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LOOK BEFORE YOU LEAP: COURT SYSTEM TRIAGE OF FAMILY LAW CASES INVOLVING INTIMATE PARTNER VIOLENCE

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I. INTRODUCTION

Family courts are increasingly interested in matching parties with appropriate dispute resolution processes and related services. For many parties, especially those who are self-represented, triage of cases could be helpful and efficient. Nevertheless, implementation of triage in complex cases may bring unintended repercussions, and in the spirit of averting these, this Article identifies and discusses challenging issues that become apparent when triage systems are viewed through the lens of intimate partner violence.

Some questions about triage in the context of intimate partner violence were raised at the Wingspread Conference on Domestic Violence and Family Courts and explored more fully by Loretta Frederick in her 2008 article titled “Questions About Family Court Domestic Violence Screening and Assessment.”¹ In light of subsequent research and commentary, this Article revisits the topic and concludes

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1. Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523 (2008); Nancy Ver Steegh & Clare Dalton, *Report From the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008) [hereinafter *Wingspread Report*].

that because thinking about triage is in its infancy, important questions remain unanswered.

Intimate partner violence poses a number of complicated challenges for any system of triage, including: (1) questions about the complexity of decision-making about dispute resolution alternatives; (2) the feasibility of quickly and accurately screening for intimate partner violence; (3) the substantive and procedural safeguards necessary to preserve confidentiality, protect litigants' due process rights, and provide accountability; and (4) the question of whether courts or parties are best positioned to make these decisions. After analyzing these questions, we conclude that maximizing the ability of parties to make informed choices about participation in dispute resolution processes is paramount. We urge courts to make this a primary goal of any system of triage developed.

II. THE CURRENT LANDSCAPE

A. *Expanding Dispute Resolution Processes Coupled with Growing Numbers of Self-Represented Litigants*

As a result of changing values and expectations, family courts have undergone a rapid and remarkable transformation. The seeds of change were sown by “dissatisfaction with the traditional . . . divorce process,” increased involvement by both parents in child rearing, and social science research concerning the harmful effects on children of ongoing parental conflict.² Dubbed the “velvet revolution,” over the past forty years the legal system has embraced a proliferation of dispute resolution alternatives.³ These alternatives include mediation, collaborative law, early neutral evaluation, parenting coordination, and arbitration.⁴

The advent of expanded dispute resolution processes, particularly mediation, has—in many jurisdictions—altered the way cases travel through the family court system. Judges have always managed cases informally by encouraging settlement and formally through pretrial

2. Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 659–60 (2008) [hereinafter *Family Court Reform*].

3. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

4. See *Family Court Reform*, *supra* note 2, at 662–64, 667; see also Singer, *supra* note 3, at 363–65 (describing components related to the “paradigm shift” in family court).

conferencing, issuance of discovery orders, appointment of experts, and setting of trial dates.⁵ Nevertheless, the expansion of dispute resolution processes has provided parties and judges with an increasingly wider range of choices.

As dispute resolution options expanded, the number of self-represented parties in family cases mushroomed:

As study after study found, “the percentage of cases in which one or both of the parties appears without a lawyer is significantly higher in family law cases than in any other area of the law,” and the number is increasing. In San Diego, for example, the number of divorce filings involving at least one pro se litigant rose from forty-six percent in 1992 to seventy-seven percent in 2000. In the eight-year period from 1996 to 2004, the percentage of [self-represented litigants (SLRs)] in family court for one Wisconsin district increased from forty-three percent to sixty-three percent. While statistics vary by state, depending on the type of proceeding, studies show that in between fifty-five and eighty percent of family law matters, at least one party appears pro se. In part as a result of the growing number of SRLs in family court, family law cases overall now comprise more than one-third of all civil filings nationally and continue to grow. It is not just that SRLs are a growing phenomena [sic], it is that they now represent a significant majority of litigants in family court.⁶

As a result of these parallel trends, more parties are left on their own to choose among a wider array of dispute resolution alternatives.⁷ To

5. See generally Nicholas Bala et al., *One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict*, 26 CAN. J. FAM. L. 395 (2010) (discussing judicial case management at various stages of proceedings).

6. Jim Hilbert, *Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court*, 43 FAM. L.Q. 545, 548–49 (2009) (footnotes and internal citations omitted) (quoting Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, RUTGERS L.J. 105, 110 (2001)).

7. See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 165–67 (2003) [hereinafter *Yes, No, and Maybe*] (discussing challenges faced by self-represented litigants).

complicate matters further, courts struggle to serve these families amid serious cutbacks in funding.⁸

B. Linking Parties with Dispute Resolution Processes

Parties currently choose or are steered to dispute resolution processes in a variety of ways. Some methods of linking parties with processes seem relatively random and unplanned, whereas others are the product of greater deliberation.

1. Individualized Legal Counseling for Represented Parties

Ideally, parties who are represented by attorneys are personally advised and counseled regarding participation in alternative dispute resolution processes. Represented parties receive information about available processes and ways that each could be advantageous or disadvantageous to their interests. The lawyer and client together make strategic decisions about which, if any, process to pursue, and prior to participation, the client is informed about what to expect and how to prepare for the proceeding.

2. Public Information Provided to Unrepresented Parties

In contrast, self-represented parties do not go through a personalized legal counseling process. They may not receive any information about dispute resolution processes, or they may be directed to public information available on a court website, in a brochure, or as part of a parenting education course. This information may be quite useful to them, but they are not availed of the opportunity to inquire in a meaningful way about the processes, the strategic implications of each, how process choice might affect their individual interests, or how to prepare to participate in the proceedings.⁹

Although court-connected self-help centers attempt to ameliorate some of the gap between represented and unrepresented parties, a two-tiered system of justice has resulted in most jurisdictions. Not only do represented parties benefit from individual legal counseling, they may

8. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 377, 384 (2009).

9. See Hilbert, *supra* note 6, at 549–50 (“Without counsel, the legal system becomes incomprehensible to SRLs.”).

also have access to dispute resolution processes and other services not available to self-represented parties.¹⁰

3. Court-Directed Tiered or Linear Participation in Dispute Resolution Processes

Some jurisdictions have attempted to streamline participation in dispute resolution processes by adopting a linear or tiered approach that strongly encourages or requires most parties to participate in a sequence of dispute resolution programs.¹¹ Under this model, parents typically attend a parenting education program, proceed to mediation, and if the case remains unresolved, participate in a child custody evaluation.¹² If these and other increasingly structured processes¹³ do not result in settlement, the case is ultimately tried to a judge.¹⁴ In some jurisdictions, mediation is mandated, but in many states a judge can exercise discretion over whether mediation is ordered.¹⁵

As research emerged concerning the varying needs of families, particularly those characterized by “high conflict” or with a history of intimate partner violence, experts began to call for more individualized or differentiated responses.¹⁶ For example, advocates and researchers

10. *Family Court Reform*, *supra* note 2, at 670–71 (2008) (“More *pro se* parties with more complex situations are seeking to use a court system that offers fewer services, is open less often, and is less well staffed. Court-connected mediation programs are likely to offer fewer sessions, if they exist at all. Parties are required to pay higher fees for services they can ill afford. At the same time, families with means are able to hire private mediators, collaborative lawyers, and divorce coaches. Some are opting out of the family law system altogether by hiring ‘private judges.’”).

11. *See Salem*, *supra* note 8, at 372.

12. *Id.* at 372–73.

13. *Id.* at 373 (referring to conflict resolution conferences, non-confidential dispute resolution and assessment, early neutral evaluations, special programs for high-conflict and chronically litigating families, collaborative law, cooperative negotiation agreements, and parenting coordination).

14. *Id.* at 373.

15. Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, 60–61 (2005) (“As of 2004, forty-two states have enacted statewide statutes or court rules authorizing mandatory or voluntary court-sponsored mediation programs of selected family law disputes. . . . [T]he majority of statutes make the decision to order parties to participate in mediation discretionary with the trial judge.”).

16. Andrew Schepard, Essay, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 396–97 (2000) (“Phase III in the continuing evolution of the judicial role in child custody disputes is for courts to recognize that not all divorce related custody disputes

have raised safety and efficacy issues with respect to the use of mediation in cases involving allegations of intimate partner violence.¹⁷ More recently, commentators have urged reconsideration of mandatory court-connected mediation in light of reduced resources, consequent declines in service, and the availability of other dispute resolution alternatives.¹⁸ These forces have culminated in heightened interest in developing viable family court triage systems.

III. COURT-SYSTEM SCREENING AND TRIAGE

In contrast to the tiered model described above, triage attempts to route families to the least intrusive process that is likely to be safe and appropriate.¹⁹ Triage moves beyond a “one-service-fits-all approach” and obviates the need for families to fail at processes before entering those ultimately more helpful.²⁰ Also known as differentiated case management (DCM), triage is similarly used in non-family civil litigation to categorize or assign cases to specific dispute resolution “tracks.”²¹

are the same. High conflict cases—roughly defined as those involving repeated relitigation, family violence, child abduction, mental illness, or drug or substance abuse—require special treatment. The disproportionate judicial resources such cases consume create a temptation to include them in the settlement culture of Phase II. Phase II mediation and education programs are, however, not tailored to include such families.”); *see also* The Wingspread Report and Action Plan, *High-Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146–47 (2001); *Wingspread Report*, *supra* note 1, at 457–58, 467 app. (2008).

17. *See* Connie J.A. Beck et al., *Mediator Assessment, Documentation, and Disposition of Child Custody Cases Involving Intimate Partner Abuse: A Naturalistic Evaluation of One County's Practices*, 34 LAW & HUM. BEHAV. 227, 228 (2010); Salem, *supra* note 8, at 372 (“Advocates for battered women and feminist scholars have long argued that mediation is inherently unfair and may be dangerous for victims of domestic violence . . .”); *Yes, No, and Maybe*, *supra* note 7, at 195–202 (discussing “categories of domestic violence cases [that] should never be mediated”).

18. *See* Salem, *supra* note 8, at 376–81; Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 15 (2009).

19. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 466 (2000).

20. *Id.*; *see also* Salem, *supra* note 8, at 382–83 (suggesting that families should not “have to fail successively at each level of service before they get the kind of help they really need” (quoting Johnston, *supra* note 19, at 466)).

21. *See* John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 94–95 (2008) (explaining that DCM “establishes different categories of cases, each of which requires different types or amounts of attention from the court”).

Triage can be accomplished in a variety of ways, but it may involve (1) identifying issues,²² such as high conflict level, difficulty communicating, intimate partner violence, child abuse, mental illness, or substance abuse,²³ early in the divorce process; (2) routing families to dispute resolution processes deemed most likely to be safe, appropriate, and effective; and (3) making referrals or connections to appropriate community services and resources.²⁴ In addition to making choices regarding dispute resolution alternatives, triage may trigger more in-depth assessments, if available.²⁵

Because triage is relatively new and involves an amalgam of functions and practices that cross traditional professional boundaries,²⁶ conceptual clarity about what triage is, what it is meant to accomplish, and how and by whom it is to be conducted is essential to any triage design or discussion. This Article primarily addresses the routing of cases to dispute resolution processes²⁷ by non-judicial²⁸ actors, such as court personnel,²⁹ case managers,³⁰ and to a lesser extent, multi-disciplinary partnerships.³¹

22. This early identification may be undertaken by court-connected agency personnel. Murphy & Rubinson, *supra* note 15, at 67–70 (discussing screening pre-filing, after filing, at first court appearance, and at mediation); Salem, *supra* note 8, at 380. It could be done by a court-employed case manager. Shepard, *supra* note 16, at 427; Janet Weinstein & Ricardo Weinstein, “*I Know Better Than That*”: *The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & FAM. STUD. 351, 394–96 (2005). Or it could be done with a multi-disciplinary partnership. Johnston, *supra* note 19, at 458.

23. See Peter G. Jaffe et al., *Early Identification and Prevention of Parent–Child Alienation: A Framework for Balancing Risks and Benefits of Intervention*, 48 FAM. CT. REV. 136, 140–41 (2010).

24. See *id.* at 139 (suggesting that “we have to move away from the concept of Alternative Dispute Resolution to one that is designed to emphasize *Appropriate* Dispute Resolution”).

25. See *id.* at 140 (noting, for example, that “[a]t some point the initial screening required may lead to assessments by mental health professionals”).

26. See discussion *infra* Part VII.C.

27. This article focuses on referral to commonly available dispute resolution processes such as mediation, early neutral evaluation, and arbitration. However, triage could involve the referral to community resources or, depending on the court services available, triage could trigger in-depth assessment and evaluation by mental health professionals.

28. Judges manage cases and may encourage or order families to participate in dispute resolution processes. Nevertheless, in some jurisdictions judges may engage in a process more akin to triage, and this raises other concerns, not addressed in this Article, about the ability of judges to screen cases and the appropriateness of judges assuming such a role. See Bala et al., *supra* note 5, at 444–45 (explaining that judges in Australia and New Zealand can screen disputants and order or recommend various modes of mediation).

29. See Salem, *supra* note 8, at 371, 380; see also Murphy & Rubinson, *supra* note 15, at

A. *Court-Mandated or Court-Guided, Screening-Based Triage*

Triage may involve a standardized process of screening, review of the results by court personnel, possible discussion with the parties, and assignment of the case to a dispute resolution track.³² Court-mandated programs order parties to participate in specific dispute resolution processes, whereas in court-guided programs, participation in specific processes is recommended rather than required.³³ In practice, this may be a distinction without a difference. Depending on how and with what accompanying information a recommendation is presented, self-represented parties may easily perceive recommendations as mandates or hesitate to challenge recommendations because they do not know how or fear they will appear to the court as being “difficult.”

Although triage practices vary, by way of example the Matrimonial Commission of the State of New York proposed the following triage system:

The goals of identifying high conflict/problem cases early, matching families and parties with services and encouraging responsible self-determination by the parties as early as possible are largely attained by this screening. Screening would be conducted by court personnel and/or the judge with the judge retaining all authority and discretion with respect to final determinations of what track the case should follow, which services should be offered or ordered; generally, how the case will proceed.³⁴

67–70 (discussing screening pre-filing, after filing, at the first court appearance, and mediation).

30. Schepard, *supra* note 16, at 427; *see also* Lande, *supra* note 21, at 94–96.

31. Johnston, *supra* note 19, at 458.

32. Triage is an emerging process so actual program designs could vary from this model. *See* Salem, *supra* note 8, at 380 (identifying possible steps in the triage process: initial screening and determination of appropriate services, which may be partially based on feedback from the parties).

33. *See* Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 488–90 (2010) (discussing the “continuum of mandatoriness” and explaining that not all court programs are mandatory).

34. Sondra Miller, *Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York*, 27 PACE L. REV. 987 app. A at 1027 (2007).

The Connecticut program provides an example where, after separately screening parties for intimate partner violence and safety concerns that would preclude a joint discussion, family court counselors conduct a structured interview with both parties together (or separately if there are safety concerns)³⁵ and then recommend a dispute resolution process.³⁶ The Family Civil Intake Screen was developed for this purpose.³⁷ Although both parties and their attorneys may be in attendance, screening information is considered confidential and may not be used for other purposes.³⁸ Parties who disagree with the recommendation may contest it in court, although they reportedly do so only rarely.³⁹

Emerging court-system triage models are built on two foundational assumptions. The first assumption is that, by means of early screening, issues such as intimate partner violence can be consistently identified.⁴⁰ The second assumption is that an institutionally determined “match,” or assignment of an individual case to a specific dispute resolution track, will be an appropriate one.⁴¹

B. Triage and Intimate Partner Violence: Opportunity and Challenge

Under current approaches, a self-represented party who has experienced intimate partner violence may be left adrift to glean information from websites or brochures or, in the alternative, to work through the layers of a tiered or linear case assignment system. The latter may entail participation in processes that are unsafe or unproductive, depending on the characteristics and implications of the violence. In contrast, triage has the potential to result in widespread screening for intimate partner violence, more thoughtful choices about

35. Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 758 (2007).

36. See Salem, *supra* note 8, at 380. Note that the Connecticut program involves referrals to some processes not readily available in other jurisdictions. In addition to mediation, referrals are made to confidential conflict resolution conferences, issue-focused evaluation, and comprehensive evaluation.

37. Salem, Kulak & Deutsch, *supra* note 35, at 758 (“The Family Civil Intake Screen contains questions in six domains: (1) General Information; (2) Level of Conflict; (3) Ability to Cooperate and Communicate; (4) Complexity of Issues; (5) Level of Dangerousness; and (6) Disparity of Facts/Need for Corroborating Information.”).

38. *Id.* at 762.

39. Salem, *supra* note 8, at 380.

40. See *supra* notes 22–25 and accompanying text.

41. See Salem, *supra* note 8, at 381, 383.

dispute resolution options, and referral to helpful resources. But triage also carries the potential for unintended consequences and it presents theoretical and practical challenges that have yet to be fully addressed.

1. Hypothetical Illustration: Triage as a Potential Opportunity to Help Families with a History of Intimate Partner Violence

A glance into the lives of one hypothetical family might reveal the potential benefits and risks associated with court-system triage. Pat, who is the parent almost exclusively providing for the daily needs of the seven-year-old son Adam, has filed a pro se petition asking for an order giving Pat sole physical and legal custody of Adam. Adam's other parent, Chris, files, through an attorney, a counter-petition for joint physical and legal custody and time with Adam shared nearly equally between the parents. Each party is required to participate in a screening interview with the court employee charged with triaging new family law cases. The triage professional separately interviews Chris, who says that Pat is drinking too much and may not be parenting as well as before. Chris also expresses a preference for mediation to settle their issues about custody.

Pat reveals in a separate triage interview that Chris has been physically and emotionally abusing Pat for years. The triage professional engages in a basic risk assessment process with Pat, and it becomes clear to both of them that there are a number of very serious lethality factors present, including Chris's recent depression and increasingly serious physical assaults, Chris's attempts to strangle Pat, Chris's constant belittling of and threats against Pat in front of Adam, and the presence of firearms in the home. The triage professional gives Pat referrals to a local domestic violence program and helps Pat think about what to do next. Pat figures out that any mediation process with Chris would be damaging and potentially dangerous. Together, the triage professional and Pat call the local domestic violence legal program and set an appointment for Pat to see an attorney for advice and representation. The resulting court order protects both Pat and Adam by conditioning Chris's access to Adam on Chris's participation in a batterer's intervention program and by encouraging Chris to be a better parent to Adam and co-parent with Pat. Triage has given Pat an opportunity to disclose information about the abuse but has focused primarily on giving information and offering referrals to Pat so that Pat can make decisions and seek services to protect both Pat and Adam.

2. Hypothetical Illustration: Possible Unintended Consequences of a Potential Triage Process

In the alternative, the following could have occurred: The triage professional separately interviews Chris and Pat. Chris expresses concern that Pat's alcohol use is getting worse and interfering with parenting and that Pat is showing increasing emotional instability. Chris says that Adam is very physically active and that Pat sometimes hits Adam in an effort to make him behave. Chris wants Pat to go into treatment so that Pat can be a more reliable parent for Adam. Chris believes that they can share custody of Adam if they have clear agreements about the obligations of each. Chris reports that there is no history of violence between them and that they can cooperate once they get things settled.

Pat misses the first appointment with the triage professional and when finally interviewed Pat is withdrawn and not very forthcoming. Pat admits use of alcohol but says that Chris is exaggerating the extent of it. Pat tells the triage professional that there has not been physical violence in the relationship but Pat reports that Chris "yells at Adam" and that Pat does not want Adam to stay overnight with Chris. Pat reports that they disagree about parenting and sometimes argue in front of Adam. Pat doesn't have a lawyer and is relieved to learn that by using other dispute resolution processes they may be able to avoid having a public hearing.

The triage professional makes notes about the interviews and then meets jointly with Chris and Pat, recommending that they attend parenting classes and participate in early neutral evaluation. (The dispute resolution processes available in the jurisdiction are mediation, early neutral evaluation, and arbitration.) Unknown to the triage professional, Chris admonished Pat not to disclose Chris's previous abuse and threatened to harm Pat and Adam if Pat "tells." Chris continuously reminds Pat that Pat is a "bad parent" and "a drunk" and that no one will believe anything Pat has to say. Pat is worried that Chris will retaliate if professionals connected to the court learn what has happened. When Chris interrogates Pat later, Pat swears that nothing "bad" came up at the meeting.

Chris and Pat attend separate parenting classes and they participate in early neutral evaluation. The evaluators conduct separate intimate partner violence screening and neither party discloses that Chris has been monitoring Pat's whereabouts, recording Pat's phone conversations, and threatening to harm Adam if Pat discloses Chris's

activities. Despite the recommendations of the evaluators, Pat refuses to agree to any parenting plan where Adam would stay overnight with Chris.

The night following the early neutral evaluation session, Chris threatens Pat and Adam and kills the family pet in retaliation for Pat's refusal to agree to overnight parenting time. Pat flees with Adam to a domestic violence shelter and seeks a protective order the next day. When Chris receives notice of the subsequent hearing, Chris hires an attorney and defends on the basis that there has been no recent physical violence and that Pat is making allegations strictly for the purpose of gaining sole physical custody of Adam. The lawyer subpoenas the triage professional to testify that although Pat was asked, Pat did not disclose abuse or any fear of Chris during the triage interview. Chris also makes a complaint to the local child protection agency and the worker contacts the triage professional to see if Pat admitted hitting Adam or having a drinking problem.

As these alternative scenarios show, triage may greatly benefit families with a history of intimate partner violence, or if appropriate safeguards are not in place, it may work to their detriment. The remainder of this Article analyzes whether and how the goals of triage might be realized while safeguarding the well-being of families who have a history of intimate partner violence.

IV. MATCHING CASES INVOLVING INTIMATE PARTNER VIOLENCE WITH DISPUTE RESOLUTION PROCESSES

Research indicates that a surprising number of divorces, probably at least 50%, include allegations of intimate partner violence.⁴² In custody-litigating families, research shows that two-thirds to three-fourths of

42. Connie J.A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555, 555 (2010); Amy Holtzworth-Munroe et al., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646, 647 (2010); Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 488 (2008) (citing California research indicating that 76% of cases mandated to mediation involved allegations of domestic violence and Australian samples showing allegations of domestic violence in 48%–55% of cases); Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 412 (2004) (citing research showing that 40% to 50% of divorcing couples report abuse); see also Beck et al., *supra* note 17, at 228 (stating that 40% to 80% of divorces include allegations of intimate partner violence).

cases may involve such allegations.⁴³ As a consequence, professionals designing triage systems for family law cases should be prepared to encounter a substantial amount of intimate partner violence, although the facts of each situation may vary extensively in terms of dangerousness and significance to the case.

A. Limited Research Base for Tracking of Cases

While there is general agreement that matching families with appropriate dispute resolution processes is an important and worthy goal, the practicalities of doing so are another matter. As Johnston, Roseby, and Kuehnle explain, in triage “[d]eveloping some valid and reliable prognostic criteria for who is likely to benefit from each service and for whom it is contraindicated becomes the central task.”⁴⁴ Commentators suggest that more research is needed concerning whether and how families might be most appropriately matched with dispute resolution alternatives:

Admittedly, a major flaw exists in the case for replacing tiered services models with a triage system: it is predicated on accurate, easy to administer, replicable methods of predicting the most appropriate service for each family. At this time no such method exists, but there is work that points us in the right direction.

....

... [E]mpirical evidence in support of a triage is currently limited, but that should not prevent further exploration of such systems in order to improve service delivery.⁴⁵

43. JANET R. JOHNSTON ET AL., *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 308 (2d ed. 2009).

44. *Id.* at 238.

45. Salem, *supra* note 8, at 383; *see also* Schepard, *supra* note 16, at 425–26 (“Ultimately, any screening process will have to rely heavily on the judgment of the professionals who undertake it, informed by a shared flow of research results from long term studies and similar programs in other states. The absence of confident guidelines for screening suggests that the process should be undertaken by a multi disciplinary team of mental health professionals and legally trained personnel to insure that different perspectives enter into it. The absence of confident guidelines also suggests the importance of amassing experience in pilot programs and carefully analyzing it before permanent policy judgments are made.”).

Concerns about the state of the current knowledge base for tracking cases are heightened in situations involving intimate partner violence because the stakes are high and because decisions about participation in dispute resolution processes are more complex than in many other cases. There is some research concerning participation by parties with a history of intimate partner violence in various dispute resolution processes,⁴⁶ but major gaps exist when it comes to predicting what will work for individual families. This point can be illustrated by considering whether parties with a history of intimate partner violence should participate in mediation. There is some empirical research regarding intimate partner violence and mediation—for example, in one recent study, parties with a history of intimate partner violence were less likely to reach full agreement in mediation, and some mothers expressed concern about joint sessions.⁴⁷ However, such research does not predict the efficacy of conducting mediation with a particular family.

Research shows that families experiencing intimate partner violence are quite different from each other and their particular circumstances at the time of divorce will vary considerably in terms of safety, ability to negotiate, willingness to compromise, good faith participation, etc.⁴⁸ Existing research can highlight important variables for deliberation, but such research is far from conclusive for the purpose of directing intimate partner violence cases through the legal system.

B. Factors to Consider in Decision-Making About Participation in Dispute Resolution Processes in Cases Involving Intimate Partner Violence

Matching an individual case to an optimum dispute resolution track requires more than simply identifying whether or not intimate partner violence exists. As discussed above, the presence of intimate partner

46. See *supra* notes 16, 17, 42 and accompanying text; see also JOHNSTON ET AL., *supra* note 43, at 236–52 (discussing research on ADR services and who benefits from them).

47. Robin H. Ballard et al., *Factors Affecting the Outcome of Divorce and Paternity Mediations*, 49 FAM. CT. REV. 16, 27 (2011). But see Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658 (2006) (validated instrument taking risk level and type of violence into account in modifying mediation process).

48. See JOHNSTON ET AL., *supra* note 43, at 317 (discussing the differences that occur in regards to safety); Beck & Raghavan, *supra* note 42, at 555 (noting that “there are different types of IPV with different etiologies and outcomes”); Holtzworth-Munroe et al., *supra* note 42, at 648 (explaining that no IPV/A measure fits every family perfectly).

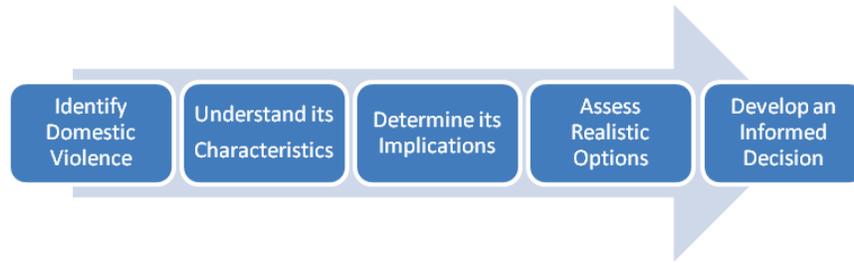


Figure 1. Decision Making in the Context of Intimate Partner Violence.

violence in an individual case tells very little about what dispute resolution alternatives should be utilized because, in itself, the existence of violence does not account for the complex array of experiences and variables that factor into informed decision-making in the context of intimate partner violence. Indeed, considering the mere presence of intimate partner violence, without understanding its context and implications for decision-making, is a little like using basic arithmetic to solve an advanced calculus problem.

A substantial body of research demonstrates that intimate partner violence is not a monolithic phenomenon but varies greatly in its nature, meaning, and effect.⁴⁹ Consequently, there are no one-size-fits-all solutions with respect to safety planning, choice of appropriate dispute resolution process, or even referrals to community resources. Decision-making requires an individualized approach that takes the specific characteristics and implications of intimate partner violence into account.

A useful decision-making process might progress along the following path: (1) identifying intimate partner violence; (2) understanding its characteristics; (3) determining its implications; (4) considering the real options available to parties; and (5) making a decision. Figure 1 visually depicts this pattern.

Most systems of triage begin at square one by attempting to identify domestic violence. Unfortunately, they may skip over the three intermediate steps and jump directly to a conclusion about which dispute resolution track the case should follow. What they miss is actually at the very heart of decision-making in the context of intimate partner violence—an understanding of what is truly going on, why it

49. Beck & Raghavan, *supra* note 42, at 555; Frederick, *supra* note 1, at 524–25; Kelly & Johnson, *supra* note 42, at 486–87.

matters, and what might realistically be done about it. Without that information, there is a significant risk that a triage professional will inadvertently substitute his or her own personal biases, beliefs, and intuition for the actual realities of the case.⁵⁰

Consider again, for example, the question of whether a family with a history of intimate partner violence should be referred to mediation, should participate in a modified form of mediation, or should be excluded from mediation altogether. Once domestic violence is identified, relevant decision-making factors may include some of the following:

Characteristics of the violence, such as:

- the frequency and severity of the intimate partner violence;
- the pattern of the violence, including the level of coercive-control, if any; and
- whether there is a primary perpetrator.⁵¹

Implications of the violence, including:

- the physical, emotional, and economic health and well-being of the parties;
- the safety of the parties before, during, and after mediation sessions;
- the relative risks and benefits of compromising on critical issues;
- the effect of the violence on the capacity of the parties to assert their own interests and make fair and voluntary agreements;
- the effect of the violence on the parties' capacity to make joint decisions about the best interests of the children;
- whether the parties trust one another and respect each other's judgment;

50. See, e.g., MICHAEL S. DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS iv (2011) (reporting the findings of a study designed to examine the relationship between evaluators' beliefs and their recommendations in custody cases involving domestic violence); Megan L. Haselschwerdt et al., *Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 28 J. INTERPERSONAL VIOL. 1694, 1697-99, 1703-04 (2011), <http://jiv.sagepub.com/content/26/8/1694.full.pdf+html>. The beliefs and intuition of third-party evaluators may mask the actual severity and danger of the violence.

51. See JOHNSTON ET AL., *supra* note 43, at 317-25 (discussing the P⁵ framework for analysis of intimate partner violence cases).

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- the practicalities of the parties' daily lives, including the security of their living arrangements and access to adequate resources and support systems;
- whether safe and effective enforcement mechanisms are in place; and
- the consequences of making or avoiding a record of the proceedings.⁵²

Realistically available options, including:

- whether the parties are represented;
- the experience of the mediator and the quality of the mediation process;
- judicial receptivity to and understanding of intimate partner violence; and
- other available legal and practical alternatives.⁵³

The decision to pursue a dispute resolution alternative involves a complicated calculation of risks and benefits. It requires a delicate weighing of multiple and often competing factors and probabilities. These factors and probabilities may relate directly to the violence itself but many may relate to matters beyond the violence, such as the quality of local services and the practicalities of everyday life.⁵⁴

Of course, if a case is routed to a dispute resolution process such as mediation, the professional providing the process should independently screen for intimate partner violence and help the parties assess the safety and suitability of participation. It is likely that more in-depth inquiry would be made at that point. In some jurisdictions it may be possible for cases involving identified intimate partner violence to be referred for further assessment in lieu of proceeding directly to a dispute resolution process. Nevertheless, for the purposes of triage, knowledge of considerably more than the mere existence of intimate partner violence is required.

52. See *Yes, No, and Maybe*, *supra* note 7, at 195–202.

53. *Id.* at 197–98.

54. See JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 41 (1998) (referring to gathering and understanding information in the context of battered women); LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 42–43 (2008).

V. INTIMATE PARTNER VIOLENCE “SCREENING” FOR THE PURPOSE OF TRIAGE

Many cases of intimate partner violence are identified through systematic screening and it is important not to lose sight of this accomplishment. At the same time, those designing triage programs should remain cognizant of the fact that, for a variety of reasons, some families with a history of intimate partner violence will not be identified at the point of initial screening.

Although much attention has been brought to bear on the development of effective screening protocols for intimate partner violence, screening nevertheless entails a bedeviling combination of art and science, and screening efforts have met with varying success. As one commentator notes, “While research on the efficacy of screening for domestic violence is currently limited, the available studies and other evidence suggest serious problems with the current system for identifying domestic violence cases in court-sponsored mediation programs.”⁵⁵

Nevertheless, effective court-based triage is predicated on the ability to collect information concerning (1) whether intimate partner violence has occurred or is occurring; (2) the characteristics of the intimate partner violence; (3) the implications of the intimate partner violence; and (4) the realistic alternatives of the parties. This puts significant pressure on a screening process that may be limited to one-time administration of a screening instrument early in the divorce process.

A. More than Incident-Specific Screening Is Required to Identify Intimate Partner Violence and Understand Its Characteristics and Implications

Because intimate partner violence encompasses a variety of dynamics, including violent acts, coercive tactics,⁵⁶ or a combination of

55. Murphy & Rubinson, *supra* note 15, at 61–63 (discussing three studies indicating problems with detecting domestic violence in mediation); *see also* Beck et al., *supra* note 17, at 228–29 (discussing studies showing mediators’ failure to effectively screen for or acknowledge domestic violence). For example, in one study examining mediator recommendations, results determined that mediators failed to document the domestic violence in their recommendations to the court in 57% of the cases with “clear indicators” of domestic violence. *See* Beck et al., *supra* note 17, at 228–29.

56. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL, at ch. 1, fig.1.1 (1993) (discussing tactics of power and control, which include coercion and threats; intimidation; emotional abuse; isolation;

both, researchers increasingly agree that incident-specific inquiry (without consideration of the context, purpose, and meaning of the violence or coercion) may be misleading.⁵⁷

For example, if both parties use violence, it is critical to know whether one partner has been subjected to years of ongoing coercion and control at the hands of the other. Without such analysis, use of violence for protection may easily be mistaken for violence designed to reinforce intimidation. Mistaking resistive violence for coercive control, or vice versa, can not only mask the risk of lethal violence, but also have enormous consequences for triage. It can mean the difference between matching a case to the best possible dispute resolution track or the worst possible track. Similarly, a frightening incident of past violence accompanied by ongoing coercive tactics may indicate lethal risk even though there has been no recent physical violence.

A recent study on screening in the context of mediation demonstrates the importance of screening for more than acts of physical violence. The authors suggest that “coercive control may be a more accurate measure of conflict, distress, and danger to victims than is the presence of physical abuse.”⁵⁸ They explain:

[O]btaining a snapshot of physical abuse, without regard to coercive control and sexual coercion, may misrepresent what are severe and less severe forms of intimate abuse. The findings of this study support the argument that coercive control is an efficient and accurate signal of relationship distress for women in

minimizing, denying, and blaming; manipulation of children; use of male privilege; and economic abuse).

57. See MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 8 (2008) (“A pattern of power and control cannot, of course, be identified by looking at violence in isolation or by looking at one incident. It can only be recognized from information about the use of multiple control tactics over time, allowing one to find out whether a perpetrator uses more than one of these tactics to control his or her partner, indicating an attempt to exercise general control.”); EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 10 (2007) (“Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics, and effects, including the fact that it is neither ‘domestic’ nor primarily about ‘violence.’”); Frederick, *supra* note 1, at 525 (discussing the need to consider “purpose, meaning, and effect of the violence”); *Wingspread Report*, *supra* note 1, at 460 (“If the focus of the analysis is on the identification of a serious incident or recurring incidents of physical violence, for example, a historic pattern of coercive control may be overlooked, and the ongoing risk to family members may not be addressed.”).

58. Beck & Raghavan, *supra* note 42, at 556, 562.

a mediation sample. Using combined moderate and high coercive groups, we were able to capture information on physically forced sex, threats to life, and escalated physical violence in up to two thirds of women. In contrast, the physical abuse index missed the majority of women who reported severe distress.⁵⁹

Thus, for the purpose of triage, it is vital that screening encompass not only acts of physical violence but also coercive-controlling tactics, with or without accompanying acts of violence.⁶⁰ While detection of physical violence is critical, limiting inquiry to physically violent acts will not capture the information needed for safety planning and to make realistic choices about dispute resolution alternatives.

B. Limitations of Screening Instruments

Screening questionnaires and instruments can be a valuable part of a screening protocol, but those administering them should be clear about their different purposes and the extent to which they are reliable and valid:

[N]o one IPV/A [(intimate partner violence or abuse)] measure is perfect and each of the currently available measures presents certain limitations or concerns. For example, some have a relatively limited scope of questions . . . or only assess certain types of abuse (e.g., physical violence but not coercive control). Others do not include behaviorally specific or detailed questions In addition, some of these measures require hours of specialized training to use . . . or are copyrighted and must be purchased to use⁶¹

59. *Id.* at 562.

60. *See id.* at 562–63. Unfortunately, many state statutory definitions of intimate partner violence, which are typically found in criminal or civil protective order statutes, concentrate attention on acts of physical violence. Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 35 (2008). Limiting screening to the legal definition of domestic violence is inappropriate because the purpose of triage is not to determine whether a crime has been committed or whether a civil remedy should be applied, but to match a case to a viable dispute resolution track. *See id.* at 43 (“The evident policy undergirding most civil protection regimes suggests that physical violence is the beginning and end of domestic abuse, or at least the only aspect of domestic abuse that the law can confront.”).

61. Holtzworth-Munroe, *supra* note 42, at 648.

As discussed in the previous section, to make decisions about participation in dispute resolution processes, information should be collected concerning the existence of violence as well as its characteristics and implications.⁶² Screening instruments are probably most useful for detecting a history of intimate partner violence and characteristics such as its frequency, severity, pattern, and primary perpetrator. Existing instruments seem less useful for understanding the implications of the violence and they do not address the realistic options of parties.

A number of screening questionnaires and instruments have been developed for use in different contexts and for different purposes.⁶³ Two screening instruments developed for use in connection with mediation⁶⁴ may be promising for the purpose of triage. First, the Domestic Violence Evaluation (DOVE), which has been empirically validated, recommends mediator interventions after taking into account risk level, violence predictors, and type of violence.⁶⁵

Second, although not yet validated, the Mediator's Assessment of Safety Issues and Concerns (MASIC) is administered during an interview and asks behaviorally specific questions about multiple types of intimate partner violence over two time periods.⁶⁶ MASIC takes into account types of abuse, lethality indicators, and potential procedural modifications in mediation.⁶⁷ It was developed in light of a study indicating that mediators failed to detect intimate partner violence in fifty percent of cases, despite the fact that intimate partner violence was identified through the separate administration of a standardized,

62. See discussion *supra* Part V.A.

63. See Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers*, 38 HOFSTRA L. REV. 699, 727 n.175 (2009) [hereinafter *Roadmap*] (containing multiple citations to screening instruments).

64. For description of specific screening programs, see Holtzworth-Munroe et al., *supra* note 42, at 648 (identifying various screening tools, including the Michigan Supreme Court protocol, the California Administrative Office of the Courts protocol, the Conflict Assessment Protocol, the Conflict Tactics Scale, the Procedural Justice Scale, the Marital Power and Decision-Making Scale, the Domestic Violence Evaluation, the P⁵ guideline, and the RBRS); and Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 448–49 (2011).

65. Ellis & Stuckless, *supra* note 47, at 664–65.

66. Holtzworth-Munroe et al., *supra* note 42, at 649–50.

67. *Id.* at 649–50.

behaviorally specific questionnaire.⁶⁸ MASIC only seeks information about a partner's perpetration of intimate partner violence to avoid the possibility that self-incriminating disclosures could be discoverable in subsequent legal proceedings.⁶⁹ This issue will be addressed at greater length in Part VI below.

In contrast, instruments focused on risk assessment are sometimes used in the context of criminal court. In fact, a 2000 survey found that courts and related agencies used approximately twenty intimate partner violence risk assessment instruments for the purpose of "making charging, sentencing, and case-processing decisions."⁷⁰ One of the best-known risk assessment instruments is the Danger Assessment (DA) developed by Jacquelyn C. Campbell to assess risk of homicide in intimate partner violence cases.⁷¹ It consists of a calendar and a twenty-question instrument, and it is used by some police, health professionals, and advocates.⁷² The DA is one of the more reliable instruments for predicting risk and lethality.⁷³ In the context of triage, a risk assessment

68. *Id.* at 647–48.

69. *Id.* at 649.

70. Jan Roehl & Kristin Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders*, 21 JUST. SYS. J. 171, 178–80 (2000) (identifying and comparing the risk assessment instruments).

71. Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS*, at 85, 92–93 & fig.5.2 (Jacquelyn C. Campbell ed., 2d ed. 2007); see also *What Is the Danger Assessment?*, DANGER ASSESSMENT, <http://www.dangerassessment.org/about.aspx> (last visited Mar. 12, 2012).

72. Campbell, *supra* note 71, at 92–93 & fig.5.2; Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire That Predicts the Likelihood That a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 281 (2009).

73. Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 530–31 (2010). *But cf.* Dana Harrington Conner, *To Protect or To Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 920–21 (2006) (discussing a comparison of Danger Assessment, DV MOSAIC, Domestic Violence Screening Instrument, and Kingston Screening Instrument for Domestic Violence, and noting that some authors have "acknowledged that the tools could yield results that are better than chance but that are still flawed in some respects and recommended that those working in the area of domestic violence continue to assess risk with any means available"); Harriet L. MacMillan & C. Nadine Wathen, *Identification of Intimate Partner Violence in Health Care Settings: What's the Evidence?*, 11 DEPAUL J. HEALTH CARE L. 69, 80 (2007) ("Four recent evidence-based systematic reviews have found insufficient evidence for the effectiveness of IPV screening in reducing violence and/or improving health outcomes for women."); Roehl & Guertin, *supra* note 70, at 171–72 ("Court officials are applying the results of risk assessments in intimate

instrument may provide critical information for the purpose of safety planning and referral to community resources. However, risk assessment instruments are not designed to yield broader information concerning the characteristics and implications of the violence or the options actually available to families.

Future development and validation of screening instruments designed for specifically identified purposes may enhance their usefulness for triage. Nevertheless, heavy reliance on current instruments (particularly those that are scored) may breed overconfidence by those who administer them because they may appear to be more comprehensive and reliable than they actually are. Consequently, pending more research, screening instruments should be used as only one indicator, among others.⁷⁴

C. Effective Screening Is Not a One-Time Event

A one-time administration of a single instrument may not yield sufficient information to ensure safety and support complex decisions about participation in dispute resolution processes. Thus, consistent with best practices, screening protocols typically involve a combination of confidential interviews,⁷⁵ written questionnaires, documentary review, and ongoing monitoring and observation.⁷⁶

A triage model that relies on an interview or the administration of a screening instrument at a single point in time, especially if that point in time is early on in the case, is likely to miss a considerable amount of

partner violence cases to provide better protection for victims, more appropriate treatment and sanctions for offenders, and better allocation of scarce criminal justice resources, from prosecutor time to prison beds. Yet these aims are largely untested, and data on the reliability, validity, and predictive accuracy of risk assessments are scarce.”).

74. Roehl & Guertin, *supra* note 70, at 191.

75. See *Roadmap*, *supra* note 63, at 725–26. Screening interviews are safest and most productive if the parties are interviewed separately and the conversations are private and confidential. *Id.* A party’s fear that the interviewer will disclose the facts about domestic abuse to the abuser, to child protective services, or to law enforcement may well cause the party to be reticent about sharing the details. *Id.* An interview should be structured so that a variety of topics related to intimate partner violence are covered and the interviewer has the opportunity to listen carefully, observe body language, and ask follow up questions. *Id.*; see also Johnson, *supra* note 73, at 532–42 (discussing the Lethality Assessment Program (LAP)). The party being interviewed should be informed about why the information sought is important and how it will be used. Johnson, *supra*, note 73, at 577. The interviewee should be advised about issues of confidentiality, under what conditions information might be shared, and who might have access to it. See *id.* at 577–78.

76. *Wingspread Report*, *supra* note 1, at 460; *Roadmap*, *supra* note 63, at 724–30.

intimate partner violence and yield less information about the characteristics and implications of the violence. Furthermore, the level of risk can shift over time, changing the parties' willingness to make disclosures as well as the relative safety and productivity of participation in dispute resolution processes.

As discussed in the next section, for a variety of reasons, parties may also choose not to disclose intimate partner violence or to disclose it only after they have time to develop trust in the professionals involved in the case.⁷⁷

VI. PARTIES MAY REASONABLY CHOOSE NOT TO INITIALLY DISCLOSE INTIMATE PARTNER VIOLENCE

The triage process is predicated on the assumption that parties will disclose intimate partner violence early in the divorce process. In reality this may not occur.

A. *Individual Hesitancy to Disclose*

In some cases, intimate partner violence is easily identified, particularly if both parties disclose it or if there have been findings in other proceedings. But, in some cases, even those with a severe and lengthy history of violence, the existence of intimate partner violence is difficult to ascertain.⁷⁸

Particular screening challenges are associated with cases involving coercive-controlling dynamics. Given the likelihood of retaliation and the increased danger at separation,⁷⁹ abused parents may find themselves and their children in more danger by disclosing intimate partner violence than by not disclosing it. They may be poorly positioned to deliberate about the benefits or costs of disclosure and the

77. See Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 507 (2008) (explaining why later disclosure should not be viewed with suspicion).

78. *Wingspread Report*, *supra* note 1, at 460.

79. See Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 291 (2011) [hereinafter Baker, *Necessary Third Parties*] ("Victims' fears are, unfortunately, well founded. Research indicates that a woman is seventy-five percent more likely to be murdered when she tries to leave or has fled than if she stays in the violent relationship."); Conner, *supra* note 73, at 887 ("Contrary to popular belief, the most dangerous time for a battered woman is not when she remains in the abusive relationship. In fact, the victim of domestic violence is at a substantially greater risk of being killed by her abuser when she attempts to leave him.").

extent to which their safety might hinge on keeping the abuse a secret. They typically engage in a process of leaving,⁸⁰ making calculated choices along the way:

“[W]oman [sic] seek assistance in proportion to the realization that they and their children are more and more in danger. They are attempting, in a very logical fashion, to assure themselves and their children protection and therefore survival.”⁸¹

In addition, abused parents may be concerned that they will not be believed, particularly if they have not previously disclosed violence or that they will be seen as instigators of intimate partner violence if they have used violence to protect themselves and their children.⁸² They are likely to be particularly hesitant to talk about what has happened to court personnel.⁸³ For different reasons perpetrators of violence may also avoid disclosure.

B. Systemic Disincentives to Disclose

1. The Imperative of Privileged Communication

Because some victims of intimate partner violence put themselves and their children at risk if they disclose abuse, they are unlikely to make disclosures unless they are convinced that their communications will be held in strict confidence.⁸⁴ Unfortunately, depending on who is doing the screening and in what context it occurs, court-system triage is unlikely to be privileged.

Disclosures to various professional groups may be privileged in that the professional in question cannot be made to testify or produce evidence related to confidential communications occurring within the boundaries of the relationship. For example, attorney–client and

80. JOHNSON, *supra* note 57 at 53–55 (describing research on the process of leaving).

81. Conner, *supra* note 73, at 885 (quoting EDWARD W. GONDOLF WITH ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 18 (1988)).

82. *Roadmap*, *supra* note 63, at 725.

83. Frederick, *supra* note 1, at 526.

84. Baker, *Necessary Third Parties*, *supra* note 79, at 296–97 (“Without full confidence that her communications, location and secrets will be safe, the domestic violence victim may choose to take her chances alone and return to the devil she knows or even to obfuscate her story . . .”).

therapist–patient privileges are widely recognized.⁸⁵ In addition, the majority of states have created testimonial privilege for intimate partner violence and sexual assault victim advocates.⁸⁶

The purpose of these privileges is to promote uninhibited disclosure of information so that professionals can provide more effective assistance.⁸⁷ Screening by court personnel will generally not fall within an existing privilege and, consequently, disclosure of information provided as a part of the triage process could be compelled. Further, not only might communications not be protected, but also some professional groups, including most court personnel, are mandatory reporters of some forms of abuse.⁸⁸ Thus, although informing parties that conversations may not be privileged may well inhibit disclosure about intimate partner violence, for safety and other reasons parties should be informed when disclosures are not privileged.

2. Concerns About Who Will Have Access to Information Disclosed

a. Discovery by the Other Party

One can easily imagine scenarios where information obtained during a court triage process might be used for other purposes. For example, information disclosed by one party during triage may be discoverable by the other party.⁸⁹ If a case ultimately goes to trial or a protective order is sought, a party might attempt to introduce disclosure or nondisclosure of intimate partner violence during triage as evidence. This could be particularly detrimental to victims of intimate partner violence who have initially withheld information about abuse out of fear of retaliation.⁹⁰ More specifically, a party might seek to have results of screening instruments admitted in proceedings.⁹¹ Even if triage information was not discoverable or admissible, in the event that a

85. *Id.* at 331 (“[A]ll fifty states as well as the District of Columbia have enacted some form of a therapist–patient privilege.”).

86. *Id.* at 331–32.

87. *See, e.g.*, Rebecca Aviel, *When the State Demands Disclosure*, 33 *CARDOZO L. REV.* 675, 703 (2011) (explaining that the purpose of the attorney–client privilege is to promote full disclosure).

88. Baker, *Necessary Third Parties*, *supra* note 79, at 319–20.

89. Frederick, *supra* note 1, at 528.

90. *Id.*

91. *See* Hitt & McLain, *supra* note 72, at 288–89 (discussing the relevancy of the Danger Assessment in civil and criminal proceedings).

triage decision was disputed and the issue came before a judge, the information might well be made part of the record for that limited purpose.

b. Disclosure to Evaluators or Dispute Resolution Providers

Beyond information sought by parties, court-system actors might seek access to screening information or triage decisions. For example, professionals such as mediators and child custody evaluators acting with the best intentions might want to know what, if anything, was disclosed by the parties during screening. While the information could certainly be used to protect parties, there could be unforeseen consequences such as revelation to a perpetrator.

Furthermore, if a mediator learned that no intimate partner violence was disclosed during triage, the mediator might conclude that no additional screening or monitoring was necessary. This is problematic because victims often make disclosures later in the court process, professionals have an independent professional duty to screen, and professionals in different roles are screening for different purposes. Professionals engaging with families should not rely on or assume that prior screening attempts have effectively resolved questions about intimate partner violence for a given family.

c. Disclosure to the Judge

As a case moves through the system, judges may expect to have access to screening and triage information. If this is allowed, a judge could rely on information not known to or contestable by the parties. For example, in a worst case scenario, a party could provide false information during triage that would find its way to the judge without the opposing party knowing about it or having an opportunity to challenge it. The possibility that information may come to a judge outside a courtroom setting, without the formal safeguards established under the rules of evidence and civil procedure, can threaten litigants' rights to fundamental fairness and due process, not to mention safety.

d. Disclosure Beyond the Court System

Finally, unprotected disclosures of intimate partner violence may be susceptible to disclosure beyond the family court system. For example, unless otherwise protected, the results of court-connected screening and triage, which can include unsworn and potentially false information, might be accessible to child protection workers, law enforcement, immigration authorities, and professional licensing boards, among

others. Such unprotected disclosures can have devastating consequences for parties well beyond the confines of their family law cases.

VII. WHO DOES THE TRIAGE PROFESSIONAL ANSWER TO?

Inherent in the triage process is the assumption that the interests of the parties and the interests of the court system are closely, if not perfectly, aligned. In practice, this may not be the case.

A. *The Interests of Parties and the Court System May Sometimes Conflict*

From the perspective of the parties, triage may provide much needed guidance as they enter a perplexing court system and equally mystifying divorce process. Parties require accurate and helpful information and support as they prepare to make important decisions. Families also have an interest in avoiding unnecessary and unhelpful processes and intrusions.

In addition to serving families more effectively, court systems hope that triage will expedite the movement of cases through the system, result in cost-savings,⁹² and possibly reduce post-decree filings. Proponents of triage believe that it is an effective response to cutbacks in funding for court services. The idea is that by allocating resources directly and promptly to high risk and re-litigating families, court systems can serve them more efficiently.⁹³ In fact,

[p]reliminary results of an evaluation of [one triage system] are promising and include increased agreement rates, reduced rates of return for a second service (after participating in an initial service), a reduced number of child-related motions filed with the court, and an overall decrease in the number of services provided. [Court] administrators also report more efficient and effective service delivery positively impacting the agency and court overall. While these results show promise, research in this area is in its infancy and the results of the one evaluation in a

92. See Salem, *supra* note 8, at 380–81 (arguing that triage could increase efficiency, preserve resources, eliminate duplication of services, and create a greater opportunity for settlement).

93. *Id.* at 380–83; Bala et al., *supra* note 5, at 441

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single agency do not warrant claims about the effectiveness of triage beyond the specific study.⁹⁴

In many cases, the interests of parties and the court system will align. Nevertheless, there is an inherent tension in the role of the court system triage professional as the professional attempts to simultaneously satisfy the needs of the parties and the court system. For example, pressure to promptly identify cases involving intimate partner violence may be at odds with screening protocol best practices. Similarly, efforts to expedite processing of cases may create problems for families who require a slower pace. In addition, the parties themselves may disagree about which dispute resolution alternatives would be most appropriate for their case, leaving the triage professional in the position of having to weigh and perhaps resolve the competing interests of the parties, which is a role traditionally reserved for a judge.

Moreover, there is a strong belief among some alternative dispute resolution proponents that the benefits of certain processes, like mediation for instance, outweigh any practical or strategic objections that the parties might raise to those processes, even in the case of domestic violence. As one commentator noted,

If mediation is going to be given the opportunity to accomplish what it has in other states and countries, it must not be left to the parties, to attorneys, or to judges to decide who will use the process. Mediation . . . in child custody matters should be mandatory.⁹⁵

The possibility of conflicting interests fuels concerns about accountability and role confusion. While the goals of triage are important and positive, when resources are scarce and difficult choices must be made, it is vital to err on the side of protecting the interests of families over the administrative needs of the court system.

B. Accountability for Decisions and Recommendations

Traditionally, when a party has legal representation, the lawyer advises the client about dispute resolution processes, and together they

94. Salem, *supra* note 8, at 383 (citations omitted).

95. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 660–61 (2007) (footnote omitted).

make strategic decisions about which alternatives to pursue, taking into account the client's individual perspectives, experiences, and particular legal goals and interests.⁹⁶ Largely because so many parties are self-represented, court-system triage professionals are assuming some of the functions traditionally performed by lawyers. Indeed, court-system triage might not even be a topic of discussion if every party had access to an attorney.

In reality the opinion of a triage professional is no substitute for advice from or representation by an attorney. While an attorney is licensed to practice law, a triage professional is not authorized to give legal advice, and as discussed above, decisions about participation in dispute resolution processes can involve important strategic choices integrally linked to the ultimate outcomes the client seeks.

Furthermore, triage systems may provide little or no formal accountability on the part of non-judicial triage professionals. While lawyers are directly accountable to their clients, triage professionals are employees of the court, and whereas a client may pursue a malpractice claim against a lawyer who provides substandard service, a triage professional likely enjoys immunity from such claims.

Concerns about lack of accountability raise due process issues for parties. While the decisions of a judge are appealable, there may be little recourse for parties who disagree with or are endangered by a triage decision. Even if a party can seek review by a judge, that party may not be aware of the possibility, may not have resources to pursue it, or may believe that the judge will back the decision of the court-system employee.

C. The Essential Functions of the Court

As family courts have evolved and incorporated more dispute resolution alternatives, they have focused less on deciding cases presented to them and more on managing and settling them. Judges have long performed these duties informally, but non-judicial court personnel have not traditionally done so. Participants in the Wingspread Conference on Domestic Violence and Family Courts expressed reservations related to this shift:

96. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 379–80 (3d ed. 2012).

A note of caution repeatedly sounded in these discussions was the danger of resting increasing responsibility on family court professionals to make sophisticated and nuanced judgments about levels of risk and the appropriateness of specific interventions and determinations without providing the resources to ensure that these professionals are adequately qualified and trained. Some participants were also uncomfortable with the idea of courts becoming “agencies” providing “services” and potentially neglecting their important role in fact finding and as enforcers of the laws designed to protect victims of domestic violence.⁹⁷

Unless the functions of triage are clearly articulated, and the role of the triage professional is clearly defined, there may be a natural but problematic tendency to expand triage beyond its intended purpose and move into information gathering for the purpose of determining the outcome of individual cases. It would not be a big leap, for instance, for triage professionals to form an opinion based on what they learn in the screening process about what kind of parenting plan they think would be in the best interests of the child. If that opinion is documented in the file or packaged up for the judge without the benefit of an evidentiary hearing (where a party is permitted to put on sworn testimony, introduce and challenge evidence, and cross-examine the opposing party), it can influence the outcome of the case in ways that raise significant due process concerns. While that tendency might well create efficiencies for the court and increase the prospects of settlement, it might also adversely impact the fundamental rights and interests of the parties.

Family courts serve a critical fact-finding function and play an important role in enforcing laws designed to protect victims of intimate partner violence and hold offenders accountable.⁹⁸ They must not abrogate that responsibility in the interests of encouraging settlement under the guise of screening or triage, or by means of extra-judicial dispute resolution practices.

97. *Wingspread Report*, *supra* note 1, at 465–66; *see also* Mary E. O’Connell, *Mandated Custody Evaluations and the Limits of Judicial Power*, 47 FAM. CT. REV. 304, 313–14 (2009) (discussing the increasingly “interventionist character” of family courts and questioning the use of intrusive custody evaluations); Singer, *supra* note 3, at 367 (questioning the “institutional competence of courts”).

98. *See Wingspread Report*, *supra* note 1, at 465–66.

Moreover, because of the intrusive nature of some interventions, a few commentators have raised questions about possible violations of constitutionally protected privacy rights associated with autonomy and self-determination, in addition to due process.⁹⁹

D. Party Self-Determination

Ironically, while a major goal of alternative dispute resolution involves party self-determination, triage can operate to curtail decision-making by parties—at least with respect to choice of dispute resolution process. On a practical level, such restriction is especially problematic for victims exiting coercive relationships because they are at the highest risk following separation.¹⁰⁰ Further, as discussed above, keeping themselves and their children safe may involve a complex web of decisions and tradeoffs unknown to the triage decision-maker.¹⁰¹ Indeed, the beliefs and intuition of the person who experiences abuse about her own danger is an important indicator of risk.¹⁰²

Given the complex nature of decision-making about dispute resolution alternatives and the high stakes involved, parties will be far more knowledgeable about their situations than professionals attempting to perform triage. Parties will also have to live with the consequences of whatever triage decision is made. Consequently, as a matter of policy it makes sense to maximize litigant self-determination and develop safe, fair, and effective mechanisms to resolve competing interests and priorities.

99. See Johnson, *supra* note 73, at 543, 546 (discussing constitutional dimensions of “dignity”); see also Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 437–38 (2002) (comparison with pre-*Gault* juvenile courts); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 900–02 (2010) (discussing expanded role of nonlawyer professionals in private family disputes).

100. Baker, *Necessary Third Parties*, *supra* note 79, at 291; Conner, *supra* note 73, at 887.

101. See Conner, *supra* note 73, at 936 (“Lawyers must also keep in mind that the act of seeking legal assistance can potentially place a victim in greater danger.”); Goodmark, *supra* note 18, at 5–22 (discussing mandatory interventions generally); Johnson, *supra* note 73, at 571 (“A report published in the National Institute for Justice Journal found that domestic violence hotlines, along with domestic violence units in police departments and prosecutors’ offices ‘appear to be associated with retaliation by abusive partners.’” (quoting Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, NAT’L INST. JUST. J., Nov. 2003, at 20, 24)). But see Edwards, *supra* note 95, at 660–61 (advocating that mediation should be mandatory in child custody cases).

102. See Conner, *supra* note 73, at 921–22; Johnson, *supra* note 73, at 559–60.

VIII. SEEKING A MIDDLE GROUND: RECOMMENDATIONS PREMISED ON INFORMED DECISION-MAKING

As the foregoing illustrates, court-system tracking of cases involving intimate partner violence presents significant challenges and potential dangers.

First, routing cases to appropriate dispute resolution processes requires identification of intimate partner violence, understanding of its characteristics and implications, and knowledge of the realistic availability of other options. Making decisions without this informational base is risky and not consistent with the substantial body of research indicating that the nature, meaning, and effect of intimate partner violence varies greatly among families experiencing it.

Second, a one-time interview or administration of a screening instrument, especially if the inquiry has an incident-specific focus, is unlikely to yield the information needed for a triage professional (or any other third party) to predict what, if any, dispute resolution process will be safe and productive for a given family. Detecting violence and then proceeding directly to a conclusion about use of a dispute resolution process is without foundation in these cases.

Third, while parties are the most knowledgeable concerning the violence and its characteristics and implications, for a variety of reasons they may not disclose it to court-system personnel. Disclosure may, in fact, heighten risk to a party if disclosures cannot be made in strict confidence. Unfortunately, disclosures made to court triage professionals are unlikely to be privileged; further, triage professionals may even be mandatory reporters. The information disclosed may actively be sought by the other party in discovery, by dispute resolution and other service providers, by the judge, and by others such as child protection investigators.

Finally, the more reticent the parties are to disclose intimate partner violence and information about it, the less reliable the “match” with a dispute resolution process becomes. To complicate matters further, dispute resolution alternatives in a given jurisdiction may be limited and may not include opportunities for more in-depth assessment. The role of the triage professional is a complicated one in that the professional answers to the court but also serves the parties, in some ways fulfilling a traditional function of a lawyer for the self-represented. In many cases the interests of the courts and parties will align, but this will not always occur. Unfortunately, court-system triage professionals are not accountable for decisions in the way that a judge would be and they are likely immune from suit for mistakes and misjudgments.

These significant challenges lead to the conclusion that without additional analysis and research, widespread adoption of court-system triage is premature. Nevertheless, the current practice of providing little or no information to parties—particularly those without attorneys—with respect to dispute resolution processes and services also creates significant risks. Some unrepresented parties may have no information on dispute resolution processes, and others may be overwhelmed by information with little idea of how it applies to them. Where linear or tiered service models are in place, families with a history of intimate partner violence may be shuffled through processes that are dangerous or ineffective for them. Thus, while court-system triage presents problems, so does the status quo.

The recommendations below are aimed at finding a middle ground consistent with furthering the laudable goals of triage but stopping short of broad expansion of court-system triage until important questions are resolved. *Although it could be achieved in a variety of ways, the central goal should be to maximize the ability of parties to make informed decisions about participation in dispute resolution processes.*

While parties are most knowledgeable about the existence of intimate partner violence and its characteristics and implications, they are least knowledgeable about dispute resolution alternatives, the strategic choices associated with these alternatives, the realistic options the parties have, and how to prepare for participation. To remedy this situation, some exchange of information will have to occur. Because the parties ultimately bear the burden of the consequences of the process choice and the information they have is more difficult to transmit, the best solution is to create a system that maximizes the ability of parties to make truly informed decisions.¹⁰³

A. Public Access to Information About Dispute Resolution Alternatives

All parties should be offered easily accessible public information about the methods of dispute resolution available in a community.¹⁰⁴

103. See Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 211–12 (2004) (stressing the importance that parents (in family dispute resolution) have the ability choose their own methods of dispute resolution in an informed way); Murphy, *supra* note 99, at 923 (suggesting that “most services should be voluntary”).

104. Although beyond the scope of this Article, given the high percentage of litigants who are self-represented, court systems might also make available basic legal information on child custody and parenting time, child support, and property distribution.

Provision of information enhances the autonomy and decision-making abilities of parties as well as their capacity to choose among dispute resolution options. In addition to offering presentations and classes, some courts have begun to provide information in accessible, cost-conscious formats, including audio or video material available in multiple languages over the Internet and at public locations.

From the perspective of families with a history of intimate partner violence, public information will be most useful if it is free, and accessing it will be safer if it is done on a voluntary basis.

For some parties, access to general information may be all that is needed to make informed choices regarding dispute resolution processes. For others, the information may trigger the desire for more help because information alone may be insufficient to equip them to calculate the risks, benefits, and potential legal consequences of their dispute resolution options.

B. Confidential Unbundled Legal Counseling

To make informed decisions about participation in dispute resolution processes, a party who has experienced intimate partner violence will benefit from confidential discussion—preferably with a lawyer—concerning the characteristics and implications of the violence, a realistic assessment of the processes and services available, the strategic consequences of choices in light of the party's interests, and how to prepare for participation in any processes selected. This is the classic role of the lawyer as counselor.

A counseling session with an attorney effectively promotes the twin goals of safety and informed decision-making. Confidentiality is critical to creating a climate conducive to free and full disclosure of intimate partner violence; by supporting the autonomy and agency of a victim party in particular, the confidential legal support session would help to ensure the protection of the family from further violence and coercive controlling abuse.

In contrast to a session with a triage professional, an attorney counseling session is clearly privileged, obviating concerns about leakage and misuse of disclosures; the lawyer's interests are aligned with those of the client; and the lawyer is entirely accountable to the client. Ideally, the counseling sessions would be conducted by an attorney who

is a specialist in intimate partner violence, including its effects on children and parenting.

Clearly there are practical issues associated with providing legal counseling sessions and communities would need to collaborate¹⁰⁵ to make possible the provision of such “unbundled” legal services.¹⁰⁶ However consistent with the spirit of triage, it is possible that upfront investment in families may be recouped through more appropriate use of processes, enhanced safety, provision of timely referrals, and efficient use of judicial time.

C. Domestic Violence Advocacy

When intimate partner violence is an issue, a qualified domestic violence advocate may be able to provide confidential dialogue (in states that have afforded the privilege) as well as risk assessment, safety planning, referrals, help with problem solving, and emotional support. Work with a domestic violence advocate might precede a counseling session with a lawyer, be integrated into such a session,¹⁰⁷ or it may supplement it.

D. Use of Screening Protocols by Dispute Resolution and Other Service Providers

All professionals providing dispute resolution and other services to parties have a professional duty to and should be required to independently adopt and use an intimate partner violence screening protocol. As part of that screening protocol, each professional should advise the party whether communications are confidential and with whom and under what circumstances information might be shared.

E. Design and Evaluation of Court-Connected Triage Models

Courts interested in implementing a court-connected triage system should consider designing and evaluating a triage program with the following features: (1) the parties, rather than a triage professional,

105. Singer, *supra* note 3, at 368 (“[P]roponents of the new paradigm might consider divorcing some of the services on the family dispute resolution continuum from the court system.”).

106. The counseling session would not result in the full legal representation of a party but would be limited in scope and could be completed in as little as an hour.

107. Care must be taken to assure that the presence of an advocate at an interview will not obviate the attorney–client privilege.

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would ultimately make an informed decision with respect to participation in a dispute resolution process (a judge would make a determination in case of disagreement); (2) in addition to standard dispute resolution processes, referral options would include an alternative for further assessment as well as an option to fast-track cases to a judge (preferably with appointed counsel); and (3) disclosures to a triage professional would be protected by creation of a special privilege to ensure confidentiality.

IX. CONCLUSION

As research on triage processes is undertaken, we hope that attention will be focused on defining different models of triage, developing expertise with respect to matching families with dispute resolution processes, incorporating best practices for screening and assessment of intimate partner violence, and assuring confidentiality and accountability.

We encourage courts to involve the community in supporting programs designed to maximize the ability of parties to make informed decisions about participation in dispute resolution processes. One way this could be accomplished is through a combination of public information, unbundled legal counseling sessions, and domestic violence advocacy.