


DOMESTIC VIOLENCE, LITIGATION AND ALTERNATIVE PROCESSES

**"Mediation for DV Victims? A "Restorative Justice" Perspective"
Friday, August 7, 2009 9:30 AM - 10:30 AM EDT**

**Brenda Waugh
Brenda Waugh Attorney at Law, L.C.
142 N Queen Street
Martinsburg, WV 25401
304-263-6601
waugh@brendawaugh.com**

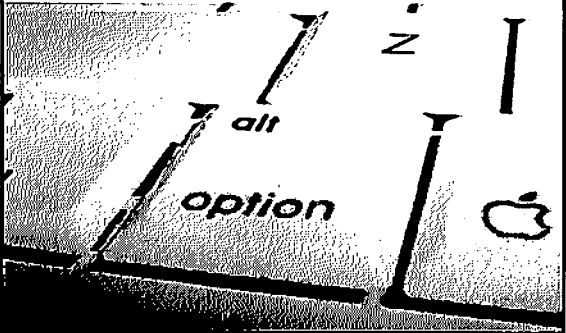
**Making Choices:
Domestic Violence, Litigation and
the Alternatives**


Brenda Waugh,
Legal Aid Society of West Virginia,
August 7, 2009



Contemporary
lawyers in the US
face a crisis.


How can a lawyer best advocate for a
victim of domestic violence?





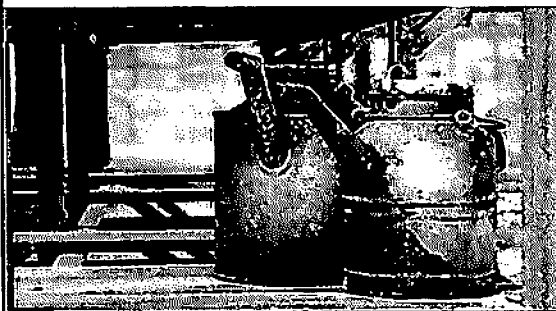
Victims of domestic violence can seek help through court

Legal remedies fail to solve domestic violence.

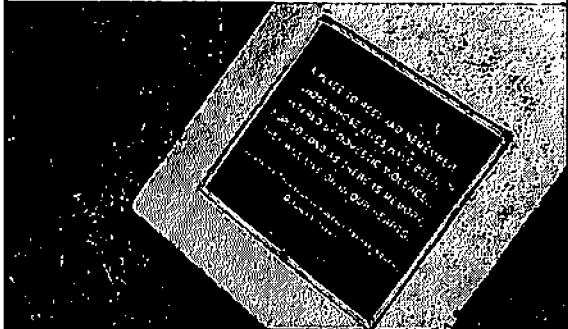



Processes beyond the adversarial system may provide safety and justice to victims of domestic violence.

Evaluating the potential benefit (and harms) of these alternative processes is critical.




The legal system's response to domestic violence is inadequate.





Domestic violence involves harm, relationships, and power.

Domestic violence involves a personal relationship between the victim and the offender.



Domestic violence may involve psychological abuse, physical harm and abuse and the threat of harm.



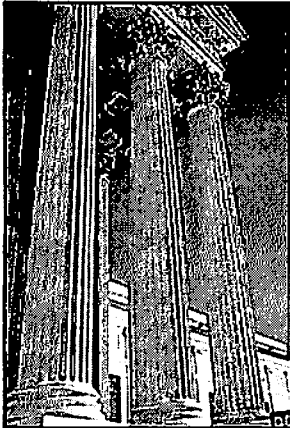
Domestic violence may include physical, sexual and mental abuse





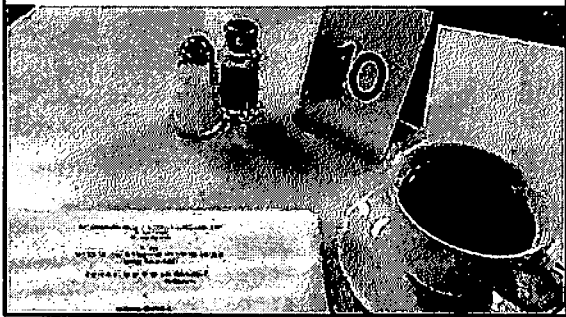
POLL
Are victims of domestic violence safer today than 20 years ago?

- yes
- no




Courts have typically engaged a number of response to domestic violence.

Civil remedies include domestic violence protective orders and divorce proceedings.




Criminal charges may be initiated.



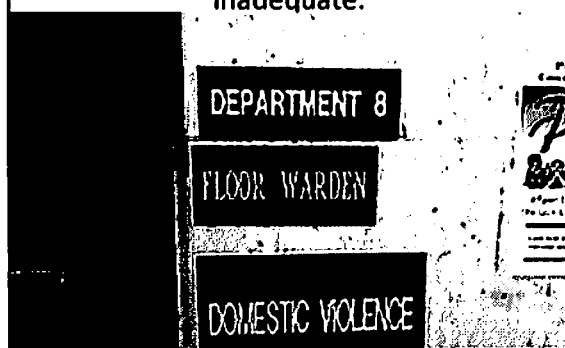


Quasi-criminal proceedings include abuse and neglect or dependency proceedings



POLL
Which forum provides the greatest protection for most victims of domestic violence?
-Divorce proceeding and protective order
-Civil Protective Order
-Criminal Charges

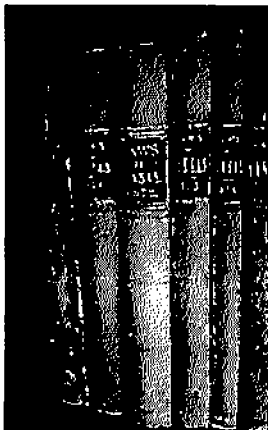
Contemporary remedies are inadequate.



They remove decision making power from the parties and place it in the hands of third parties.

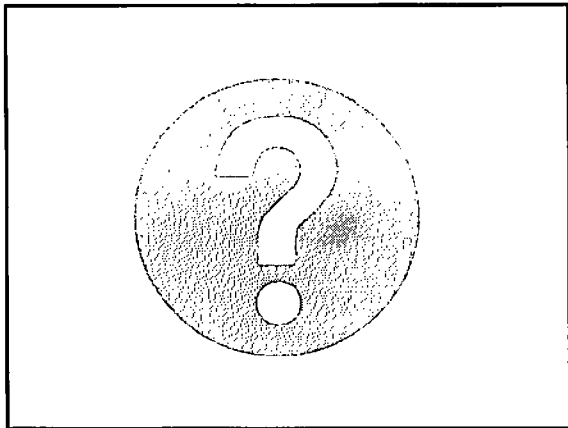



Remedies are limited to those set forth in the statute.



Remedies focus on fault and injuries not needs and obligations.






Poll
Have you heard the term
"restorative justice?"

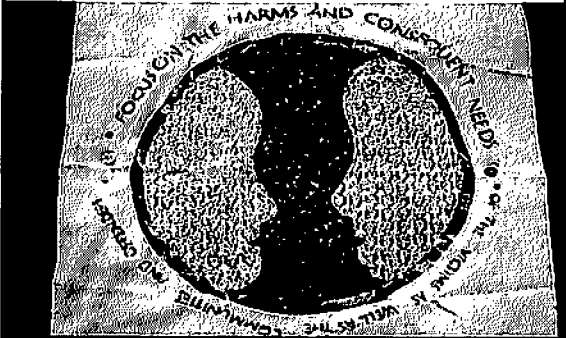
Restorative Justice places decision making in the hands of those harmed and expands the options to right the wrongs.

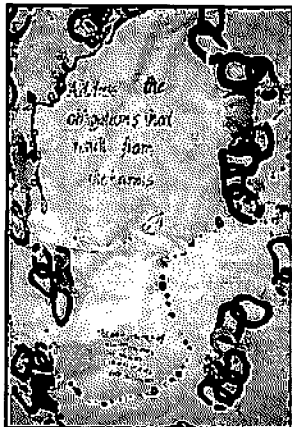
Restorative justice is defined primarily as addressing harms and making right the wrongs.

Restorative Justice is more a set of principles than a specific program.



Focusing on the harms and consequent needs of all participants.

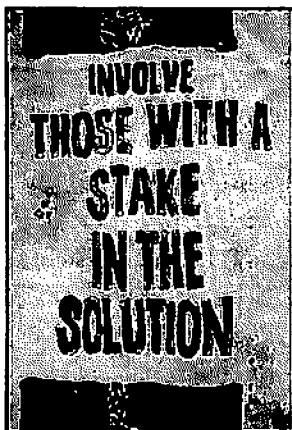




Addressing the obligations that result from those harms



Use of inclusive, collaborative processes



Involving those with a stake in the situation

Seeking to put right the wrongs.



Some applications of restorative justice demonstrate the scope of the processes and resolutions

Victim Offender Conferencing brings the victim and offender together.

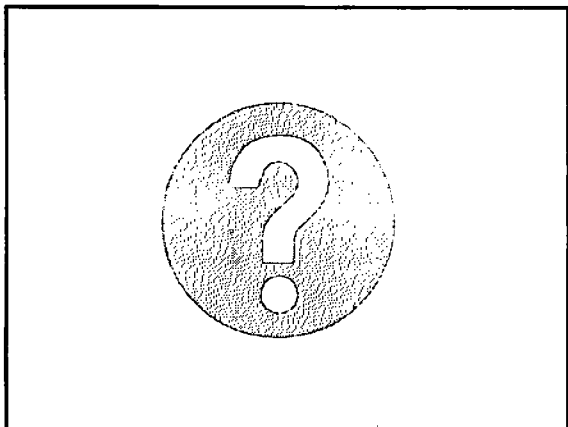


Court personnel, the community and the family are involved in sentencing.





Family Group Decision Making and Family Group Conferencing involves extended families in matters involving children.

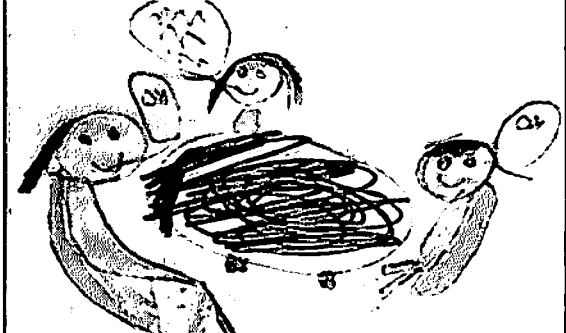


Poll
In divorce and custody cases in your state is mediation in family law cases with allegations of DV:
 unavailable generally
 prohibited for dv victims
 required
 depends on the case

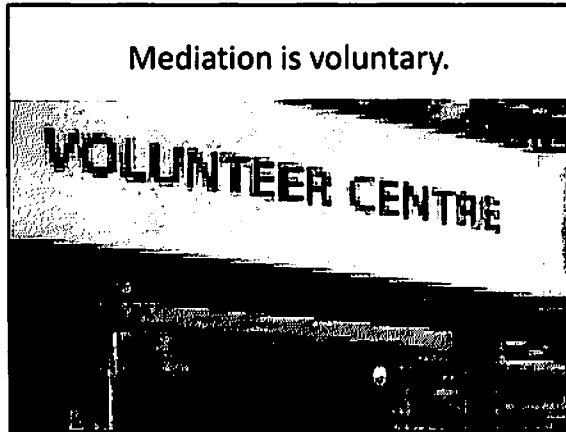
Mediation addresses some of the deficiencies in our adversarial process and increases the options available to parties.



Mediation is defined in terms of shifting decision making and facilitating discussion.







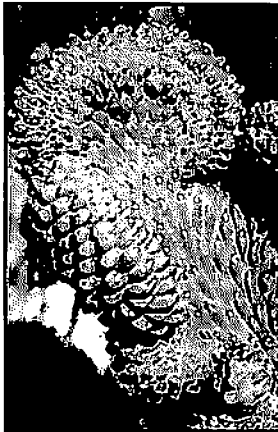


Mediation involves a third party as a facilitator, not a decision maker.

Mediation expands the options and satisfaction for most participants.



Within these definitions, mediation takes many forms.



Evaluative mediation is most commonly seen in courts and is settlement focused.

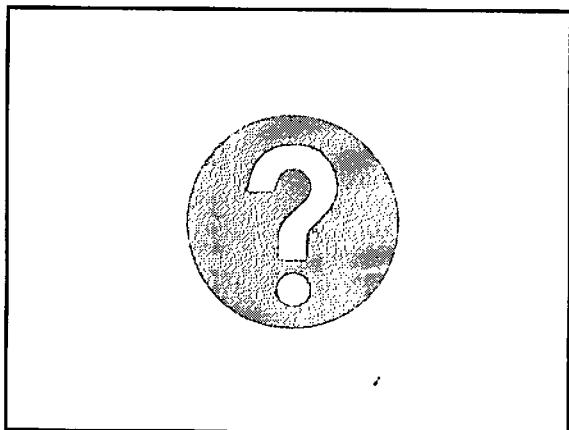




Facilitative mediation places control over the process with the mediator, of the outcome with disputants.

Transformative mediation is relationship focused and places control of the process with the parties.





Restorative Justice and Mediation
create questions and problems.



Restorative Justice is not always the
answer



Restorative Justice requires that the
offender accept responsibility.



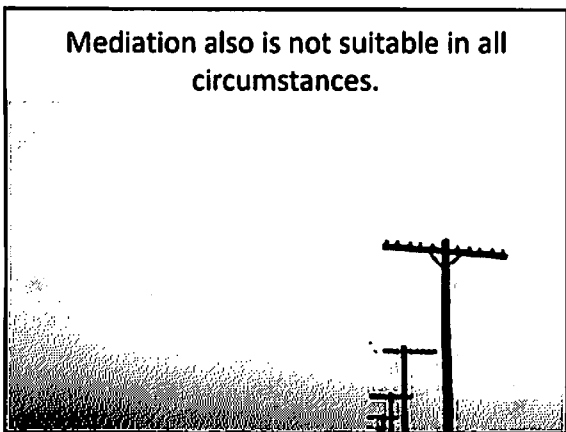


Our current systems may have inadequate resources to fund the responses identified in a restorative process.

Our current system may not provide adequately trained facilitators or physical space to implement a restorative process.



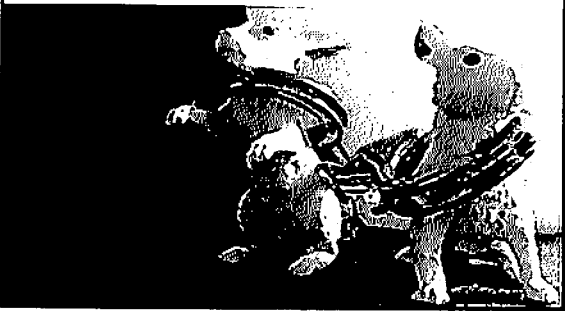
Mediation also is not suitable in all circumstances.





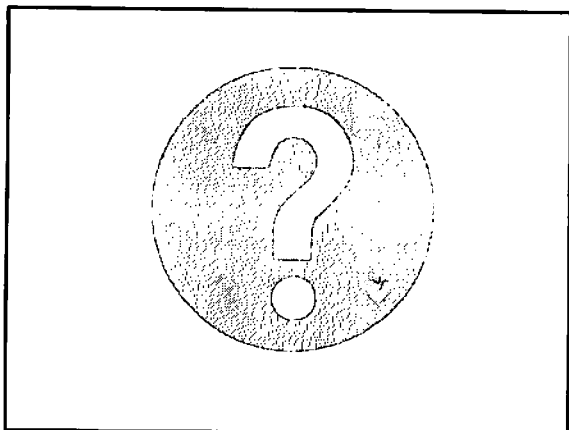
Mediation is not suitable many situations involving drug use, mental health issues, power imbalance.


Mediation is not suitable when it is not voluntary.

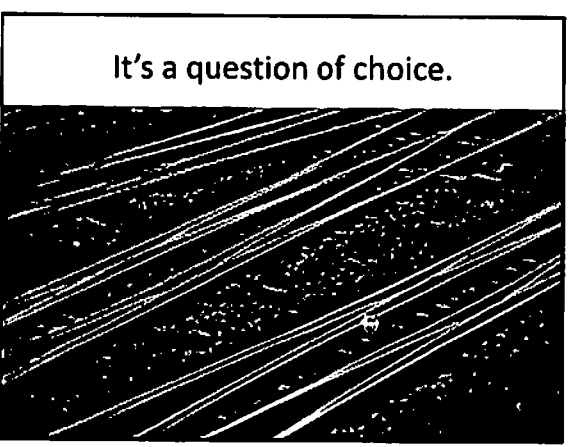


Mediation is not suitable when there are inadequate resources to provide sufficient training, screening and a safe physical location.






Poll
Which one of the following is best to
decide whether or not mediation is an
option?
The judge
A court employee
Lawyers
The parties



Who decides who should participate in alternative processes?



In some states victims of domestic violence are precluded from participation by statute.



Other states place discretion in the hands of administrators to determine which cases are suitable for mediation.





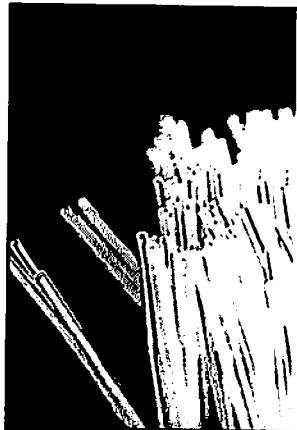
Some states leave it to judges to decide whether or not the abuse is significant enough to preclude mediation.




Some states rely upon lawyers to file motions or argue for exemptions.




What about the victim?



Should litigants have the option to opt in (or out) of mediation?



Litigants have the most knowledge and information about their cases and their needs.



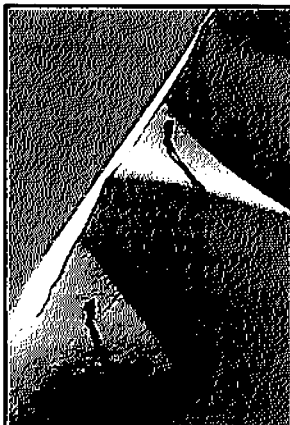
However, litigants can be coerced by court officials, lawyers, and the other party to compromise.



What will
empower the
victim?

When do "protections" simply remove
options?





What course
should we
recommend when
the person sitting
across the table
trusts us?

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For information contact Brenda Waugh,
Attorney at Law, L.C. 142 N. Queen Street,
Martinsburg, WV 25401 304-263-6601,
waugh@brendawaugh.com

MEDIATION/RESTORATIVE JUSTICE/ ADR PROCESSES WITHIN THE COURTS

Conflict Resolution	Control of Process	Control of Outcome	Civil or Criminal
Litigation	Specially trained experts-judges and lawyers	External Actor: Judge	Civil and criminal
Arbitration	Specially trained experts selected by litigants	External Actor selected by disputants	Civil
Mediation	Specially trained expert-mediator unless purely transformative	Parties	Civil or criminal
Collaborative Practice	Parties, assisted by specially trained attorneys and mental health professionals	Parties	Civil
Circle Process	Lay trained "keeper of the circle" or specially trained expert	Participants, which usually include disputants; judge may retain veto power in circle sentencing	Usually criminal in sentencing, sometimes used within mediation
Facilitation	Specially trained expert-facilitator or lay person with training	Parties	Civil Some criminal as the Family Group Conference for juvenile offenders
Negotiation (formal)	May include experts or only parties	Parties, judge may retain "veto" power	Civil, also used in plea bargaining in criminal
Negotiation (informal)	Parties	Parties	Civil, may be used in minor crimes

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Marshall Yoder, Wharton Aldhizer & Weaver PLC , 100 S. Mason St., Harrisonburg VA 22801,
540-438-5375 , pmyoder@wawlaw.com

Brenda Waugh, Brenda Waugh, Attorney at Law, L.C., 142 N. Queen Street, Martinsburg, WV 25401
304-263-6601, waugh@brendawaugh.com

COMPARISONS OF PROCESSES: MEDIATION AND RESTORATIVE JUSTICE PROCESSES OF FAMILY GROUP CONFERENCING AND VICTIM OFFENDER MEDIATION

	Mediation	FGC	VOM
Pre-convening	May include screening (in person, by telephone) May include court order.	Selection of case and selection of participants and location.	Selection of case (by victim). Preparation process of at least six months.
Introduction	Greeting, process description, ground rules	Determined by cultural preference or department regulations. Usually includes procedural provisions.	Mediators describe reason for meeting briefly.
Storytelling	Each disputant sets out story, which is summarized by the mediator and key points emphasized	Typically not included except as part of issue identification.	Victim and offender tell stories, ask for information, may discuss impact or any issue. Mediator plays role primarily as observer.
Issue Identification	Mediator identifies issues presented and verifies with parties	Investigator and others disclose findings. Victim may disclose losses	No issues are identified or required.
Problem solving/Healing	Options generated for mutual gain, criteria for evaluation established,	Private family time to discuss problems and craft solutions. (Not included in all programs in US)	Parties direct the course which may or may not include healing.
Agreement/Resolution	Decision reached. Written mediation agreement reached.	Family proposal presented to full group and decision made on whether to adopt proposal. Usually includes written plan with formal process for monitoring.	Typically no agreement or resolution is objective. In some cases ongoing relationships are established.

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540-438-5375 , pmyoder@wawlaw.com

Brenda Waugh, Brenda Waugh, Attorney at Law, L.C., 142 N. Queen Street, Martinsburg, WV 25401
304-263-6601, waugh@brendawaugh.com

PRINCIPLES OF RESTORATIVE JUSTICE

While restorative justice is often associated with certain programs, such as Victim Offender mediation, Family Group Conferencing or Circle Sentencing, restorative justice is more appropriately defined as a set of principles which work in concert to address the harm after a wrong doing. Those principles are described by Howard Zehr in *Changing Lenses*, (2005, Herald Press, Scottsdale, Pennsylvania, p. 270) as:

1. focusing on the harms and consequent needs of all participants
2. addressing the obligations that result from these harms
3. the use of inclusive, collaborative processes
4. involving those with a stake in the situation
5. seeking to put right the wrongs.

For further information regarding restorative justice, contact: Marshall Yoder, Wharton Aldhizer & Weaver PLC , 100 S. Mason St., Harrisonburg VA 22801, 540-438-5375 , pmyoder@wawlaw.com or Brenda Waugh, Brenda Waugh, Attorney at Law, L.C., 142 N. Queen Street, Martinsburg, WV 25401, 304-263-6601, waugh@brendawaugh.com

STYLES OF MEDIATION

Mediation is usually defined as an informal process where two parties work with a facilitator, who is typically neutral, to explore potential for a mutually agreeable resolution of a conflict. Within this definition there are countless means to explore resolution. Many mediators in the United States employ one or more of the following forms of mediation.

Evaluative: In this form of mediation, the mediator evaluates the substantive strengths and weaknesses of each party's case. They typically report those strengths and weaknesses to the parties in an effort to reach a mediated settlement and frequently rely on "doubt creation" to move the parties to resolution. Evaluative mediators are normally well-versed in the substantive area of the mediation.

Facilitative: In facilitative mediation, a neutral mediator acts to facilitate negotiation by assisting the parties in identification of issues, reframing and prioritizing issues and identification of common objectives in an effort to maximize the potential of reaching a settlement.

Transformative: In transformative mediation the mediator does not focus on the precise issue that brings the parties to mediation, but attempts to create an environment where the parties may address not only the underlying issues but move to greater empowerment and recognition of the problems of others, even though they may not necessarily reach agreement. In such, the parties may build an improved relationship but the focus is on personal growth.

Directive: In directive mediation, the mediation is narrowly directed or focus on certain issues, such as those contained within court pleadings.

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Brenda Waugh, Brenda Waugh, Attorney at Law, L.C., 142 N. Queen Street, Martinsburg, WV 25401
304-263-6601, waugh@brendawaugh.com

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