advise the victim, in an ongoing way throughout the process, as to the legal implications and realities in relation to statements made or proposals put forward by the perpetrator.

Being able to effectively use the lawyer's legal knowledge and expertise to 'bargain in the shadow of the law' (Mnookin and Kornhauser, 1979: 950) throughout the mediation would allow the victim to develop appropriate responses to the perpetrator's proposals and trade-offs on issues subject to negotiation. This knowledge also allows the victim to firmly contradict any inaccurate assertions on the part of the perpetrator about his legal rights and entitlements.

Specific tactics can also be employed by the lawyer advocate to ensure that the process is not manipulated to the victim's disadvantage. These include: overtly naming and contradicting inappropriate behaviour from the perpetrator, detecting when pressure from the perpetrator is resulting in the victim losing energy for the negotiations and calling for a break or 'time-out', insisting where necessary that several short sessions take place rather than one exhausting and lengthy one, providing motivational encouragement to the victim and helping reorient her if the discussions become difficult, and taking responsibility for advising if it is time to withdraw from or terminate the mediation process (Sordo, 1996: 26).

The final key role of the lawyer advocate during the mediation is that of protecting and

promoting the victim's interests in relation to advising on the detail of any final agreement. The balance here is to assist the victim in terms of pursuing what is equitable, whilst also acting on her instructions.

It is important that in bringing their expertise and assistance into the mediation room as the victim's legal advocate, and in working to protect the victim's interests, the lawyer does not allow the environment to become a courtroom-style contest with the perpetrator. Not only would this impede the mediation process and counteract any of the benefits of the process for the victim, but it may also endanger the victim's post-mediation safety by exacerbating the conflict between the victim and the perpetrator. Important also is the need for the legal advocate to remain sensitive to the victim's need for as much autonomy in the process as possible. They must be able to allow the victim to pursue options that may not sit with legal authority but are consistent with the victim's own notion of what is safe and fair.

3.3 The Lawyer Advocate's Post-Mediation Role

Where the mediation has resulted in an agreement between the parties it is a clear role of the lawyer advocate to provide assistance in encouraging the victim to make the agreement enforceable through filing it, for example, as a consent order. This provides the victim with security in relation to what has been agreed and ensures that she has breach actions available to her in the event that the perpetrator does not comply with the agreement.

Where the mediation has been unsuccessful or no agreement has been reached, the mediator also has a role in terms of ensuring that the victim's post-mediation safety is assured. Even walking to the car, having terminated a mediation, for example, might be a dangerous process for a victim. It is also the role of the lawyer advocate to support the victim by providing a realistic re-assessment of other processes that might potentially be available. Of course, without improvements to our systems of legal aid, victims will

continue to face barriers to accessing other dispute resolution fora.

Conclusion

It is certainly true that mediation, on a feminist analysis, can be seen as offering potential benefits to women seeking assistance to resolve family disputes. These benefits centre on the empowerment of women in the negotiation environment, and contradict the way the formal legal system works to isolate and disengage women and their issues. For women who are victims of domestic violence, however, these benefits are less relevant, and in some cases not applicable at all. Rather, mediation can be argued as providing a dangerous environment through which unfair and unjust outcomes are possibly reached.



This article suggests a way of making mediation an equitable process for victims of domestic violence through ensuring that victims have a lawyer advocate to help them prepare for mediation, to help represent and protect their interests during the mediation and also to assist them with the terms and enforcement of a final agreement. This proposal, through promoting the presence of a legally trained representative for victims of domestic violence, might be said to contradict some of the fundamental tenets of mediation philosophy, and in particular the commitment to party control. It does however sit well with mediation's concern to uphold self-determination, to empower its participants and to ensure that fair and appropriate outcomes are reached through the process.

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Women Negotiating the Legal System Barbara Shalit, Solicitor, Mental Health Legal Centre

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