

HOW DOMESTIC VIOLENCE IMPACTS SETTLEMENT CONFERENCES

State Bar of Montana Annual Family Law Section CLE
Kalispell, Montana
June 20, 2014

John C. Schulte
Schulte Law Firm P.C.
2425 Mullan Road
Missoula, MT 59808
(406) 721-6655
jcs@jschultelaw.com

Cynthia K. Thiel
Boone Karlberg P.C.
P.O. Box 9199
Missoula, MT 59807
(406) 543-6646
cthiel@boonekarlberg.com

A. Purpose of Mediation.

1. MCA § 40-4-302 states, “the purpose of a mediation proceeding is to reduce the acrimony that may exist between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding.”

2. MCA § 26-1-813 defines mediation as “a private, confidential, informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences.”

B. Types of Mediation.

1. Facilitative mediation. A mediation process wherein a neutral third-party (mediator) facilitates the negotiations and discussions between the disputing parties. Generally, a facilitative mediator does not offer advice on the substantive issues and conveys no opinions related to the mediator’s evaluation of the case. Often defined as “needs based” mediation.

2. Evaluative mediation. A mediation process where the mediator evaluates the issues in dispute, may form opinions, and proposes solutions. However, the goal of evaluative mediation is for the parties to reach a mutually satisfactory outcome which the parties control.

3. Transformative mediation. A mediation process that encourages the participants' personal understanding and growth. By better understanding themselves and the other side's perspective, groundwork and an environment are created that promote resolution of the disputes at issue.

C. Settlement Conferences.

1. Settlement conferences are a form of alternate dispute resolution in matters that usually are being litigated in a court of law. As such, the Settlement Master (mediator) is an attorney.

2. The parties are usually represented by their own separate legal counsel and their lawyers actively participate in the settlement conference with their clients.

3. Settlement conferences do not involve joint meetings of counsel and the parties. Rather, the parties are segregated in separate rooms with their individual attorneys, and the Settlement Master moves between the two rooms.

4. Often, settlement conferences are ordered by the court and may be considered quasi-judicial, even though the Settlement Master has no decision making authority or ability to order the parties to do anything.

5. The Settlement Master generally has knowledge of the relevant law and often some experience with the issues involved in the pending litigation.

6. The Settlement Master shares his or her views related to the matters being litigated with the settlement conference participants and their counsel in order to bring settlement to the case.

7. Settlement conferences are often considered to be a form of evaluative mediation, although techniques from all three forms of mediation are employed during the conference.

8. This presentation deals largely with settlement conferences in which domestic violence (DV) has been alleged or is suspected.

D. Domestic Violence Defined.

The following is taken from the Michigan Supreme Court's Proposed Amendments to its Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, which was adopted in 2006 and being considered for amendment in 2013:

This protocol uses the terms “domestic violence” or “domestic abuse” to mean a pattern of behavior characterized by the use of various tactics, both criminal and non-criminal, to control and coerce an intimate partner by fear and intimidation, which may or may not be apparent to outside observers. An ever-present threat of physical or sexual violence is the ultimate coercive tactic, although this threat may only be carried out infrequently, if at all.

Besides acts and threats of physical and sexual violence, abusers use money, children, isolation, and emotional and psychological abuse to control their spouses or partners and to get their way. Other tactics include: belittling their partners; threatening self-harm if the partner leaves; interfering with their partners’ work or educational opportunities; stalking; and harming pets or property. Some abusers harshly enforce strict household rules, or closely monitor their partners, restricting their access to transportation or means of communication. Each abuser has a unique pattern of coercion which is best known to the abused partner.

Some abused individuals will readily talk about the violence that they are experiencing or have experienced if they feel safe and supported. However, many others may not identify their experiences as “domestic violence” when an inquiry is made about abuse in their lives, or they may disclose incrementally, as trust in the person asking the question develops.

Some abused individuals may not disclose abuse in their relationships out of shame, fear of retaliation, or fear of negative consequences resulting from such disclosures. Alternatively, abused individuals may be reluctant to disclose abuse because they have experienced negative responses to disclosures of abuse.

1. Many different types of DV exist: emotional, physical, sexual, economic. Many abusers often use more than one type of DV, and the boundaries between some of these behaviors may overlap.

2. Emotional or psychological abuse can be verbal or nonverbal. Its aim is to chip away at feelings of self-worth and independence. Victims of emotional or psychological abuse often feel there is no way out of the relationship, or without the abusive partner they will have nothing. Emotional abuse includes verbal abuse such as yelling, name-calling, blaming, and shaming. Isolation, intimidation, and controlling behavior also fall under emotional abuse. Abusers who use emotional or psychological abuse often throw in threats of physical violence.

3. Physical abuse is the use of physical force against someone in a way that injures or endangers that person. Physical abuse includes hitting, grabbing, choking, throwing things, and assault with a weapon. Physical assault or battering is a crime.

4. Sexual abuse is common in abusive relationships. Any situation in which an individual is forced to participate in unwanted sex, unsafe, or degrading sexual activity is considered sexual abuse. Statistics show that women whose partners abuse them physically *and* sexually are at a higher risk of being seriously injured or killed.

5. In that an abuser's goal is to control the victim, he or she may engage in economic abuse by controlling the finances, withholding money or access to credit cards, giving the victim an allowance, making the victim account for every penny spent, stealing from the victim, taking the victim's money, exploiting the victim's assets for personal gain, withholding basic necessities (food, clothing, medication, shelter), preventing the victim from working or choosing a career, or sabotaging the victim's job (making the victim miss work, calling constantly).

E. How We Got Here.

1. In large part, the current focus on how DV impacts settlement conferences grew out of the Montana Supreme Court's April 12, 2011, decision in *Hendershott v. Westphal*, 360 Mont. 66, 253 P.3d 806 (2011) (attachment 1), which determined that MCA § 40-4-301(2) (2011) (attachment 2) mandated that mediation could not be ordered to occur in family law cases if there was a "reason to suspect" physical, sexual, or emotional abuse was present in the relationship. The Court acknowledged that "reason to suspect" is a very low standard.

2. "Physical, sexual, or emotional abuse" is referred to generically today as "domestic violence" or "DV." Attorneys should distinguish between DV and high conflict divorces.

3. As a result of the *Hendershott* decision, the 2013 Montana Legislature amended MCA § 40-4-301(2) (2013) (attachment 3) to authorize mediation in DV cases upon the written, informed consent of both parties. MCA § 40-4-301(2).

4. MCA § 40-4-301(5) defines "informed consent" as "an educated, competent, and voluntary choice to enter into mediation." See sample consents found at attachment 4. The Montana Rules of Civil Procedure allow courts to manage their calendars, including efforts to facilitate settlement. Mont. R. Civ. P. 16(a)(5). The Twenty-First Judicial District Court implemented its own procedure to deal with the issue of informed consent earlier this year. Its forms may be found at attachment 5.

5. Additional background information can be found at: *The Hendershott Ruling, When Mediation Runs Into Domestic Violence*, Capulong, Eduardo R.C. and Alley, Kren, 36 Mont. L. Rev. 9 (2011); and *Mandatory Appellate Mediation and Domestic Violence in Montana*, Parks, Wesley, 39 Mont. L. Rev. 12 (2013).

6. The American Bar Association's Model Standards of Practice for Family and Divorce Mediation (adopted February 2001) can be found at attachment 6.

F. Mediator Qualifications.

1. If court appointed, the mediation must be conducted by a mediator who is trained in mediating DV cases. MCA § 40-4-301(2).

2. The district court is directed by statute to "establish and maintain a list of mediators to assist parties in formally mediating disputes." MCA § 40-4-306.

3. An attorney interested in being included on the list should present an application to the clerk of court stating he or she meets the qualifications required by MCA § 40-4-307. The clerk then presents the application to the court for review and approval. MCA § 40-4-306.

4. Mediators on such list must meet the minimum qualifications found in MCA § 40-4-307, which includes "knowledge in the area of domestic violence." MCA §§ 40-4-306 and -307.

G. Rules of the Road.

1. Since Settlement Masters are attorneys, the Montana Rules of Professional Conduct apply.

2. Informed consent. Mont. Rule of Prof. Conduct 1.0(g) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

3. Confidentiality. Mont. Rule of Prof. Conduct 1.6 prohibits a lawyer from revealing client information and communications unless there is informed consent by the client. There are three exceptions to this general prohibition, with exception (b)(1) being especially relevant to this presentation as it allows disclosure "to prevent reasonable certain death or substantial bodily harm."

4. Duty to Inform. Mont. Rule of Prof. Conduct 2.3 requires that a lawyer serving as a third-party neutral (Settlement Master or mediator) "inform all parties that the lawyer is not representing them." Additionally, the lawyer neutral must also "explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

H. Confidentiality.

1. Settlement conferences are confidential proceedings. In addition to the proceeding being confidential (generally not the fact of the settlement conference itself, but what takes place in the conference), the Settlement Master and participants have a confidential relationship. This confidential relationship perhaps is the best and most powerful tool a Settlement Master may have in bringing resolution to the case. Confidentiality assists the Settlement Master in earning the trust and confidence of the participants. Without this trust and confidence, a Settlement Master is unlikely to be effective.

2. In addition to Mont. Rule of Prof. Conduct 1.6, Confidentiality of Information, specific Montana statutes and rules provide for and support confidentiality.

a. Public Policy. MCA § 26-1-801 sets forth the policy to protect confidentiality.

b. Spousal privilege. MCA § 26-1-802 grants a confidential privilege to spouses regarding communications made during the marriage. However, an exception to this privilege exists in matters relating to civil actions between the spouses or for crimes committed against a spouse or the parties' children.

c. Attorney-client privilege. MCA § 26-1-803 is the statutory equivalent of Mont. Rule of Prof. Conduct 1.6, Confidentiality of Information.

d. Advocate privilege. MCA § 26-1-812 provides for confidential communications between a victim of DV and the victim's advocate. This provision helps to ensure the confidentiality of settlement conference proceedings when an advocate is present with the victim at the settlement conference. MCA § 40-4-302(3) allows a mediator to exclude attorneys from a mediation unless it involves DV, but not the victim's advocate.

e. Mediation confidentiality and privilege. MCA § 26-1-813 is the general statute relied on by most parties for establishing the confidentiality of a settlement conference or mediation.

f. Family law confidentiality. MCA § 40-4-303 provides for the confidentiality of mediation proceedings in family law cases.

g. Appellate mediation. Mont. R. App. P. 7(6) mandates that appellate mediations are confidential. Additionally, this provision also refers to Mont. R. Evid. 408 related to the admissibility of settlement negotiations at trial. It is interesting to note that Mont. R. App. P. 7(2)(b) allows for the appellate

mediation to occur by telephone “if there has been a finding by a district court that one of the parties has been a victim of domestic violence.” This rule appears to be at odds with MCA § 40-4-301(2). We have heard reports of colleagues who have been successful in moving the Court to except them from appellate mediation on the basis of the Court’s *Hendershott* decision.

I. Screening for Domestic Violence.

1. Attorneys representing clients need to screen for DV at the outset of their representation and make further inquiries if signs of DV crop up during the representation. See sample screening tools found at attachment 7.

2. Taking into account exceptional circumstances, if an attorney learns DV is alleged or suspected, he or she should make opposing counsel aware, as both parties’ consent is required to proceed to a settlement conference.

3. If an attorney is aware DV is alleged or involved in a case headed to a settlement conference, the attorney should make the Settlement Master aware of the same and ensure the Settlement Master is presented with the written consent of both parties before the settlement conference begins.

4. In order to not run afoul of the statutory requirements, Settlement Masters are advised to include a statement in their engagement letters to the following effect:

If this case involves domestic violence, the consent of both parties is required before the settlement conference is to take place. I will assume the case does not involve domestic violence unless I hear from one of you. If I hear from either of you that domestic violence is suspected in this case, the written consent of both parties is required prior to beginning the settlement conference. Also, if domestic violence is suspected, I would appreciate if you would advise if any additional accommodations should be made beyond our usual arrangements of starting at different times and meeting in different conference rooms.

J. Assisting a Client in Making an Informed Decision as to Whether to Participate in a Settlement Conference or Proceed to Trial.

1. Settlement conferences are a voluntary process. The participants are able to agree to what they want to agree to, disagree with what they want to disagree, or accept or reject

proposals made. If the parties do not settle some or all of the outstanding issues, the parties have a right to a non-jury trial before the court.

2. Settlement conferences involve self-determination—any agreement reached must be voluntary. At trial, the judge makes a determination, not the parties. Thus, the judge takes away the parties' power to resolve disputes and exercises his or her judicial powers. This process continues a victim's powerlessness.

3. Even if a full settlement is not expected, consider whether at least some issues can be resolved prior to trial.

4. The parties' attorneys actively participate in settlement conferences. This may be problematic for pro se litigants, and the Settlement Master likely plays a larger role in such cases.

5. Consider the cost of a settlement conference versus trial, in terms of time, emotion, and expense.

6. Consider the timing of the settlement conference (i.e., is it too soon?).

7. Determine whether the case can be settled by negotiations between the parties' attorneys, without either a settlement conference or trial.

8. Consider whether DV is relevant to the current situation or has the party emotionally moved on, is no longer intimidated by his or her partner, or is not worried about the occurrence of future DV. In this regard, it is helpful to consider the recency and severity of the abuse that has occurred in the relationship, as DV occurs on a spectrum.

9. Explain to your client he or she will not be in the same room as the other party.

10. Explain to your client that other safety precautions can be taken.

11. Consider whether court and evidentiary rules will prevent presentation of the evidence necessary for the court to make a reasoned decision. The court cannot create or consider evidence that is not brought before it or not brought before it correctly. The court cannot apply the law unevenly, even to the advantage of a victim of DV.

12. Parties to a settlement conference are rarely, if ever, in the same room, whereas they will be at trial. Ensure your client understands the courtroom is a public forum, and his or her testimony will need to be made publicly, not in private.

13. Discuss the client's willingness to testify and subject himself or herself to cross-examination.

14. Non-party witnesses may not be willing to testify and, if subpoenaed, may not testify as expected.
15. Discuss the relative certainty of a negotiated settlement versus the unknown decision a judge may make.
16. The settlement conference may offer an opportunity for informal discovery and information gathering.
17. Settlement agreements often are more finely tuned in addressing the specifics of a case than a court order may be.
18. Consider the judge assigned to the case.
19. Consider whether this is a case that should not go to a settlement conference:
 - a. Is the abuse currently ongoing?
 - b. Does the victim have the ability to negotiate for himself or herself?
 - c. Is the victim able to assert his or her needs?
 - d. Can the physical safety of everyone involved, including the settlement master, be ensured?
 - e. Will the abuser use the settlement conference to discover information that can later be used against the abused party or to otherwise manipulate the court process.
20. Make a referral to a local DV program or shelter or a therapist to allow the client to obtain further information about whether he or she may be able to make decisions at such a conference.
21. Settlement conferences may provide the parties with more time to resolve their outstanding issues than the court may allot them at trial.
22. The parties, counsel, and Settlement Master can collectively talk through the pros and cons of various resolutions and how they will impact the parties. The judge does not have this opportunity, so his or her decision may not be as well crafted to address the parties' specific circumstances.

K. Procedural Accommodations for and Environment of the Settlement Conference.

1. The Settlement Master should take appropriate steps to ensure the participants' safety and well-being during a settlement conference. The procedural accommodations should be designed to directly respond to the abused party's safety needs and concerns.

2. Place the parties and their respective counsel in separate rooms, with as little proximity to each other as space allows. If necessary, have parties on different floors of the same building, in different buildings, or in an undisclosed location. Consider whether telephone (not preferable) or Skype participation by a participant is appropriate. Consider whether you need to have a staff member escort a party to/from the conference room and restroom or stand sentry to a conference room.

3. Stagger the parties' arrival and departure times and, if appropriate, escort parties to/from their vehicles.

4. Have the alleged abuser arrive first and leave last.

5. Arrange for a way for the alleged victim to leave the building without being seen.

6. Have the alleged victim arrange to have a support person present (family member, friend, therapist, DV advocate, etc.). In some situations where pro se litigants are involved, the settlement master may need to consider whether he or she will require a party to have legal counsel present.

7. Ensure the alleged victim has access to a phone so he or she may contact family, friends, advocates, etc.

8. Ensure the alleged abuser does not have access to a weapon.

9. Allow the victim extra time to make decisions or time to take breaks.

L. Practical Considerations for the Settlement Conference.

1. Ensure you have signed consents from both parties to proceed.

2. Consider the layout of your office space (proximity of conference rooms, sound proofing, access to restrooms, etc.).

3. Consider seating arrangement. May depend on the shape of your table, size of the room, etc. Victim may want to sit closer to or further from the door. Do not hesitate to ask

people to move around if it will facilitate the environment of the conference and communications between you and the party.

4. Promptly introduce yourself and shake hands.
5. Make appropriate eye contact with the parties.
6. Acquaint the participants with the layout of your office (access to a restroom, in particular).

M. Preliminary Remarks.

1. Explain what will occur (you will move from room to room, lunch will be brought in, a written agreement will be prepared for their consideration and hopefully execution, etc.).
2. Explain that in family law matters, verbal agreements are not enforceable. Rather, the agreement must be in writing and signed by the parties.
3. If a participant does not have an attorney with him or her, explain that the party will be given an opportunity to take the agreement to an attorney to review before it is enforceable.
4. Address the DV and outline the safeguards.
5. Inquire into the party's concerns regarding the conference.
6. Pursuant to Mont. R. Prof. Conduct 2.3, make the participants aware you are an attorney, but you are not their attorney, you do not represent them, and they should not rely on you for legal advice.
7. Advise the participants you are not the judge and do not have any decision-making authority.
8. Discuss the parameters of the confidentiality that surrounds the settlement conference proceeding. Explain that you cannot be called upon or subpoenaed as a fact witness before the court.
9. Advise the participants you will be filing a report with the court as to whether the matter settled or did not settle.

10. Request the participants tell you if at any time they are feeling pressured or under duress to make a decision.

11. When appropriate during the proceeding, advise you may give them your opinion as to an appropriate outcome based on what you have heard and learned during the process.

N. Strategies for Dealing with Emotions, Stress, and Anger.

1. Emotions usually run high in a domestic relations settlement conference. This can be especially true in settlement conferences involving DV.

2. It is important that the parties are able to recognize objective reality as it relates to their case; and this is unlikely to occur if a person is highly emotional, stressed out, and angry. No two cases are alike, and there is no cookie cutter approach to dealing with the emotion, stress, and anger. However, it is absolutely necessary that the parties are comfortable with and trust the Settlement Master.

3. While it is very important that the Settlement Master validate the issues and concerns of each participant, it is always necessary to regularly remind the participants that the Settlement Master does not find any facts or order any results. One important reason for this is in DV cases, participants often may want a pound of flesh for harm caused or vindication from false allegations.

4. When appropriate, quash any perceived frivolity in a conference room that may distract from coming to settlement.

5. Recognize signals that mean, "I'm out of here," "I need a break," or "that raised eyebrow means a whole lot more."

6. Reframe each party's message.

7. Be creative in offering and assisting the parties with considering solutions. Often a solution coming from the Settlement Master may be more acceptable than if it comes from one of the parties.

8. When appropriate, recess the conference and reconvene another day or, if necessary, stop the conference and report to the court the matter did not settle so the parties can proceed to trial.

O. Success.

1. Success at a settlement conference is usually defined as an informed, negotiated resolution of the issues between the parties. In a domestic relations case, with or without DV, this usually means an executed Marital and Property Settlement Agreement and/or Parenting Plan.

2. A risk analysis generally occurs during a settlement conference in order to obtain resolution. However, settlement conferences may be considered a success with partial settlement or even with the parties and their attorneys leaving the settlement conference with a more clear and defined understanding of the issues in their case and the proof necessary to prevail in court.

3. It is important for the Settlement Master to also have an objective reality of what is realistically possible in the case at hand and to have a somewhat flexible view of what a successful settlement conference may be.

P. Provisions for Managing Conflict Post Settlement Conference.

1. Whether the case involving DV settles or does not settle at settlement conference, every effort should be made to provide some method of dealing with any ongoing conflict and DV. This can be done with no contact orders and other creative solutions related to the property and debt distribution or parenting and support of the children that ensure the safety and emotional well-being of the parties. Remember that each case is unique and provisions for managing conflict post settlement conference must be specifically tailored to that particular case.

2. Contents of Marital and Property Settlement Agreements.

- a. Arrangements for collection of personal property.
- b. Waiver of tort claims.
- c. The attorneys may have brought specific language with them they wish to include in the settlement agreement or parenting plan.
- d. Payment of child support or spousal maintenance through wage withholding or automatic withholding/deposit.

3. Contents of Parenting Plans.

a. Make specific provisions for transfers of custody (neutral location such as school, specified location with third-party observation, supervised exchanges of children, etc.).

b. Set specific times when custody changes from one parent to another.

c. Set specific times for when holidays and special days begin and end.

d. Revise any dispute resolution provision to address the specific circumstances of the case at hand or eliminate the provision altogether.

4. Attempt to limit future or ongoing contact between parties. Instead of face-to-face or phone contact, consider mail, email, text, and Our Family Wizard.

INDEX

Attachment 1	The Montana Supreme Court's April 12, 2011, decision in <i>Hendershott v. Westphal</i> , 360 Mont. 66, 253 P.3d 806 (2011)
Attachment 2	MCA § 40-4-301(2) (2011)
Attachment 3	MCA § 40-4-301(2) (2013)
Attachment 4	Sample Informed Consents
Attachment 5	Twenty-First Judicial District Court Forms
Attachment 6	ABA Model Standards of Practice for Family and Divorce Mediation
Attachment 7	Screening Checklists
Attachment 8	Montana Statutes
Attachment 9	Montana Rules of Professional Conduct
Attachment 10	Montana Rules of Appellate Procedure
Attachment 11	Montana Rules of Evidence

Attachment 1



253 P.3d 806
360 Mont. 66, 253 P.3d 806, 2011 MT 73
(Cite as: 360 Mont. 66, 253 P.3d 806)

Page 1

C

Supreme Court of Montana.
Heidi R. HENDERSHOTT, Petitioner and Appellant,
v.
Jesse B. WESTPHAL, Respondent and Appellee.

No. DA 10-0434.
Submitted on Briefs Feb. 16, 2011.
Decided April 12, 2011.

Background: Wife moved in dissolution proceeding to amend final parenting plan by striking the provision calling for alternative dispute resolution. The District Court, the Eleventh Judicial District, Flathead County, Stewart E. Stadler, Presiding Judge, denied motion. Wife appealed.

Holdings: The Supreme Court, Beth Baker, J., held that:

(1) as a matter of first impression, family law provision creates an absolute bar to mediation where there is a reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party; and

(2) there was "reason to suspect" that relationship between husband and wife was emotionally abusive, and therefore district court was prohibited from ordering alternative dispute resolution for disputes regarding the final parenting plan.

Reversed and remanded.

West Headnotes

[1] Alternative Dispute Resolution 25T 440

25T Alternative Dispute Resolution
25TIII Mediation
25TIII(A) In General
25Tk440 k. In general. Most Cited Cases
Family law mediation provision does not limit district court's authority to order mediation to

instances in which both parties consent. MCA 40-4-301(1).

[2] Statutes 361 1091

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 k. In general. Most Cited Cases
(Formerly 361k188)
When interpreting a statute, the Supreme Court looks first to the plain meaning of its words.

[3] Statutes 361 1216(2)

361 Statutes
361III Construction
361III(G) Other Law, Construction with Reference to
361k1210 Other Statutes
361k1216 Similar or Related Statutes
361k1216(2) k. Subject or purpose.
Most Cited Cases
(Formerly 361k223.2(.5))

Statutes 361 1374

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1372 Statute as a Whole; Relation of Parts to Whole and to One Another
361k1374 k. Giving effect to entire statute and its parts; harmony and superfluosity.
Most Cited Cases
(Formerly 361k212.4)

The Supreme Court operates under the presumption that the Legislature does not pass meaningless legislation, and the Supreme Court will harmonize statutes relating to the same subject in order to give effect to each statute.

[4] Statutes 361 1362

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 2

361 Statutes
 361III Construction
 361III(M) Presumptions and Inferences as to
 Construction
 361k1362 k. Nature, characteristics, and
 knowledge of legislature in general. Most Cited
 Cases
 (Formerly 361k212.1)

Statutes 361 ↩️1385(1)

361 Statutes
 361III Construction
 361III(M) Presumptions and Inferences as to
 Construction
 361k1381 Other Law, Construction with
 Reference to
 361k1385 Other Statutes
 361k1385(1) k. In general. Most
 Cited Cases
 (Formerly 361k212.7)

Statutes 361 ↩️1385(2)

361 Statutes
 361III Construction
 361III(M) Presumptions and Inferences as to
 Construction
 361k1381 Other Law, Construction with
 Reference to
 361k1385 Other Statutes
 361k1385(2) k. Similar or related
 statutes. Most Cited Cases
 (Formerly 361k212.1)

The Supreme Court presumes the Legislature
 acts with deliberation and full knowledge of all
 existing laws on a subject.

[5] Alternative Dispute Resolution 25T ↩️440

25T Alternative Dispute Resolution
 25TIII Mediation
 25TIII(A) In General
 25Tk440 k. In general. Most Cited Cases
 Family law provision creates an absolute bar to
 mediation where there is a reason to suspect that

one of the parties or a child of a party has been
 physically, sexually, or emotionally abused by the
 other party. MCA 40-4-301(2).

[6] Child Custody 76D ↩️3

76D Child Custody
 76DI In General
 76Dk2 Constitutional and Statutory Provisions
 76Dk3 k. In general. Most Cited Cases

Child Custody 76D ↩️419

76D Child Custody
 76DVIII Proceedings
 76DVIII(A) In General
 76Dk419 k. Mediation, alternative dispute
 resolution, arbitration. Most Cited Cases

Statute that authorizes district court, in its
 discretion, to order the parties in parenting plan
 proceeding to participate in a dispute resolution
 process does not conflict with another family law
 provision that prohibits district court from
 authorizing mediation if the court has reason to
 suspect that one of the parties or a child of a party
 has been physically, sexually, or emotionally
 abused by the other party; instead, both provisions
 afford court discretion in ordering mediation,
 unless there is reason to suspect emotional,
 physical, or sexual abuse in the relationship. MCA
 40-4-234, 40-4-301(2).

[7] Statutes 361 ↩️1177

361 Statutes
 361III Construction
 361III(F) Extrinsic Aids to Construction
 361k1172 Ancillary Provisions or Material
 361k1177 k. Titles, headings, and
 captions. Most Cited Cases
 (Formerly 361k211)

Consideration of the title of the act through
 which the statute was introduced is a necessary first
 step in the search for the purpose and meaning of

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 3

the statute.

[8] Child Custody 76D 419

76D Child Custody

76DVIII Proceedings

76DVIII(A) In General

76Dk419 k. Mediation, alternative dispute resolution, arbitration. Most Cited Cases

There was "reason to suspect" that relationship between husband and wife was emotionally abusive and, therefore, family law provision prohibited district court in dissolution proceeding from ordering alternative dispute resolution for disputes regarding the final parenting plan; psychologist who evaluated wife opined that difficulty in wife's marriage, with ongoing traumatic experiences, had resulted in post traumatic stress disorder, three experts all testified that wife would be significantly traumatized by forced interaction with husband, and husband admitted to controlling and dominating wife during their marriage and to having trouble controlling his anger. MCA 40-4-234, 40-4-301(2).

****807** For Appellant: Monte Jewell, Attorney at Law; Missoula, Montana.

For Appellee: Jesse B. Westphal, (self-represented); Kila, Montana.

Justice BETH BAKER delivered the Opinion of the Court.

***66** ¶ 1 Petitioner Heidi Hendershott appeals from the Eleventh Judicial District Court's order denying her motion pursuant to ***67**M.R. Civ. P. 59(g) to amend the final parenting plan by striking the provision requesting alternative dispute resolution.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 Pursuant to this Court's order to seal the record in this case, we have limited any reference to sensitive confidential information in the following factual summary and include those facts necessary

to our analysis of the issue presented. Petitioner Heidi Hendershott and respondent Jesse Westphal were married in 1999, in Flathead County, Montana, where they resided throughout their marriage. Heidi filed a petition for dissolution and proposed parenting plan in 2007. Prior to filing for dissolution, Heidi obtained an order of protection against Jesse. Heidi's proposed parenting plan sought to allow Jesse supervised visits with the parties' two children at the Nurturing Center in Kalispell until Jesse worked his way to age appropriate visitation.

¶ 3 Heidi's affidavit in support of an interim parenting plan described "increasing levels" of physical and emotional abuse to which she could no longer subject herself or their children. Heidi alleged Jesse would frequently become enraged and had trouble controlling his anger. Heidi also alleged that their children had witnessed his actions and started to justify Jesse's behavior.

¶ 4 The District Court approved Heidi's proposed parenting plan as an interim parenting plan and set a hearing on the order of protection and the parenting plan. After hearing from both parties, the District Court modified the plan and granted Jesse age appropriate visitation. The court ordered that the order of protection remain in effect and be modified only to account for visitation. The court also ordered that an independent ****808** parenting plan evaluation be conducted by Dr. Edward Trontel.

¶ 5 Heidi refused to meet with Jesse during Dr. Trontel's evaluation, which Dr. Trontel claimed "perturbed" his examination process. Dr. Trontel ultimately opined that "there is no way to conclude, with absolute certainty, that serious endangerment is nonexistent. However, there is no empirical foundation to conclude with reasonable confidence that Mr. Westphal poses a serious danger to Ms. Westphal or her children."

¶ 6 On December 7, 2007, Heidi also underwent an evaluation by Dr. Christine Fiore, a

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 4

Licensed Clinical Psychologist. Dr. Fiore opined that difficulty in Heidi's marriage, with ongoing traumatic experiences, has resulted in post traumatic stress disorder. Dr. Fiore explained that *68 post traumatic stress disorder is a diagnosis commonly found in women who experience ongoing emotional or other abuse in their relationships. Dr. Fiore further concluded that continued contact with Jesse would exacerbate Heidi's symptoms.

¶ 7 On March 3, 2008, the parties stipulated to a new interim parenting plan. By agreement, the order of protection entered against Jesse was dismissed. The stipulated interim parenting plan identified an exchange point for the children and allowed for either parent to request the presence of law enforcement. It further stipulated that Heidi and Jesse would only communicate through a written parenting journal. The stipulated plan omitted any provision for the mediation of disputes over the parenting plan. As part of the new interim parenting plan, Heidi and Jesse agreed to undergo a supplemental parenting evaluation by Dr. Paul Silverman, a Licensed Clinical Psychologist.

¶ 8 Heidi consistently requested that an officer of the Kalispell Police Department be present during child exchanges. After the Kalispell Police Department complained of Heidi's frequent request for "stand by" officers, Heidi, with the assistance of her family, hired uniformed security guards to accompany her. After the children's visits with Jesse, Heidi claimed the children were timid and uncomfortable.

¶ 9 On December 26, 2008, Dr. Silverman completed a parenting plan evaluation of Jesse, Heidi, and the children. Dr. Silverman opined that "[d]etermining whether Jesse was abusive during their marriage is extremely difficult and the truth may only be known by Jesse and Heidi." Dr. Silverman did note that Heidi's alleged abuses included constant put downs and rages and that Jesse would tell Heidi he owned her body and she should do what he wants her to do. However, Dr.

Silverman concluded that these allegations, as well as other observations of Jesse's behavior, led him to question whether abuse actually was occurring or if Heidi's allegations were merely her own interpretations of Jesse's behavior. Dr. Silverman noted that Jesse agreed he had not been a "Godly husband" and acted towards Heidi in a way that contributed to the end of their marriage. While Dr. Silverman did not find evidence of physical or sexual abuse, he found Jesse to be insensitive and intolerant of others, that he had difficulty managing his anger, and that he viewed the relationship in a traditional male-dominated manner. Dr. Silverman also noted Heidi was inhibited socially, had low self esteem, and suffered from stress and anxiety which caused physical symptoms.

¶ 10 Dr. Jennifer Robohm, a Licensed Clinical Psychologist and Heidi's *69 individual therapist, responded to Dr. Silverman's Parenting Evaluation Report with a number of concerns about Dr. Silverman's methodology and observations. Dr. Robohm specifically noted that even though Heidi had been seeing her for six months, Dr. Silverman did not consult Dr. Robohm for her impressions. She further explained that many of the anecdotes Heidi shared with Dr. Silverman were consistent with experiences of abuse victims but were not included in his report.

¶ 11 On February 28, 2009, Dr. Robert Geffner, a Licensed Psychologist, reviewed Dr. Silverman's report and completed a forensics consultation. Dr. Geffner noted that Dr. Silverman's report failed to account for the children's problematic behavior before or after visits with Jesse or Jesse's difficulty managing his anger. Dr. Geffner also noted many red flags for potential abuse, including **809 power and control issues he claimed were disregarded by Dr. Silverman. Dr. Geffner concluded Heidi displayed many behaviors and traits of an abused woman and recommended Jesse undergo psychotherapy with an abuse specialist.

¶ 12 At trial, both Heidi and Jesse presented

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 5

testimony regarding Heidi's abuse allegations. The District Court heard testimony from Heidi, Jesse, Dr. Trontel, Dr. Silverman, Dr. Fiore, Dr. Robohm, and Dr. Geffner, among others.

¶ 13 Heidi testified, as she told Dr. Silverman, that Jesse believed her body belonged to him, not to her, and that he expected her to do whatever he said. Heidi stated she lived in fear of Jesse. Heidi's counsel also presented a letter, written by Jesse, which read, in part, "[i]t is so dumb because I don't want to control you or dominate you or abuse you or manipulate you, but that's what I have done, but I sure couldn't see it." Upon questioning Jesse stated, "I could see places where, yes, I could be viewed as a controlling person or a manipulative person."

¶ 14 On January 13, 2010, the District Court issued a decree of dissolution, along with findings of fact regarding Heidi's abuse allegations. The court reviewed the opinions of the trial witnesses and stated, "[t]he Court finds that Dr. Silverman was the only professional person who performed and completed a parenting evaluation and that his final evaluation followed accepted standards which support his conclusions and recommendations." The court summarized Dr. Silverman's recommendations, including the following:

Communication between Petitioner and Respondent concerning the children should be accomplished by the existing journal, *70 email, or any other method agreeable to both parties.

With no direct contact by the parents, medical information should be shared by the parties but actual appointments attended by only the parent who scheduled the appointment.

Child exchanges between the parties should take place in the vicinity of the parties' residences through neutral third parties with no direct contact between Petitioner and Respondent....

¶ 15 The District Court concluded:

[I]t is in the best interests of the parties' children

to continue, as a final parenting plan, the previously approved Interim Parenting Plan of March, 2008. The children are to reside primarily with Petitioner with Respondent having parenting time as indicated in the Interim Plan.... With the exception of the recommendation by Dr. Silverman that parenting time be increased ... the Court finds that Dr. Silverman's other recommendations, listed above, as to direct contact, exchanges, communication between the parents, phone contact, public school, and medical appointments, are in the best interests of the children and are to be incorporated in the parties' final parenting plan.

¶ 16 The court directed Jesse's counsel to prepare a final parenting plan based on the court's findings. Heidi objected to Jesse's proposed parenting plan on the ground that, pursuant to § 40-4-301(2), MCA, the final parenting plan should not include a mandatory mediation provision.

¶ 17 The District Court ultimately approved and ordered a final parenting plan. The plan specified that communication between the parties be with "no direct contact" and that "all non-emergency communication between mother and father should be accomplished in writing." Section IV of the final parenting plan included the following requirement:

If not resolvable between the parties themselves, disputes concerning issues addressed in this Plan, other than as to child support, shall be submitted to a mediator (e.g. counselor, attorney) agreed upon by both parties. Any mediation should be structured to avoid direct contact by the parties, either with separate sessions or submission in writing.

Heidi then moved under M.R. Civ. P. 59(g) to alter the District Court's judgment and final parenting plan, pursuant to § 40-4-301(2), MCA, by striking the alternative dispute resolution provision. Heidi argued it would be an abuse of discretion for the District Court to disregard §

253 P.3d 806
360 Mont. 66, 253 P.3d 806, 2011 MT 73
(Cite as: 360 Mont. 66, 253 P.3d 806)

Page 6

40–4–301(2), MCA. Heidi cited**810 expert testimony from trial, the court's *71 acknowledgment of the risks in ordering the parties to communicate in writing, and her own testimony that Jesse was “emotionally controlling” and that being forced to meet with him made her fearful and nervous. Jesse contended mediation was appropriately included in the final parenting plan.

¶ 18 The District Court denied Heidi's motion. Heidi now appeals, claiming error in the court's imposition of mandatory alternative dispute resolution.

STANDARD OF REVIEW

¶ 19 We review for correctness a district court's interpretation and application of statutes. *Kulstad v. Maniaci*, 2009 MT 326, ¶ 50, 352 Mont. 513, 220 P.3d 595.

DISCUSSION

[1][2][3][4] ¶ 20 This case requires the interpretation of § 40–4–301, MCA, a matter of first impression for our Court. When interpreting a statute, we look first to the plain meaning of its words. *Marriage of Christian*, 1999 MT 189, ¶ 12, 295 Mont. 352, 983 P.2d 966. This Court operates under the presumption that the Legislature does not pass meaningless legislation, and we will harmonize statutes relating to the same subject in order to give effect to each statute. *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. We also presume the Legislature acts with deliberation and full knowledge of all existing laws on a subject. *Id.*

¶ 21 Section 40–4–301(1), MCA, grants a district court the discretion to require parties to participate in mediation of a family law proceeding:

The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance

of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.

Heidi first argues that this section allows the court to order mediation only where both parties consent. We disagree. The first sentence of the statute plainly gives the court authority to *require* mediation. In the alternative, a party may *request* mediation or both parties may *agree* to mediation. In the event mediation occurs by agreement of the parties, the court nonetheless may *require* attendance of certain persons at the mediation. Subsection (1) does not limit the court's *72 ability to order mediation. Because we find the statute to be plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation. *Christian*, ¶ 12.

[5] ¶ 22 However, § 40–4–301(2), MCA, makes an explicit exception to court-ordered mediation:

The Court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.

This subsection's plain language prohibits court-ordered mediation where there is a reason to suspect abuse.

[6] ¶ 23 Jesse argues that subsection (2) of § 40–4–301, MCA, is in conflict with the final parenting plan criteria listed in § 40–4–234, MCA. Section 40–4–234(4), MCA, states “[t]he Court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan.” While § 40–4–234(4), MCA, invokes the court's discretion to order mediation, it does not *require* a court to include an alternative dispute resolution provision in a parenting plan and is silent on the subject of

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 7

mediation in instances of domestic abuse. Section 40-4-301(2), in contrast, prohibits mediation in all family law matters if there is reason to suspect abuse.

¶ 24 “Reason to suspect” sets a minimal standard that the legislature expressly considered and included in the law. Section 40-4-301, MCA, was enacted in 1993. See 1993 Mont. Laws ch. 199, sec. 1. During the Senate Judiciary Committee's discussion of the bill, Senator Halligan, the bill's sponsor, stated the “reason to suspect” standard was *811 used because it was lower than probable cause and consistent with doctor and teacher standards for investigating abuse. Mont. S. Jud. Comm., *Executive Action on SB 117*, 53rd Reg. Sess. 2 (Jan. 25, 1993).

¶ 25 The Senate Judiciary Committee also added evidence of “emotional abuse” as a specific reason to prohibit court-ordered mediation. See Mont. S. Stand. Comm. Rpt., 1993 Legis., 53rd Reg. Sess. 1 (Jan. 26, 1993). Senator Halligan explained that a reason to suspect emotional abuse should prohibit mediation due to the significant difficulties in mediating a conflict where one person is intimidated by another. Mont. S. Jud. Comm., *Executive Action on SB 117*, 53rd Reg. Sess. 2 (Jan. 25, 1993). Given the plain language of the statute, together with its legislative history, it is clear the Legislature intended § 40-4-301(2), MCA, as an absolute bar to mediation where *73 the court finds a reason to suspect abuse.

¶ 26 Our interpretation finds support in the legislative history of § 40-4-234, MCA, enacted in 1997. See 1997 Mont. Laws ch. 343, sec. 19. In that legislation, the Legislature sought to neutralize the terminology used in parenting determinations and to provide direction for parenting plans, including specific provisions in the best interest of the child. See generally 1997 Mont. Laws ch. 343. Section 40-4-234(4), MCA, was specifically added to encourage mediation because mediation is an effective approach to creating and enforcing parenting plans. See Mont. H. Jud. Comm., *Hearing*

on HB 231, 55th Reg. Sess., ex. 5 (Jan. 29, 1997); see also Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. Ill. U.L.J. 559, 563 (2002) (citing Sarah R. Cole, et al., *Mediation: Law, Policy and Practice*, § 12:2, 122-23 (2d ed., West 2002)). However, the basic rules, assumptions, and goals of mediation are undermined in those particular cases when the parties have a history of domestic violence. David Frazee, Ann M. Noel, and Andrea Brenneke, *Violence Against Women: Law and Litigation*, § 16:45, 16-60 (West 1998) (when there is evidence of violence, mediation is not effective because the parties have unequal bargaining power); accord Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 Harv. Women's L.J. 272, 272-92 (1992); Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, 39 Judges' J. 21, 22 (Spring 2000).

[7] ¶ 27 The legislative history indicates the Legislature was aware of these concerns and did not intend the law to require alternative dispute resolution provisions without regard to domestic abuse. The title of the 1997 Act stated that the bill provided “an option for dispute resolution or mediation except in cases of proven child or spousal abuse.” 1997 Mont. Laws ch. 343, sec. 1. “Consideration of the title of the Act through which the statute was introduced is a necessary first step in the search for the purpose and meaning of the statute.” *Montana Dep't of Nat. Resources & Conserv. v. Clark Fork Logging Co.*, 198 Mont. 494, 496, 646 P.2d 1207, 1208 (1982).

¶ 28 By allowing a court discretion to include a mediation provision in a parenting plan, the Legislature merely encouraged practitioners and courts to consider alternative dispute resolution for future conflicts. The discretionary language of § 40-4-234, MCA, as well as the legislative history, make clear the Legislature did not seek to override the exception in § 40-4-301(2), MCA, to mediation of parenting conflicts in instances of abuse. We therefore conclude that § 40-4-234(4), MCA, *74

253 P.3d 806
 360 Mont. 66, 253 P.3d 806, 2011 MT 73
 (Cite as: 360 Mont. 66, 253 P.3d 806)

Page 8

and § 40-4-301(2), MCA, are not in conflict. Instead, both provisions afford court discretion in ordering mediation, unless there is reason to suspect emotional, physical, or sexual abuse in the relationship.

[8] ¶ 29 Heidi relied on § 40-4-301(2), MCA, in requesting the District Court to strike the alternative dispute resolution provision contained in the parenting plan. She argued the law specifically prohibits the alternative dispute resolution provision because her testimony and the testimony of many professionals at trial established that Heidi and Jesse have an emotionally abusive relationship. Heidi referenced testimony that she suffers from post traumatic stress disorder and fears interacting with Jesse. Dr. Robohm, Dr. Fiore, and Dr. Silverman all testified that Heidi would be significantly traumatized by forced interaction with Jesse. **812 Although Jesse admitted to controlling and dominating Heidi during their marriage and to having trouble controlling his anger, he denied abuse and urged the court to include mandatory mediation in the parenting plan.

¶ 30 In its final decree, the District Court reviewed the various experts' testimony and concluded that Dr. Silverman was the only professional person who performed a complete parenting evaluation. The court's adoption of nearly all of Dr. Silverman's recommendations indicates it found his testimony credible. While the court noted the conflicting evidence of abuse, it did not find whether there was "reason to suspect" that either physical, sexual or emotional abuse was present in the relationship. In its post-decree order denying Heidi's motion to strike the alternative dispute resolution provision from the proposed final parenting plan, the District Court did not discuss its factual findings, Jesse's admission of controlling and dominating behavior, Heidi's post traumatic stress disorder, or other evidence presented at trial. Instead, the District Court attempted to accommodate Heidi's concerns and other no-contact provisions of the parenting plan by requiring that

"[a]ny mediation should be structured to avoid direct contact by the parties." Section 40-4-301(2), MCA, however, does not afford discretion to design a special mediation procedure.

¶ 31 In construing and applying statutes, courts are not at liberty to "insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. We conclude that § 40-4-301(2), MCA, explicitly prohibits courts in family law proceedings from authorizing or continuing mediation of any kind where there is a reason to suspect emotional, physical, or sexual abuse.

¶ 32 We therefore hold that the District Court erred as a matter of law by failing to apply § 40-4-301(2), MCA. The statute does not *75 require proof of abuse by clear and convincing evidence, a preponderance of the evidence, or even probable cause, but simply a "reason to suspect." Jesse's admission in writing and at trial, the testimony of Dr. Silverman, which the District Court found credible, and other evidence presented at trial provide sufficient evidence of reason to suspect that Heidi and Jesse's relationship was emotionally abusive. By the express language of § 40-4-301(2), MCA, alternative dispute resolution may not be mandated in this case.

¶ 33 As a final matter, we note that while the plain language of § 40-4-234(4), MCA, does not undermine § 40-4-301(2), MCA, a slightly different prohibition on mediation is reflected in § 40-4-219, MCA. That section, governing the process for amending a parenting plan, states that "except in cases of *physical* abuse or threat of physical abuse ... the court may, in its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts ... regarding amendment of the parenting plan." Section 40-4-219(9), MCA (emphasis added). While this case does not call for the application of § 40-4-219, MCA, the Legislature may wish to consider the potential conflict between its reference to physical abuse and the more expansive reference to abuse in § 40-4-301(2),

253 P.3d 806
360 Mont. 66, 253 P.3d 806, 2011 MT 73
(Cite as: 360 Mont. 66, 253 P.3d 806)

Page 9

MCA.

¶ 34 We reverse and remand to the District Court with instructions to strike Section IV, the alternative dispute resolution provision, from the final parenting plan, and for appropriate modification of other provisions in the plan that make reference to Section IV.

We concur: MIKE McGRATH, C.J., MICHAEL E WHEAT, PATRICIA COTTER, JAMES C. NELSON, BRIAN MORRIS, and JIM RICE, JJ.

Mont.,2011.
Hendershott v. Westphal
360 Mont. 66, 253 P.3d 806, 2011 MT 73

END OF DOCUMENT

Date of Printing: Apr 03, 2014

KEYCITE

C Hendershott v. Westphal, 360 Mont. 66, 253 P.3d 806, 2011 MT 73 (Mont. Apr 12, 2011) (NO. DA 10-0434)

Citing References

Positive Cases (U.S.A.)

★★ Cited

- 1 Van Orden v. United Services Auto. Ass'n, 318 P.3d 1042, 1046, 2014 MT 45, 45 (Mont. Feb 19, 2014) (NO. OP 13-0430) **HN: 2,7 (P.3d)**
- H** 2 State v. Cooksey, 286 P.3d 1174, 1186+, 366 Mont. 346, 364+, 2012 MT 226, 226+ (Mont. Oct 09, 2012) (NO. DA 11-0165) **HN: 3 (P.3d)**
- C** 3 CBI, Inc. v. McCrea, 285 P.3d 429, 431, 365 Mont. 512, 514, 2012 MT 167, 167 (Mont. Aug 09, 2012) (NO. DA 11-0708) **HN: 2 (P.3d)**
- C** 4 In re Marriage of Wolf, 258 P.3d 995, 997, 361 Mont. 324, 327, 2011 MT 192, 192 (Mont. Aug 11, 2011) (NO. DA 11-0071) **HN: 2 (P.3d)**

Secondary Sources (U.S.A.)

- 5 Child Custody Practice and Procedure s 16:20, Contraindications (2013) **HN: 5,6 (P.3d)**
- 6 Mediation: Law, Policy and Practice s 15:5, Criminal (2013) **HN: 5,6 (P.3d)**
- 7 Sutherland Statutes and Statutory Construction s 69:8, Child custody (2013)
- 8 Sutherland Statutes and Statutory Construction s 67:11, Arbitration (2013)
- 9 CJS Divorce s 1024, Reference to master or referee (2014) **HN: 1,5 (P.3d)**
- C** 10 CJS Statutes s 80, Formal parts (2014) **HN: 2 (P.3d)**
- C** 11 A REVIEW OF THE YEAR IN FAMILY LAW: NUMBERS OF DISPUTES INCREASE, 45 Fam. L.Q. 443, 489 (2012) **HN: 5,6 (P.3d)**
- C** 12 FAMILY MEDIATION AFTER HENDERSHOTT: THE CASE FOR UNIFORM DOMESTIC VIOLENCE SCREENING AND OPT-IN PROVISION IN MONTANA, 74 Mont. L. Rev. 273, 273+ (2013) **HN: 1,5,6 (P.3d)**
- 13 MANDATORY APPELLATE MEDIATION AND DOMESTIC VIOLENCE IN MONTANA, 39-NOV Mont. Law. 12, 12+ (2013) **HN: 1,6 (P.3d)**
- 14 THE HENDERSHOTT RULING When Mediation Runs into Domestic Violence, 36-JUL Mont. Law. 9, 9+ (2011) **HN: 1,5,6 (P.3d)**
- C** 15 TAKING LIMITED REPRESENTATION TO THE LIMITS: THE EFFICACY OF USING UNBUNDLED LEGAL SERVICES IN DOMESTIC-RELATIONS MATTERS INVOLVING LITIGATION, 2 St. Mary's J. Legal Mal. & Ethics 166, 261 (2012) **HN: 1 (P.3d)**

Court Documents
Appellate Court Documents (U.S.A.)

Appellate Briefs

- 16 Aimee Catherine SCHMIDT, Appellant, Todd Delroy SCHMIDT, Appellee., 2014 WL 1227661, *1+ (Appellate Brief) (Mont. Mar 17, 2014) **Appellant's Reply Brief** (NO. DA12-0731) ★ ★ **HN: 6 (P.3d)**
- 17 STATE OF MONTANA, Department of Revenue, Petitioner, Appellant, and Cross-Appellee, v. Carol Lee HEIDECKER, Respondent, Appellee, and Cross-Appellant., 2013 WL 1614129, *1+ (Appellate Brief) (Mont. Mar 29, 2013) **Reply/Response Brief of Appellant/Cross-Appellee State of Montana, Department of Revenue** (NO. DA12-0616) ★ ★ **HN: 3 (P.3d)**
- 18 In the Estate of C. K. O., a Minor Child, Appellant., 2012 WL 3822051, *1+ (Appellate Brief) (Mont. Aug 24, 2012) **Appellants= Opening Brief** (NO. DA-12-0334) ★ ★ **HN: 2 (P.3d)**
- 19 In Re the Marriage of Terance Patrick PERRY, Petitioner and Appellee, Karen Jane PERRY, Respondent and Appellant., 2012 WL 3526840, *1+ (Appellate Brief) (Mont. Aug 02, 2012) **Appellant's Reply Brief** (NO. DA11-704) ★ ★ **HN: 6 (P.3d)**
- 20 V.L-S., Petitioner/Appellee, v. M.S., Respondent/Appellant., 2011 WL 3584305, *1+ (Appellate Brief) (Mont. Aug 01, 2011) **Appellant's Opening Brief** (NO. DA11-0231) " ★ ★ **HN: 4 (P.3d)**
- 21 In the Matter of the Adoption of S.R.T., a/k/a S.R.F., a Minor Child. In the Matter of the Adoption of M.F.M., a Minor Child., 2011 WL 3464806, *1+ (Appellate Brief) (Mont. May 27, 2011) **Appellants' Opening Brief** (NO. DA11-0089, DA11-0090) ★ ★ **HN: 2,3 (P.3d)**

Attachment 2

MCA § 40-4-301(2) (2011)

40-4-301. Family law mediation -- exception. (1) The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.

(2) The court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.

(3) The court shall appoint a mediator from the list maintained pursuant to 40-4-306. By agreement of all parties, mediators not on the list may be appointed.

(4) The court may adopt rules to implement this part.

History: En. Sec. 1, Ch. 199, L. 1993.

Attachment 3

MCA § 40-4-301 (2013)

40-4-301. Family law mediation -- exception. (1) The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.

(2) Unless each of the parties provides written, informed consent, the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party. A mediation conducted under this subsection may be conducted by a mediator who is trained in mediating domestic violence cases.

(3) The court shall appoint a mediator from the list maintained pursuant to 40-4-306. By agreement of all parties, mediators not on the list may be appointed.

(4) The court may adopt rules to implement this part.

(5) For purposes of this section, "informed consent" means an educated, competent, and voluntary choice to enter into mediation.

Attachment 4

INFORMED CONSENT TO PARTICIPATE IN MEDIATION

1. I, [REDACTED], have discussed the provisions of §40-4-301, M.C.A. with my attorney. I have also discussed with my attorney the issues commonly associated with mediating a case involving physical or emotional abuse by one party toward another party.

2. I understand that I cannot be required to participate in mediation with the opposing party because I have been physically or emotionally abused by the other party or I have a child who has been physically or emotionally abused by the opposing party.

3. I understand that unless the opposing party and I both provide written, informed consent, the Court may not authorize or permit mediation if the Court has reason to suspect that one of the parties or a child of the party has been physically, sexually or emotionally abused by the other party.

4. Although I have been subjected to physical or emotional abuse by the opposing party, I have decided to proceed with mediation and am providing my attorney with my written, informed consent to do so. I understand that I may be required to provide a separate written, informed consent form to the mediator.

5. I have discussed safety measures to implement during mediation with my attorney, such as staggered arrival and departure times to the mediation, and shuttle mediation, which requires the parties to remain in separate rooms throughout the mediation.

6. I have been given a copy of this consent form.

INFORMED CONSENT TO PARTICIPATE IN MEDIATION

I have reviewed Mont. Code Ann. § 40-4-301. I understand the terms of the statute, and pursuant to this statute, I acknowledge that the court may not authorize or permit continuation of mediated negotiations in my case if the court has reason to suspect that one of the parties, or a child of the parties, has been physically, sexually, or emotionally abused by the other party. By voluntarily signing this agreement to enter into mediation, I affirm that these circumstances do not apply to me, or that although these circumstances may exist in my case, I am hereby providing my informed consent to participate in the mediation process by making an educated, competent, and voluntary choice to enter into mediation.

CONSENT TO PARTICIPATE IN MEDIATION/SETTLEMENT CONFERENCE

I, _____, a lawful adult, being of sound mind do hereby willingly, voluntarily and acting without any constraint or undue influence acknowledge as follows:

1. I am the Respondent in a dissolution of marriage action currently pending before the Montana _____ Judicial Court, Cause No. _____, before Hon. _____.
2. ~~I have alleged that Petitioner physically abused me.~~ I understand that these allegations have not been proven or determined to be true in a court of law.
3. I understand that Montana law and various court rules allow the court to order parties to a dissolution or parenting action to participate in mediation, settlement conference or other dispute resolution process, which are collectively referred to herein as "mediation."
4. I understand that under Mont. Code Ann. § 40-4-301, the court cannot "authorize or permit continuation of mediated negotiations" in cases where the court has reason to suspect that "one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party" unless the parties provide written, informed consent to participate in the mediation process.
5. I understand that I may choose not to participate in mediation and instead to have the court determine all disputed issues in my case.
6. I understand that the law allows me to select a mediator from a list of mediators specifically trained in mediating domestic violence cases, but that this is not required.
7. I understand that mediation is a voluntary process and that there is no requirement that I reach a particular resolution or any resolution at all but that if I elect to participate, I will do so in good faith and not merely as a way to compound or delay this proceeding.
8. I understand that unless I choose to, I am not required to participate in mediation in this case if I do not want to.
9. I understand that if I choose to participate in mediation certain safeguards shall be put in place to attempt to ensure that I am able to make free, voluntary choices of my own self-determination, including:
 - a. I will not be in the same room as the other party to the mediation during any part of the mediation process;
 - b. The mediator will make every effort to ensure that each party enters and leaves the building where the mediation is taking place at separate times so the parties do not see each other on the premises;
 - c. I am free to have my attorney present at all points during the mediation;

Comment [A1]: Physical abuse has been alleged by both parties in our case. I am aware that the opposing party has alleged physical abuse against me, which I deny.

- d. I may also have other advocates or support persons present during the mediation, although I understand that the presence of additional persons other than my attorney may or may not benefit the mediation process;
- e. I may request additional accommodations to assist in the mediation process and should inform the mediator of these requests as soon as possible;
- f. I have a right to review any documents prepared during the mediation with my attorney prior to signing any documents;
- g. I have a right to conclude the mediation at any time, for any reason;
- h. I may ask for a break at any point during the mediation;
- i. I may ask to speak privately with the mediator, my advocates, support persons, or my attorney at any point during the mediation;
- j. If at any point I believe the mediator is not maintaining his/her neutrality, I have a right to conclude the mediation and request a substitute mediator;
- k. All settlement discussion which occurs during the mediation will be kept confidential and cannot be disclosed by the mediator or any other person present during the mediation except by a final, signed, written agreement or as otherwise agreed upon by the parties to the mediation and the mediator;
- l. Threats of physical harm against self or others are not kept confidential and may be disclosed by the mediator.

10. I have had a chance to discuss with my attorney my rights, the mediation process and the risks and benefits associated with participating in mediation and not participating in mediation. I understand that I may ask the mediator or my attorney to review and/or clarify any of these matters for me during the mediation to the extent allowed by their respective roles and ethical obligations.

Having reviewed the foregoing and discussed the same with my attorney, I voluntarily consent to participating in a settlement conference with _____ acting as settlement master. In addition to my attorney, I anticipate having _____ present with me during the mediation. In addition to the accommodations set forth above, I ask the mediator to make the following accommodations for me: _____.

DATED this ____ day of _____, 201__

 Petitioner/ Respondent

Attachment 5

HON. _____
District Judge, Dept. ____
Twenty-First Judicial District
Ravalli County Courthouse
205 Bedford, Suite A&B
Hamilton, Montana 59840
(406) 375-6780
Fax (406) 375-6785

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

IN RE THE MARRIAGE OF:

Petitioner,

and

Respondent.

Cause No. DR _____
Department No. ____

**RULE 16(b) ORDER FOR
DOMESTIC RELATIONS CASES**

In order to enable the Court to issue the scheduling order required by Rule 16(b), M.R.Civ.P., the parties (or their attorney(s), if represented) are directed to consult with each other and thereafter file with the Court the attached proposed Domestic Relations Case Scheduling Order within thirty (30) days.

Each party shall read the attached Notice of Informed Consent to Settlement Conference and, pursuant to § 40-4-301, MCA, after conducting any further investigation necessary to make an educated, competent, and voluntary choice, file with the Court a personally signed copy of the attached Notice of Informed Consent to Settlement Conference within twenty-one (21) days.

If such filings indicate that both parties consent to the use of a Settlement Conference in this cause, the attorneys (and any unrepresented party(ies)) are to agree upon a Settlement Master, consult and arrange a date for a Settlement Conference with said Settlement Master, and

state such arrangement in the proposed Case Schedule. The Court will then issue an Order setting out the settlement conference procedures in this matter.

If either party fails to file the attached notice within twenty-one (21) days and (i) the other party has also failed to file a notice or (ii) the other party has filed a notice consenting to the use of a Settlement Conference, the Court will - on its own initiative – appoint a Settlement Master trained in mediations involving domestic abuse, who will first obtain an educated, competent, and voluntary consent from the party who has failed to file a notice before permitting mediated negotiations to begin. The Settlement Master may also require either or both of the parties to sign a separate, detailed disclosure and consent, with content similar to the sample “Form of Consent to Participate in Mediation/Settlement Conference” (available at www.rc.mt.gov/districtcourt). The Settlement Master will file any Notice of Informed Consent to Settlement Conference obtained with the Court together with his or her report. The Settlement Master will not permit the Settlement Conference to proceed or will terminate the Settlement Conference if he or she determines that there is a reason to suspect physical, sexual or emotional domestic abuse and a party’s consent has been withdrawn or is not informed as defined in § 40-4-301(5), MCA.

Unless other arrangements are made, the fee charged by the Settlement Master will be shared equally by the parties. In cases in which both parties have consented to the use of a Settlement Conference and such consent is not subsequently withdrawn, the case will not be set for trial or final hearing until the Settlement Master report is filed with the Court.

If a completed proposed Domestic Relations Case Scheduling Order is not filed within thirty (30) days of the date of this Order, the Court will issue a scheduling order sua sponte.

DATED this _____ day of _____, 20_____.

_____, District Judge

cc: _____

Name: _____

Address: _____

Phone: _____

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

IN RE THE MARRIAGE OF:

_____,
Petitioner,

and

_____,
Respondent.

Cause No. DR-41- _____

Department No. ____

**NOTICE OF INFORMED CONSENT TO
SETTLEMENT CONFERENCE**

I understand that under § 40-4-301(2), MCA, unless I provide written, informed consent, the Court may not permit mediated negotiations in my case if the Court has “reason to suspect” a party (or party’s child) has been physically, sexually, or emotionally abused by the other party.

I am informed that information about domestic abuse and settlement conferences is available at <http://www.rc.mt.gov/districtcourt> (in the Court’s parenting class packet), local domestic violence organizations such as S.A.F.E ((406) 363-4600), the law kiosk at the Bitterroot Public Library (306 State St., Hamilton), and MLSA (www.mtlsa.org), and through an attorney trained in settlement conferences involving domestic violence.

I understand that if I consent to a Settlement Conference in my case, I may decide to agree only to a Settlement Master who, at my request, will implement certain safeguards during the Settlement Conference, such as allowing a domestic violence advocate to be present with me.

Without admitting or denying any past family history of physical, sexual, or emotional abuse, I have explored the resources listed above to the extent necessary to determine that I can make an educated, competent, and voluntary choice to consent to or to decline the use of a Settlement Conference in my case, and I hereby (check one):

consent to the use of a Settlement Conference decline the use a Settlement Conference.

DATED this _____ day of _____, 201_.

(signature)

(printed name)

HON. _____
District Judge, Dept. __
Twenty-First Judicial District
Ravalli County Courthouse
205 Bedford, Suite A&B
Hamilton, Montana 59840
(406) 375-6780
Fax (406) 375-6785

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

IN RE THE MARRIAGE OF:

Petitioner,

and

Respondent.

Cause No. DR-41-2013-_____
Department No. __

**DOMESTIC RELATIONS
CASE SCHEDULING ORDER**

The following schedule shall govern further proceedings in this matter:

1. On or before _____: All motions to join parties and all motions to amend the pleadings are to be filed.
2. On or before _____: Names and addresses of Petitioner's expert witnesses together with the information described in Rule 26(b)(4)(A)(i), M.R.Civ.P., must be furnished to Respondent on or before this date.
3. On or before _____: Names and addresses of Respondent's expert witnesses together with the information described in Rule 26(b)(4)(A)(i), M.R.Civ.P., must be furnished to Petitioner on or before this date.
4. On or before _____: All discovery in this matter shall be completed on this date; i.e., all responses to discovery shall be due on or before this date.
5. On or before _____: Exchange exhibits and final witness lists.

ESTABLISHING DEADLINES FOR THE IDENTIFICATION OF EXPERT WITNESSES, WITNESSES AND EXHIBITS DOES NOT SUPERSEDE THE REQUIREMENT OF ALL PARTIES TO FAIRLY AND ACCURATELY RESPOND TO OTHER DISCOVERY. THAT IS TO SAY, BY ESTABLISHING THESE DEADLINES, IT IS NOT INTENDED THAT THE PARTIES CANNOT IDENTIFY EXPERTS, WITNESSES, OR EXCHANGE EXHIBITS IN RESPONSE TO OTHER DISCOVERY BY CLAIMING THAT THE EXCHANGE OF INFORMATION IS NOT DUE UNTIL THE DEADLINES ESTABLISHED BY THIS ORDER. ALL DISCOVERY IS TO BE FAIRLY AND ACCURATELY RESPONDED TO AND FAILURE TO DO SO MAY RESULT IN APPROPRIATE SANCTIONS.

6. On or before _____: All pretrial motions, along with supporting briefs, shall be filed and served on the opposing party on or before this date. Filing of answer briefs and reply briefs shall comply with the schedule provided by Rule 2(a) of the Uniform District Court Rules.

7. On or before _____: Hearings on motions or submission of the motions on briefs shall be accomplished by this date. It shall be the responsibility of the moving party to advise the Court either that the motions are submitted on briefs or to request a hearing in accordance with Rule 3 of the Local Rules of the Twenty-First Judicial District.

8. Unless a party files the proper written nonconsent, on or before _____: A Special Settlement Master shall be jointly nominated, as provided in Rule 11 of the Local Rules.

9. Unless a party files the proper written nonconsent, on or before _____: A settlement conference shall be held before the Special Settlement Master. The Special Settlement Master should be knowledgeable in the area of domestic violence and the current best practices in mediating domestic violence cases. The Settlement Master shall submit a report to the Court within five (5) days of the scheduled conference. Upon submission of the Settlement Master's report, the case will be set for trial. The parties shall advise the Settlement Master and the Settlement Master shall include in the report to the Court the anticipated length of trial and the dates the parties or key witnesses are unavailable for trial. If both parties have filed a written consent in a Notice of Consent to Settlement Conference and no party has subsequently filed a written withdrawal of such consent, no case will be set for trial unless a master-supervised settlement conference has been held. In the event a trial setting is necessary, the Court will issue a final scheduling/trial preparation order *sua sponte* upon receipt of the Special Settlement Master's report.

10. If child custody remains at issue following a scheduled Settlement Conference and no provision has earlier been made, Petitioner shall be obligated to so inform the Court, and the Court shall thereupon order a child custody evaluation and/or home study by suitable professional persons and/or agencies, and trial shall not be held until said evaluation and/or home study has been received by the Court.

11. There shall be no changes in this Scheduling Order absent Court order upon showing of good cause. All motions for continuance shall be submitted in writing, supported by affidavit, and shall bear the signatures of the parties.

DATED this _____ day of _____, 20____.

Approved: _____
_____, District Judge

Approved: _____

cc: _____

**[FORM OF] CONSENT TO PARTICIPATE IN MEDIATION/SETTLEMENT
CONFERENCE**

I, _____, a lawful adult, being of sound mind do hereby willingly, voluntarily and acting without any constraint or undue influence acknowledge as follows:

1. I am _____ the [Petitioner/Respondent] in a separation, dissolution of marriage, child custody, or child support action currently pending before the Montana Twenty-First Judicial Court, Cause No. DR-_____, before Hon. _____.
2. Physical, sexual, or emotional abuse by the opposing party against me or one of my children may have been alleged by me in such action. I understand that any such allegations have/have not [circle appropriate language] been proven or determined to be true in a court of law.
3. I understand that Montana law allows the court to order parties in most separation, dissolution of marriage, child custody, and child support actions to participate in mediation or a settlement conference.
4. I understand that under Mont. Code Ann. § 40-4-301, the court cannot “authorize or permit continuation of mediated negotiations” in cases where the court has reason to suspect that “one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party” unless each party provides written, informed consent to participate in the mediation process.
5. I understand that I may choose not to participate in mediation and instead to have the court determine all disputed issues in my case.

6. I understand that the mediator or settlement master may not use coercive measures to effect a settlement, and that the mediator may recommend that a party obtain assistance from other resources in the community.
7. I understand that the law allows me to require a mediator from a list of mediators specifically trained in mediating domestic violence cases, but that is not required if the parties agree after consultation with their own legal counsel.
8. I understand that mediation is a voluntary process and that there is no obligation that I reach a particular resolution or any resolution at all.
9. I understand that unless I choose to, I am not required to participate in mediation or a settlement conference in this case if I do not want to.
10. I understand that if I choose to participate in mediation or a settlement conference, the mediator or settlement master shall put certain safeguards in place to ensure that I am able to make free, voluntary choices of my own self-determination, including:
 - a. Measures will be implemented to prevent me from being in the same room as any other party to the mediation or settlement conference during any part of the mediation or settlement conference process;
 - b. Measures will be implemented so that each party enters and leaves the building where the mediation is taking place at separate times so the parties do not see each other on the premises;
 - c. I am free to have my attorney (if I have one) present at all points during the mediation or settlement conference;

- d. I may also have other advocates or support persons present during the mediation or settlement conference, although I understand that the presence of additional persons other than my attorney may not benefit the mediation process;
- e. I may request additional accommodations to assist in the mediation or settlement process and I should inform the mediator or settlement master of these requests as soon as possible;
- f. I have a right to review any documents prepared during the mediation or settlement conference with my attorney (if I have one) prior to signing any documents;
- g. I have a right to conclude the mediation or settlement conference at any time, for any reason;
- h. I may ask for a break at any point during the mediation or settlement conference;
- i. I may ask to speak privately with the mediator, the settlement master, my advocates, support persons, or attorney at any point during the mediation or settlement process;
- j. If, at any point, I believe the mediator or settlement master is not maintaining his/her neutrality, I have a right to conclude the mediation or settlement conference and to request a substitute mediator or settlement master;
- k. Except as provided in (l) below, all settlement discussion which occurs during the mediation or settlement conference will be kept

ACKNOWLEDGMENT

I _____, acting as mediator/settlement master
[circle one] in this matter have received a copy of the above "[Form of] Consent to
Participate in Mediation/Settlement Conference"

Dated this _____ day of _____, 20_____

Mediator in Cause No. _____
Montana 21st Judicial District

Attachment 6

*Model Standards of Practice for
Family and Divorce Mediation*

Developed by

The Symposium on Standards of Practice

Approved by the ABA House of Delegates February 2001

MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION

STANDARD I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

STANDARD II

A family mediator shall be qualified by education and training to undertake the mediation.

STANDARD III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

STANDARD IV

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

STANDARD V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

STANDARD VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

STANDARD VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants

STANDARD VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

STANDARD IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

STANDARD X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly

STANDARD XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason.

STANDARD XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

STANDARD XIII

A family mediator shall acquire and maintain professional competence in mediation.

Reporter=s Foreword

Attachment 7

American Bar Association
Commission on Domestic Violence

Tool for Attorneys to Screen for Domestic Violence



What is Domestic Violence?

Domestic violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation or emotional, sexual or economic abuse to control the other partner in the relationship. Domestic violence does not necessarily involve physical violence and it equally affects all aspects of our society, rich or poor, regardless of race, ethnicity, religion or national origin.

“Domestic violence is an epidemic.”

Domestic violence is an epidemic. One out of nearly every three women will be the victim of domestic violence in her lifetime. Between three and ten million children are exposed to domestic violence every year and that exposure has a negative impact on their development. Moreover, studies indicate that forty to sixty percent of men who abuse women also abuse children.

How to Screen Your Clients for Domestic Violence – Examples and Suggestions

It is not easy to bring up these issues, but it is critically important. Think carefully about your manner of speaking and your actions before you begin to ask these questions. Incorporate questions about domestic violence in your standard intake process to minimize the stigma and encourage disclosure.

Here are some examples of questions to integrate into your standard interview for any new client:

- Has your intimate partner ever pushed, slapped, hit or hurt you in some way?
- Has your intimate partner ever hurt or threatened you?
- Has your intimate partner ever forced you to do something you did not want to do?
- Is there anything that goes on at home that makes you feel afraid?
- Does your intimate partner prevent you from eating or sleeping, or endanger your health in other ways?
- Has your intimate partner ever hurt your pets or destroyed your clothing, objects in your home, or something you especially cared about?
- Has your intimate partner taken the children with out permission, threatened to never let them see you again, or otherwise harmed them?

Why Should I Screen My Clients to Determine if they are Victims of Domestic Violence?

Given the prevalence of domestic violence in our society, it is likely that some of your clients are in, or have been in, violent relationships that impact the legal advice you will provide. For example, your client may be seeking advice in a personal injury case and the prospective defendant is the perpetrator of domestic violence. Similarly, in a sexual harassment case, the harasser may have also been in a violent relationship with her and his behavior may also be a violation of an existing protection order. However, your client may not disclose this information to you because she may not think it is related to the advice sought or she is embarrassed or ashamed.

"To make sure you are ethically representing your client and to avoid malpractice..."

To ensure that you are *ethically representing your client and to avoid malpractice*, it is critical that you learn if she is a survivor and consider how this information affects your representation. Moreover, if their safety is at risk while you are representing them, your safety may be at risk as well.

How Do I Screen My Clients to Determine if they Are Survivors of Domestic Violence?

Interview your client alone. Let your client know that you ask a series of standard questions of all of your clients when you embark on representation.

Explain why you are asking about domestic violence:

It is an epidemic.

It impacts how you provide representation.

You care and can provide referrals and support.

Include direct questions about domestic violence in your standard set of questions such as "Do you feel safe at home?"

What Should I Do If My Client Discloses That She is a Victim of Domestic Violence?

Let her know that your conversation with her about the violence is confidential and that it is not her fault.

You do not and should not provide her with counseling or tell her what you think she should do about the situation. Instead, provide information about resources in your community for herself and her children such as a hotline, shelter, or domestic violence legal services.

For advocacy, counseling and referrals 24 hours a day provide her information about how to contact the **National Domestic Violence Hotline: 1-800-799-SAFE (7233) or 1-800-787-3224 (TTY).**

Explain that she will reach an advocate who can talk with her about her situation, her safety, and the options available to her. All conversations with advocates at the National Hotline are strictly confidential.

What if I Suspect That My Client is a Victim of Domestic Violence but She Has Not Disclosed?

Remain supportive and let her know that if, at any time, she needs resources about domestic violence she should feel comfortable asking you. Remind her that if she is a victim, that information is important for you to know so that you may best represent her.

Should I Be Concerned for My Client's Safety and Mine If She Discloses That She Is Currently Being Threatened by Her Batterer?

The danger of violence, including the risk of death, escalates when a domestic violence survivor attempts to leave a batterer. Seeking legal assistance is a step towards independence, which threatens a batterer's sense of power and control and may lead to increased violence. If you represent a client who is planning to leave or to take any legal or financial steps to separate from a batterer, alert her to the increased likelihood of violence.

Your safety may also be at risk. Please review the Safety Checklist for Attorneys below for ways to increase your safety.

Safety Checklist For Attorneys Representing Victims of Domestic Violence

- ✓ For your safety and that of your client and your staff, safety planning is crucial. Be aware of your own safety. Most batterers seek to control their former or current partners, rather than their lawyers, and many batterers appear to be well behaved in court.
- ✓ Nevertheless, lawyers for victims of domestic violence may be threatened by batterers and their family members. Take precautions if a problem arises. Carefully review your office security procedures.
- ✓ If the batterer is representing himself and is coming to your office, do not hesitate to ask a law enforcement officer to sit outside your office or seek similar precautions. You may wish to obtain a protection order that includes the batterer staying away from you and your office.
- ✓ Instruct your staff as to how much interaction they should have with a batterer who represents himself and calls your office. All staff should be particularly careful not to reveal last names or personal contact information.
- ✓ Find out the safest way to contact your client and the names of other individuals who will know how to reach her.
- ✓ Ask for your client when you call and speak only to your client about the case. Do not leave messages with other family members or on an answering machine or voice-mail unless your client has told you this is safe.
- ✓ If questioned by family members, do not indicate that you are a lawyer; rather, give an innocuous reason for the call, such as taking a survey. ***Avoid leaving your last name if you do leave a message.***

- ✓ Always ask your client first if it is safe to talk. The batterer may be present, even if the batterer no longer lives with your client. Develop a system of coded messages to signal danger or the batterer's presence, or if you should call the police.
- ✓ Block identification of your number when calling your client. ***Suggest that your client block hers.***
- ✓ Keep your client's whereabouts confidential, including during discovery.
- ✓ If your client fails to respond to your calls, make extensive (but confidential) efforts to confirm that your client is safe. If your client has decided to drop the case, try to verify that your client has not been threatened or coerced. Let your client know that she should not be embarrassed to call you in the future.
- ✓ If your client wants you to, or if it may be a life/death matter, call the police if your client is in danger, and, where possible, confirm that a non-responsive client is safe.
- ✓ Talk to your client in advance about what to do if she disappears – does she want you to try and locate her?

"...call the police if your client is in danger..."

Resources For Attorneys Screening For Domestic Violence

Check your local telephone directory or search on line for information about local resources in your community for victims of domestic violence. *These include:* The local police department, victim witness program, local domestic violence hotline, domestic violence shelter, and counseling program. Request information pamphlets and other outreach materials from these organizations. By making these materials available in your waiting room, you will increase the safety and security of your clients as well as increase the likelihood of her disclosure to you.

Each state has at least one statewide coalition on domestic violence that may be a resource such as the Maryland Network Against Domestic Violence or the Washington State Coalition Against Domestic Violence. Most state domestic violence coalition websites provide information on local programs and resources for victims of domestic violence.

Information about state coalitions and other national domestic violence organizations may be found on the website of the National Coalition Against Domestic Violence at www.ncadv.org.

The American Bar Association Commission on Domestic Violence provides resources for attorneys nationwide on domestic violence including, publications, a listserv, and technical assistance and training for attorneys representing victims of domestic violence. Information about these resources may be found on our website: www.abanet.org/domviol.

If your client requests information for her own safety planning, you may wish to provide information from one of these resources:

Women's Law Initiative, Safety Planning:
www.WomensLaw.org

For information on Technology safety, see this site of the National Network to End Domestic Violence:
www.nnedv.org

The Bureau of Justice Statistics reported that 85% of victimizations by intimate partners in 2001 were against women.

The use of gender specific language, however, should not be construed to mean that domestic violence perpetrators are all male, nor should it be construed to mean that domestic violence exists only in heterosexual relationships. The screening attorney should be sensitive that domestic violence can be present in all intimate relationships.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association except where otherwise indicated, and accordingly, should not be construed as representing the policy of the American Bar Association.

"Each state has at least one statewide coalition on domestic violence"

The contents of this publication may be adapted and reprinted only with the permission of the American Bar Association Commission on Domestic Violence, 740 15th St., NW, Washington, D.C. 20005-1009.

Copyright © 2005 by the American Bar Association.
All rights reserved. ISBN # 1-59031-597-9



How to Screen Your Clients for Domestic Violence

Adapted from:

"Screening Guidelines" by Roberta L. Valente, published in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook, 1996, American Bar Association

"Screening Tools for Attorneys", American Bar Association, Commission on Domestic Violence, 2005

"Representing Victims of Domestic Violence", American Bar Association, Division for Public Education, 2001.

There are two issues to consider prior to an initial interview with a new client. The first is how you conduct the interview. What questions should you ask and how should those questions be phrased? The second is how to prepare for the interview. You must consider where interviews should take place, how to present appropriate, non-judgmental responses and how to deal with ethical dilemmas.

Recognizing which of your clients are victims of domestic violence and which are batterers can be crucial to your effectiveness and success as a lawyer, regardless of the nature of your law practice. Given the prevalence of domestic violence in our society, most lawyers can expect at some point in their careers to work with clients who either perpetrate or experience domestic violence. **Regular screening protocols to identify domestic violence issues are therefore essential.**

Unless you introduce yourself as a domestic violence legal specialist, very few of your clients will identify themselves as abusers or victims. They may remain silent about the issue even if they need legal help because of the havoc that domestic violence has created in their financial, workplace and family lives. Clients who are victims may be silent about the abuse because of embarrassment or shame, or for fear that their batterers will find out about the disclosure and retaliate. Clients who are abusers are likely to minimize their actions or blame the victims for provoking the violence. Other clients, whether victims or abusers, may characterize their experiences as family quarrels that "got out of control" or as normative behavior in the family context.

Ask direct questions about domestic violence in the home or relationship; however, do not force clients to disclose information. Compelling victims or abusers to admit that domestic violence is occurring when they are not ready to take further steps may escalate the danger. By conducting appropriate screening for all of your clients, you inform them that the door is open for further discussion and help. If your clients reveal domestic violence problems, consider whether you wish to take the case or refer them to professionals who specialize in domestic violence cases. Whether or not you accept the cases, conduct safety planning with the clients who are victims before they leave your office.

Screening Questions

Domestic violence is neither rare nor confined to "certain groups." Because it is so difficult to predict who is likely to be a batterer and who is likely to be a victim of domestic violence, screen all of your clients. If the responses indicate that domestic violence exists, conduct a full interview and safety planning session. Introduce the subject by using the following screening questions:

"To represent clients effectively, I need to know about all of the issues which impact their cases. For this reason, I routinely ask the following questions."

- Everyone argues or fights with their partner now and then. When you argue or fight at home, what happens? Do you ever change your behavior because you are afraid of the consequences of a fight?
- Do you feel your partner treats you well? Is there anything at home that makes you feel afraid for yourself or your children?
- Is there anything your partner does that makes you uncomfortable?
- Has your partner ever hurt or threatened you or your children? Has your partner ever put his hands on you against your will? Has your partner ever forced you to do something?
- Has your intimate partner taken the children without permission, threatened to never let them see you again or otherwise harmed them?
- Has your intimate partner ever hurt your pets or destroyed your clothing, objects in your home or something you especially cared about?
- Does your intimate partner prevent you from eating or sleeping, or endanger your health in other ways?
- Has your partner ever tried to keep you from taking medication you needed or from seeking medical help?
- Has your intimate partner ever hurt or threatened you?
- Has your intimate partner ever forced you to do something you did not want to do?
- Is there anything that goes on at home that makes you feel afraid?
- Does your partner act jealously, for example, always calling you at work or home to check up on you? Is it hard for you to maintain relationships with your friends, relatives, neighbors or co-workers because your partner disapproves of, argues with or criticizes them? Does your partner accuse you unjustly of flirting with others or having affairs? Has your partner ever tried to keep you from leaving the house?
- Does your spouse or partner make it hard for you to get or keep a job or go to school?
- Is your partner over-controlling or impulsive?
- How dangerous would you say your partner is? Does your partner have a weapon? Has he ever used it or threatened to use it against you or your children?
- Does your partner abuse drugs or alcohol? What happens?
- Have you ever called the police about your partner? Has he ever been arrested?
- Have criminal charges for domestic violence ever been filed against your partner?
- Have you ever filed for a restraining or protective order? Did your partner obey it?
- If the victim indicates she has left before, what happened?
- Do you have any evidence of the abuse you have suffered? Photos? Police reports? Medical reports? Torn clothing? Weapons? Statements of your family, friends, neighbors or co-workers?
- Every family has their own way of handling finances. Does your partner or spouse withhold money from you when you need it? Does your partner withhold information about finances? Do you know what your family's assets are? Do you know where important documents like bank books, check books, financial statements, birth certificates and passports for you and members of your family are kept? If you wanted to see or use any of them, would you partner or spouse make it difficult for you to do so? Does your spouse or partner sometimes spend large sums of money and refuse to tell you why or what the money was spent on?
- Where are you staying right now? Are you able to return home safely? If not, what circumstances would ensure your safety?
- If you are unable to return home safely, where do you plan to live?
- What is your immigration status? Is your partner a legal resident or citizen?
- Are you aware of services for victims of partner abuse, child abuse or elder abuse?

Attachment 8

MONTANA STATUTES

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

26-1-802. Spousal privilege. Neither spouse may, without the consent of the other, testify during or after the marriage concerning any communication made by one to the other during their marriage. The privilege is restricted to communications made during the existence of the marriage relationship and does not extend to communications made prior to the marriage or to communications made after the marriage is dissolved. The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse.

26-1-803. Attorney-client privilege. (1) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by the client to the client's attorney or the advice given to the client by the attorney in the course of the attorney's professional employment.

26-1-812. Advocate privilege. (1) Unless a report is otherwise required by law, an advocate may not, without consent of the victim, be examined as to any communication made to the advocate by a victim and may not divulge records kept during the course of providing shelter, counseling, or crisis intervention services.

(2) This privilege belongs to the victim and may not be waived, except by express consent. The privilege continues even if the victim is unreachable. Consent may not be implied because the victim is a party to a divorce or custody proceeding. The privilege terminates upon the death of the victim.

(3) For purposes of this section, the following definitions apply:

(a) "Advocate" means an employee or volunteer of a domestic violence shelter, crisis line, or victim's services provider that provides services for victims of sexual assault, stalking, or any assault on a partner or family member.

(b) "Victim" means a person seeking assistance because of partner or family member assault, any sexual assault, or stalking, whether or not the victim seeks or receives services within the criminal justice system.

26-1-813. Mediation -- confidentiality -- privilege -- exceptions. (1) Mediation means a private, confidential, informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. In the mediation process, decisionmaking authority remains with the parties and the mediator does not have authority to compel a resolution or to render a judgment on any issue. A mediator may encourage and assist the parties to reach their own mutually acceptable settlement by facilitating an exchange of information between the parties, helping to clarify issues and interests, ensuring that relevant information is brought forth, and assisting the parties to voluntarily resolve their dispute.

(2) Except upon written agreement of the parties and the mediator, mediation proceedings must be:

- (a) confidential;
- (b) held without a verbatim record; and
- (c) held in private.

(3) A mediator's files and records, with the exception of signed, written agreements, are closed to all persons unless the parties and the mediator mutually agree otherwise. Except as provided in subsection (5), all mediation-related communications, verbal or written, between the parties or from the parties to the mediator and any information and evidence presented to the mediator during the proceedings are confidential. The mediator's report, if any, and the information or recommendations contained in it, with the exception of a signed, written agreement, are not admissible as evidence in any action subsequently brought in any court of law or before any administrative agency and are not subject to discovery or subpoena in any court or administrative proceeding unless all parties waive the rights to confidentiality and privilege.

(4) Except as provided in subsection (5), the parties to the mediation and a mediator are not subject to subpoena by any court or administrative agency and may not be examined in any action as to any communication made during the course of the mediation proceeding without the consent of the parties to the mediation and the mediator.

(5) The confidentiality and privilege provisions of this section do not apply to information revealed in a mediation if disclosure is:

- (a) required by any statute;

(b) agreed to by the parties and the mediator in writing, whether prior to, during, or subsequent to the mediation; or

(c) necessary to establish a claim or defense on behalf of the mediator in a controversy between a party to the mediation and the mediator.

(6) Nothing in this section prohibits a mediator from conveying information from one party to another during the mediation, unless a party objects to disclosure.

40-4-201. Separation agreement. (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, parenting, and parental contact with their children. In cases in which children are involved, the separation agreement may contain a parenting plan as required in 40-4-234.

(2) Subject to subsection (7), in a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, it may request that the parties submit a revised separation agreement or it may make orders for the disposition of property, maintenance, and support.

(4) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance and not unsatisfactory as to support:

(a) unless the separation agreement provides to the contrary, its terms must be set forth in the decree of dissolution or legal separation and the parties ordered to perform them; or

(b) if the separation agreement provides that its terms may not be set forth in the decree, the decree must identify the separation agreement and state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except as provided in subsection (7) and except for terms concerning the support, parenting, or parental contact with the children, the decree may expressly preclude or limit

modification of terms set forth in the decree if provided for in the separation agreement. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

(7) The decree may be modified, as provided in 40-4-251 through 40-4-258, for failure to disclose assets and liabilities.

(8) The court shall seal any qualified domestic relations order, as defined in section 414(p) of the Internal Revenue Code, 26 U.S.C. 414(p), that is issued under this part except for access by the pension plan administrator of the plan for which benefits are being distributed by the order, the child support enforcement division, the parties, and each party's counsel of record.

40-4-219. Amendment of parenting plan—mediation. . . .

(9) Except in cases of physical, sexual, or emotional abuse or threat of physical, sexual, or emotional abuse by one parent against the other parent or the child or when a parent has been convicted of a crime enumerated in subsection (8)(b) [deliberate homicide, mitigated deliberate homicide, sexual assault, sexual intercourse without consent, deviate sexual conduct with an animal, incest, aggravated promotion of prostitution of a child, endangering the welfare of children, partner or family member assault, sexual abuse of children], the court may, in its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding amendment of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency, and court action.

40-4-234. Final parenting plan criteria. . . .

(4) The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.

40-4-301. Family law mediation -- exception. (1) The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.

(2) Unless each of the parties provides written, informed consent, the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party. A mediation conducted under this subsection may be conducted by a mediator who is trained in mediating domestic violence cases.

(3) The court shall appoint a mediator from the list maintained pursuant to 40-4-306. By agreement of all parties, mediators not on the list may be appointed.

(4) The court may adopt rules to implement this part.

(5) For purposes of this section, "informed consent" means an educated, competent, and voluntary choice to enter into mediation.

40-4-302. Mediation proceeding -- tolling of statute of limitations. (1) The purpose of a mediation proceeding is to reduce the acrimony that may exist between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding.

(2) The mediator shall attempt to effect a settlement of the parenting, child support, parental contact with the child, maintenance, or property settlement dispute. The mediator may not use coercive measures to effect the settlement. The mediator may recommend that a party obtain assistance from other resources in the community.

(3) Subject to 40-4-301(1) and except in cases involving domestic violence, the mediator may exclude attorneys from the mediation sessions. The parties' attorneys may confer with the mediator prior to the mediation session and may review and approve any agreement. In cases involving domestic violence, a victim may elect to have advocates and support persons who are not attorneys present during the mediation.

(4) An applicable statute of limitations is tolled as to the participants during the period of mediation. The tolling commences on the date the parties agree in writing to participate in the mediation or when the court orders mediation, whichever is later, and ends on the date the mediation is officially terminated by the mediator.

40-4-303. Proceedings -- records -- confidentiality. Mediation proceedings under this part are subject to the confidentiality and privilege provisions of 26-1-813. Mediation proceedings must be conducted in private unless otherwise agreed to in writing by the parties and the mediator. All records of a mediation proceeding are confidential and may not be used in evidence in an action enumerated in 40-4-301. A mediator and the parties to a mediation under this part are entitled to the confidentiality and privilege provisions of 26-1-813.

40-4-304. Mediator recommendation. The mediator may, upon stipulation by the parties, recommend temporary orders to the court prior to the final decree.

40-4-305. Mediation agreement. An agreement reached by the parties as a result of mediation must be discussed by the parties with their attorneys, if any, before the agreement is finalized. An agreement reached in mediation is not admissible as evidence in any action unless the agreement has been affirmed by the parties in a signed, written agreement. The signed, written agreement is governed by 40-4-201.

40-4-306. Mediator list. The district court shall establish and maintain a list of mediators available to assist parties in formally mediating disputes as provided in 40-4-301 and 40-4-302. The list of mediators must be maintained by the clerk of court. The clerk of court may

accept the applications of individuals who meet the qualifications required under 40-4-307 and who seek placement on the mediator list. The applications must be presented to the court for review and approval. A mediator may be a member of the staff or contracted staff of a district court, probation department, mental health services agency, or private mediation service.

40-4-307. Mediator qualifications. A mediator must meet the following minimum qualifications:

- (1) knowledge of the court system and the procedures used in family law matters;
- (2) knowledge of other resources in the community to which the parties may be referred for assistance;
- (3) knowledge in the area of domestic violence;
- (4) if applicable, knowledge of child development, clinical issues relating to children, the effects of marriage dissolution on children, and parenting research; and
- (5) knowledge of the mediation process.

40-4-308. Court to establish fees. A court may establish a fee schedule for the costs of administering this part. The fees must be paid by the parties to the mediation proceeding.

Attachment 9

MONTANA RULES OF PROFESSIONAL CONDUCT

RULE 1.0 - TERMINOLOGY

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RULE 1.6 - CONFIDENTIALITY

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer’s compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
- (4) to comply with other law or a court order.

RULE 2.3 - LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, settlement master, mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform all parties that the lawyer is not representing them. The lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

Attachment 10

MONTANA RULES OF APPELLATE PROCEDURE

Rule 7. Mandatory appellate alternative dispute resolution.

(2) Appeals subject to rule. The following categories of appeals shall be subject to the provisions of this rule:

....

(b) Domestic relations. Appeals in domestic relations cases, including but not limited to all dissolution issues, child custody and support issues, maintenance issues and modifications of orders entered with respect to those issues; but excluding proceedings regarding abused or neglected children, paternity disputes, adoptions, and all juvenile and contempt proceedings when the excluded matters constitute the only issues on appeal. In addition, if there has been a finding by a district court that one of the parties has been a victim of domestic violence, the appellate mediation may be conducted by telephone upon motion submitted to the mediator by either party.

....

(6) Proceedings confidential. The mediation process shall be confidential. All proceedings held, submissions tendered, and statements made by anyone in the course of the mediation process required by this rule constitute offers to compromise and statements made in compromise negotiations pursuant to M. R. Evid. 408 and are inadmissible pursuant to the terms of that rule.

Attachment 11

MONTANA RULES OF EVIDENCE

Rule 408. Compromise and offers to compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.