

## **GUIDELINES FOR MEDIATION IN CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE**

For purposes of these guidelines and the procedures that implement them, domestic violence is defined as follows:

Causing or attempting to cause physical harm to a current or former intimate partner or spouse; placing that person in fear of physical harm; or causing that person to engage involuntarily in sexual activity by force, threat of force or duress.

In addition to acts or threats of physical violence, for purposes of these guidelines, domestic violence may include abusive and controlling behaviors (such as intimidation, isolation, and emotional, sexual or economic abuse) that one current or former intimate partner or spouse may exert over the other as a means of control, generally resulting in the other partner changing her or his behavior in response. Even if physical violence is not present in these circumstances, such a pattern of abusive behavior may be a critical factor in whether or not a party has the capacity to bargain effectively. Therefore, a person conducting screening for domestic violence must be alert to patterns of behavior that, while not overtly violent, may indicate a pattern of domestic abuse that should be treated as domestic violence for purposes of these guidelines.

1. Criminal cases that involve domestic violence should not be referred to mediation from any court.
2. Cases arising solely under the Family Violence Act should not be referred to mediation from any court.
3. All court programs should screen domestic relations cases for domestic violence through intensive intake. Those domestic relations cases referred to mediation directly from the bench are also subject to the domestic violence screening process. Intake procedures should be designed to identify those cases which involve allegations of domestic violence.
4. When intake and screening procedures are in place and there are mediators available who have advanced domestic violence training, and the alleged victim chooses to proceed with mediation, those cases may be referred to mediation. However, only mediators who have received special training should mediate such cases.
5. Every program should have no less than two mediators who have received special training in domestic violence.
6. If allegations of domestic violence arise in the context of a mediation, any mediator who has had no special training in handling cases involving domestic violence should in most instances conclude the mediation and send the case back to the court. In concluding the mediation, the mediator should take precautions to guard the safety of the participants, particularly the alleged victim, and of the mediator.

## **GUIDELINES FOR SCREENING FOR DOMESTIC VIOLENCE BY THE COURT AND THE MEDIATION PROGRAM**

### **I. SCREENING**

Screening for domestic violence is a shared responsibility of the court, program directors, attorneys, mediators, and parties. However, the final determination as to appropriateness of mediation will be made by the court upon the recommendation of the program director.

Every opportunity should be taken to educate the public about mediation in general and about the factors which should be considered in gauging the appropriateness of mediation in a case involving allegations of domestic violence. Mediation brochures and parenting seminars for divorcing couples may be vehicles for dissemination of this information. Briefings given to community groups and civic clubs are also excellent methods of getting the word out.

#### **A. PHASE I: Initial Screening of All Domestic Relations Cases**

(a) At the initial screening stage, the Mediation Director should determine whether either party has filed a petition under the Family Violence Act. For purposes of these guidelines, a petition filed pursuant to the Family Violence Act against the other party is considered an indication of domestic violence, as is any verbal or written statement alleging domestic violence made in pleadings or in the screening process. If there is or has been a petition filed under the Family Violence Act, the program should proceed to Phase II of the screening process.

(b) If there has been no petition for a protective order under the Family Violence Act, it is the responsibility of the program to continue with Phase I of the screening process and inquire about domestic violence in every domestic relations case. This screening inquiry will be accomplished primarily through the use of Mediation Referral Form I that includes a question to be answered by the party or attorney to help identify potential domestic violence cases. Pleadings in cases may also be examined to identify potential domestic violence as well as continuing contact with attorneys. It then becomes the responsibility of the parties and their attorneys to inform the Mediation Program of any domestic violence allegations. Once reported, it is the responsibility of the Mediation Program to follow up on these allegations and continue with Phases II and III of the screening process.

(c) A case that is filed solely pursuant to the Family Violence Act (FVA) should not be referred to mediation, and, if referred, should be returned to the court process as inappropriate for mediation.

(d) If there is no indication of domestic violence, then the case will be scheduled for mediation in the routine manner.

(e) If there is an indication of domestic violence in Phase I, then the program will contact the party alleging domestic violence to obtain further information as set forth in Phase II. If

that party is represented by counsel, her or his attorney must be contacted first and given an opportunity to participate in further screening should s/he choose to do so.

## B. PHASE II: Further Screening Where There Is an Indication of Domestic Violence

1. Further Screening: The means by which this program elicits additional information is through personal contact, either by telephone interview or face-to-face interview. The person conducting the screening interview shall be a trained mediator who has had advanced domestic violence mediation training. In selecting the screening technique, personnel should be aware that the screening process itself could place a victim at risk, and must therefore ensure that the screening is conducted under safe and confidential circumstances. If direct contact reveals that there is in fact no allegation of domestic violence (because the indication in Phase I resulted from a miscommunication, clerical error, etc.), then the case may be scheduled for mediation in the normal manner. If there is an allegation of domestic violence, the process continues in order to ensure that the alleged victim is fully informed about the mediation process before making a decision whether to proceed with mediation.

2. Informed Consent: Informed consent involves two aspects of information to be discussed with the alleged victim: (1) information about the mediation process; and (2) information about how the individual's circumstances may affect her or his ability to function in the mediation setting. Because the dynamics of a relationship characterized by a pattern of violent and abusive behavior may manifest in mediation, an alleged victim of such behaviors is provided with choice in order to avoid further victimization or endangerment. The Ethical Standards for Neutrals (Appendix C, Chapter 1, Alternative Dispute Resolution Rules) place primacy on the principles of self-determination and voluntariness. These standards also require that parties be fully informed about the mediation process. In keeping with these principles, and the necessity of protecting participants, an alleged victim of domestic violence will be given the opportunity to exercise choice about whether to proceed with mediation prior to assignment of the case. To ensure that the alleged victim's choice to proceed with mediation is self-determined, s/he must be provided with sufficient information about the process to make an informed choice. At a minimum, the nine items set forth in "Ethical Standard I. Self-Determination/Voluntariness," must be explained. This information may be conveyed informally in conversation between screening staff and the alleged victim, and may be discussed in conjunction with the following screening questions. (Please also see Appendix A of this document.) While mediation is oriented towards the future, past and/or present patterns of party interaction can have a significant impact upon the process. Questions about party interaction are a valuable tool for ensuring that the alleged victim has enough information about the mediation process to make an informed decision about whether s/he wishes to proceed with mediation. For this reason, the Cordele Judicial Circuit Mediation Program will make a good faith effort through some screening technique to discuss the following questions with the party alleging domestic violence. The purpose of this process extends beyond obtaining information and should assist the party in focusing on barriers and the capacity to mediate.

1. Can you tell me more about what has happened that led you to file for a protective order (or say there has been violence, etc.)?
2. Mediation is a process that helps parties to plan for the future. Are you able at this time to think about your own future needs?
3. Have you had an opportunity to think about your own needs, interests and concerns separate from those of your spouse?
4. Do you think that you will be able to talk about your needs, interests and concerns if your spouse is in the room?
5. Is there any reason that you do not feel able to discuss your needs openly with your spouse?
6. Are you able to disagree with your spouse and talk about that disagreement? Do you feel safe in saying no to things that you do not agree with?
7. Do you have concerns about sitting in the same room with your spouse?
8. Are you afraid of your spouse? If so, would you be able to speak up for yourself in a separate room with a mediator? (Explain shuttle mediation option.)
9. Are you still living in the same home with your spouse? If so, do you think you would feel safe in returning home after discussing the issues in your case in mediation?
10. Do you have concerns about going to court?
11. Do you have any other concerns about safety that you would like us to know about?

After presenting information about the process of mediation and discussing the information elicited by these questions, the screener should ask whether the person needs any further information about the mediation process in order to decide whether or not s/he is willing to mediate.

### C. PHASE III: Referral to Mediation if Domestic Violence Alleged

After the information in Phase II has been discussed, the party alleging domestic violence may choose whether or not to proceed with mediation. If represented, s/he should be encouraged to discuss that decision with counsel and given an opportunity to do so before a decision is made. No case involving issues of domestic violence should be sent to mediation without the consent of the alleged victim given after a thorough explanation of the process of mediation.

(a) If the person alleging domestic violence declines mediation, the case will be released for process through the court system, and the court will simply be notified that mediation was not appropriate.

(b) If the alleged victim chooses to proceed with mediation, the case should be sent to mediation unless the program or the court determines that there is a compelling reason (such as extreme violence) that this particular case should not be referred.

(c) If the party alleging domestic violence chooses to mediate, the program must take appropriate steps to ensure that the safeguards set forth in Section II below are in place for the mediation session

## **II. SAFEGUARDS FOR THE MEDIATION SESSION IN CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE**

1. The program should exercise care to avoid disclosure of the parties' place of residence by either the program staff or the mediator.

2. The mediator conducting the session should have received special training in dealing with issues of domestic violence in the context of mediation.
3. The alleged victim should have an attorney or advocate available for the entire session or sessions. If the alleged victim does not have an attorney, s/he should be invited to bring an advocate or friend to the mediation session to be available for consultation and to see him/her safely to his/her car.
4. Arrangements should be made for the parties to arrive and leave the mediation session separately.
5. The session itself should be made safe through adequate security and any other necessary means.
6. Arrangements should be made for the session to be held entirely in caucus if that is necessary.
7. At the earliest possible point in the mediation the mediator should explore power dynamics in order to 1) confirm the comfort of each party with the mediation format and 2) confirm the ability of each party to bargain for him/herself.

### **III. CONFIDENTIALITY IN SCREENING FOR DOMESTIC VIOLENCE**

Program directors and staff conducting screening for domestic violence must keep information elicited confidential. Information elicited should not be communicated to the court unless absolutely necessary. The court should simply be informed that the case is inappropriate for mediation. Communication of sensitive information to the court could create a necessity for the judge to recuse him/herself.

## **APPENDIX A**

### **Guidelines for Phase II Screening**

#### **I. Contacting the alleged victim:**

If the alleged victim is represented by counsel, consult with her/his attorney regarding your need to contact the alleged victim to conduct an interview to learn more about the allegations and to provide information about mediation so that the alleged victim can make an informed choice about whether to participate in mediation.

Because you are not making a decision about whether the allegations of domestic violence are credible, it is better to not contact the alleged perpetrator unless there are indications of violence on the part of both parties in Phase I. If any contact with the alleged perpetrator is necessary, exercise great care to avoid disclosure of any allegations of abuse that do not appear in court pleadings.

If it is necessary to contact the alleged victim by mail, avoid expressing specific concerns regarding domestic violence in correspondence. If you mail routine correspondence about the mediation to the parties, do not include the alleged victim's address on any correspondence that is sent to anyone other than the victim.

When you telephone to arrange an interview, take precautions to ensure that the person is able to speak privately.

During first contact with the alleged victim, explain how the case came to your attention for further screening and the purpose of the screening, which is to allow the person to make an informed choice.

#### **II. Information to be included in the screening interview:**

a. **Neutrality:** an explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome; explanation that the mediator will not allow abusive behavior of which she or he is aware and will have skills in balancing power, but will not in any way serve as an advocate for the alleged victim.

b. **Confidentiality:** an explanation of confidentiality of the mediation session and any limitations on the extent of confidentiality;

c. **Termination:** an explanation that the mediation can be terminated at any time by either party or the mediator;

d. **Legal counsel:** an explanation that the alleged victim may bring an attorney to the mediation or consult her/his attorney by telephone during the mediation as needed; and an explanation that if s/he does not have an attorney, s/he may bring another advocate or friend;

- e. Expert advice: financial advice; an explanation that the mediator will not provide any legal or financial advice.
- f. Process: an explanation of how mediation is conducted (joint sessions, caucus, etc.) with an explanation of the option of shuttle mediation;
- g. Good faith: an explanation that parties will be expected to negotiate in good faith and therefore should be prepared to make full disclosure of matters material to any agreement reached; but that good faith does not in any way require parties to enter an agreement about which they have any reservations;
- h. Effect of agreement : an explanation that a mediated agreement, once signed, can have a significant effect on the rights of the parties and the status of the case.