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M E M O R A N D U M

DATE: November 19, 2013

TO: Persons interested in Domestic Relations Mediation

FROM: Doug Van Epps, Director, Office of Dispute Resolution

SUBJECT: Comments Sought on Proposed Amendments to Domestic Violence Screening Protocol for Mediators

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The State Court Administrative Office (SCAO) is seeking comment on proposed revisions to the Domestic Violence Screening Protocol for Mediators. The document was last revised in 2006. The proposals were drafted by a 19-member committee convened by the SCAO to assess whether the current document should be revised in light of advances in research and practice in the fields of domestic violence prevention and alternative dispute resolution.

In addition to being significantly reorganized, this draft more precisely tracks the mediation process so that issues are addressed in the order in which they are most likely to arise. Recommendations for screening by courts and suggested scripts for concluding the mediation process are consolidated into two new sections.

All written comments received by February 14, 2014 will be considered. Comments may be directed to:

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DOMESTIC VIOLENCE SCREENING PROTOCOL

FOR MEDIATORS OF DOMESTIC RELATIONS

CONFLICTS

PROVIDED BY:

Office of Dispute Resolution
State Court Administrative Office
Michigan Supreme Court

DRAFT October 25, 2013

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Domestic Violence Screening Protocol
for Mediators of Domestic Relations Conflicts

A. Key Considerations of Domestic Violence Screening

1. Protocol purpose

The purpose of this protocol is to protect the safety of mediation participants and the integrity of the mediation process. This screening protocol is designed to identify parties involved in divorce or child custody actions for which mediation may be inappropriate because of domestic violence or child abuse, and to maximize safety in the mediation process.

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

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

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

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

The ability and willingness to disclose abuse **may** be enhanced where abused individuals believe that the inquiring professional will believe their allegations, that it is safe to share, and that sensitive information will be handled responsibility by the system. Inquiries about specific behavior (rather than inquiries about "domestic violence") may yield important information in cases where the abused individual has not identified the perpetrator's conduct as abusive. If abuse is disclosed or identified, it is common for abused individuals to minimize it, or to accept some responsibility for it. Minimizing and accepting responsibility is sometimes a coping mechanism that makes the abuse less frightening to abused individuals by framing it as something within their control.

This protocol contains many strategies and best practice recommendations for promoting, identifying, and responding to the safe identification of domestic abuse and other impediments to mediation. These strategies include:

- Questions about the dynamics of the relationship, including various tactics of abuse;
- Questions about specific behaviors;
- Follow-up questions to clarify participants' answers;
- Explanations about the limitations on confidentiality; and
- Information about what will be done with the information that is disclosed.

Employing these strategies can help mediators determine whether a case should be mediated and make appropriate referrals for supportive services.

2. Minimizing the risk of mediation compounding domestic violence.

Mediation presumes that with the help of a mediator, participants can maintain a balance of power sufficient to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous if the imbalance of power is great or if the imbalance is unrecognized for these reasons:

- When domestic violence is present, the abuser's desire to maintain power and control over the abused party is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the abused party from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the abused party, the children, and the mediator to a risk of violence. In addition, statements made by the abused party during mediation may subject the party to retaliatory violence.

- Mediator neutrality may support the abuser's belief that the abuse is acceptable. The future-orientation of mediation may discourage discussion of past abuse, which in turn invalidates the abused party's concerns and excuses the abuser. This may result in agreements that are inherently unsafe.

- Mandatory referral to mediation by the court may communicate to the abuser and the abused party that the violence is not serious enough to compromise the parties' ability to negotiate as relative equals. This message also may invalidate the seriousness of the abuse, dilute abuser accountability, and result in unsafe agreements.

Mediation is not an appropriate process for all cases, and an agreement is not necessarily the appropriate outcome of all cases referred to mediation.

Mediators must be able to identify cases that are inappropriate for mediation, and refuse or discontinue mediation in those cases.

3. Presumption against mediating if domestic violence exists

Cases in which domestic violence is present are presumed inappropriate for mediation. This presumption can be overcome, but only if the abused party desires to participate in mediation and the circumstances of the individual case indicate that mediation will be a safe, effective tool for all concerned.

The decision whether to order, initiate or continue mediation despite a presumption against mediation should be made on a case-by-case basis. The most important factor to consider in deciding whether to proceed with mediation is whether the abused party wants to mediate. Mediation should not proceed if the abused party does not wish to participate. Other factors to consider are:

- Ability to negotiate for oneself;
- Physical safety of the mediation process for all concerned;
- Ability to reach a voluntary, uncoerced agreement;
- Ability of the mediator to manage a case involving domestic violence; and
- Likelihood that the abuser will use mediation to discover information that can later be used against the abused party, or to otherwise manipulate court processes.

Parties should be fully and regularly informed that continuing the mediation is a voluntary process and that they may withdraw for any reason.

B. SCREENING QUESTIONNAIRE

Section 1: General

a) Is there anything you would like to ask me or tell me before we continue?

_____

_____

_____

b) Please tell me about your situation.

_____

_____

_____

c) Could you tell me about how the decision to divorce or separate was reached?

_____

_____

_____

d) Do you want to mediate? If so, why? If not, why not?

_____

_____

_____

Section 2: Control, Coercion, Intimidation, Fear

a) When you look back over time, how were decisions made in your marriage/relationship? Please provide examples. How did you feel about the way decisions were made? Possible follow-up questions as appropriate: How did you make major decisions, for instance, where your children went to school? In making major purchases?

_____

_____

_____

b) What happens when you speak your mind and express your point of view to [insert name]? (Possible follow up questions as appropriate: What happens specifically? Can you give me some examples? What does it look like? And then what happens…, and then what happens…, and then what happens…., etc.)

_____

_____

_____

c) Has [insert name] ever interfered with your relationships with family or friends, or with your children? (Follow up questions as appropriate: Can you tell me more about it? Can you give me some examples?)

_____

_____

_____

d) Has [insert name] ever made it difficult for you to have money you need for things for yourself or the family? (Follow up questions as appropriate: Tell me more about it. Can you give me some examples?)

_____

_____

_____

e) When you and [insert name] disagree, fight and/or are angry with each other, what happens?

_____

_____

_____

1) Would you feel more comfortable if your attorney was present with you during the mediation sessions?

Yes _____ No ____

2) Would you feel more comfortable if you and [insert name] were in separate rooms during the mediation sessions?

Yes _____ No ____

3) Would you feel more comfortable if you and [insert name] arrived and departed at separate times or weren't in the building at the same time?

Yes _____ No ____

4) (If the mediator and parties are comfortable with available technology) Would you feel more comfortable if the mediation took place over the telephone, internet, or by video conference?

Yes _____ No ____

Section 3: Violence/Fear of Violence

Caution: If there is a "yes" answer to questions 3a-3p, advise the party that mediation may NOT be appropriate. If the abused party still wants to mediate, continue through the screening process.

a) Have there ever been any physical confrontations between you and [insert name]? (Follow up questions as appropriate to determine whether mediation can safely occur: Can you tell me what happened? Have there been any other physical confrontations? Can you tell me what happened?)

_____

_____

_____

b) Do you ever feel afraid of [insert name]? What are you afraid of? Tell me about the time you felt most afraid. Do you think that [insert name] has ever felt afraid of you? What do you think he/she may be afraid of?

_____

_____

_____

c) Do you ever feel afraid for yourself, your children, or others based on a look from [insert name] or actions of [insert name]? If so, tell me about it.

_____

_____

_____

d) Has [insert name] ever caused you to feel threatened or harassed by following you, interfering with your work or education, making repeated phone calls to you, using social media or sending you unwanted letters, emails, text messages, faxes, or gifts? Can you tell me more about it?

_____

_____

_____

e) Have either of you ever been arrested? If so, what happened?

_____

_____

_____

f) Have either of you been convicted of a crime? If so, what happened?

_____

_____

_____

g) Is there currently or has there ever been an order limiting contact between the two of you, for example, a Personal Protection Order or a No Contact Order? Can you tell me more about this?

_____

_____

_____

h) Has there ever been a violation of the order, whether or not the violation was ever reported? Can you tell me about it?

_____

_____

_____

i) Have you or [insert name] ever applied for an order to limit contact between the two of you (for example, a PPO) that was denied?

Yes _____ No ____

Can you say more about that?

_____

_____

_____

j) Are either of you currently restrained from contacting any other person by a PPO or other court order?

_____

_____

_____

k) Has [insert name] ever pushed, shoved, hit, kicked, spit on, choked, strangled, restrained, or pulled your hair? If so, what happened?

_____

_____

_____

l) Has [insert name] ever damaged or destroyed your property or harmed or threatened to harm your pets? Your children's property or pets? If so, what happened?

_____

_____

_____

m) Are there any guns or other weapons in your home/either of your homes? If so, do you have any concerns about them?

_____

_____

_____

n) Does [insert name] carry a gun outside of the home? If so, does this cause you any concern?

_____

_____

_____

o) Has [insert name] ever used a weapon in a way that felt threatening to you, or threatened your children? Can you tell me more about it?

_____

_____

_____

p) Have you ever been afraid that [insert name] would kill or injure you or anyone else close to you? Has [insert name] ever threatened to hurt or kill him/herself? Can you tell me more about it?

_____

_____

_____

NOTE: **If there is a "YES" answer to the following question, discontinue the screening process. <u>If the parties are together in a mediation session, safely terminate the process and explore safety options.</u>**

q) Do you feel you are in danger right now?

Yes _____ No ____

Section 4: Children (if applicable)

a) How are the children doing?

_____

_____

_____

b) Do you have any concerns about the safety of the children? If so, please describe.

_____

_____

_____

c) Has [insert name] ever talked about taking the children away from you? Has [insert name] ever interfered with or prevented you from seeing them? Please describe.

_____

_____

_____

d) Is there an open abuse or neglect case involving your children? Tell me about it.

_____

_____

_____

Section 5: Attorney Awareness of Violence

(If attorney is not present) Have you ever told your attorney what you've told me? It is generally important for your attorney to know about things we've talked about. Is there a concern you have about telling your attorney?

Yes _____ No ____

_____

_____

_____

Section 6: Other Considerations Regarding Ability to Negotiate

Note: In addition to domestic violence, the following are other factors that may affect a parties' ability to mediate. This is not an exhaustive list of screening questions that impact a parties' ability to negotiate. The issues may or may not be present in cases involving domestic violence.

a) Do you believe alcohol or drug use have ever caused difficulties for either of you? (If so, how recent? What is the current status of treatment?) If yes, how do you think this may impact mediation?

_____

_____

_____

b) Do you believe mental health (illness) issues or emotional problems have ever caused difficulties for either of you? (If yes, how recently? What is the current status of treatment?) If yes, how do you think this may impact mediation?

_____

_____

_____

Section 7: Conclusion

Is there anything I haven't asked you about that you'd like to tell me?

_____

_____

_____

Now that we have had a chance to discuss your situation and mediation, how do you feel about going forward with mediation? Do you feel any pressure to mediate?

_____

_____

_____

C. Mediator's Initial and Ongoing Screening

Mediators must make reasonable efforts throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. See "Mediator Standards of Conduct," Appendix 2.

1. Initial screening

Mediators have the opportunity to conduct the most extensive screening for domestic violence and child abuse or neglect without providing the abuser with access to the information disclosed by the other party.

Mediators should conduct separate screening interviews with each party to determine whether domestic violence or child abuse or neglect is present. The screening questionnaire used during these interviews also asks about substance abuse and mental health issues that may be impediments to mediation. Under no circumstance should information gathered from one party in a screening interview be disclosed to the other party unless permitted or required by statute or court rule.

Mediators must recognize that mediation is not an appropriate process for all cases and that an agreement is not necessarily the appropriate outcome in all mediated matters.

A key factor in this assessment is whether the participants can safely stand up for what they believe is good for themselves and their children. Mediation should not be initiated, but if initiated should not continue unless all parties and the mediator believe that a safe, non-coercive process will occur.

If domestic violence is identified, mediation should continue only when all of the following conditions are present:

- The abused party freely requests to participate in mediation and provides informed consent to mediation;
- The abused party has reviewed and demonstrated an understanding of the materials provided concerning mediation;
- The abused party has been advised to consult with an attorney and a domestic violence services provider;
- The abused party provides compelling reasons to mediate;
- Accommodations can be put into place that will enable the parties to:
    - Speak up and negotiate for themselves;
    - Feel safe and comfortable during and after the mediation;
    - Reach an uncoerced, voluntary agreement; and
- The mediator has adequate training and expertise to undertake mediation where domestic violence has been identified.

Even if the initial screening mechanisms do not reveal domestic violence, mediators should continually screen for its presence.

2. Ongoing screening

Ongoing screening is critical for these reasons:

- because domestic violence is about control over an intimate partner, abuse tactics may first appear or escalate at times when an abuser perceives a loss of control. Thus, abusive behavior may not appear until the abuser becomes fearful of losing ground as mediation progresses. Abusers who initially appear charming or engaging may shift to more overtly coercive tactics if they are unable to achieve their goals through seemingly cooperative behaviors.

- particularly in cases where mediation takes place over a longer period of time, changes in the parties' external circumstances may cause abuse tactics to appear or escalate. Circumstances such as physical separation of the parties, the abused party's formation of a new relationship, or a court ruling that favors the abused party may cause an abuser's tactics to escalate as the abuser seeks to regain lost control in the relationship.

During the course of mediation, the mediator may notice abusive or controlling behaviors that were not revealed during the screening process. Behaviors that may be of concern include threatening looks or actions, one party attempting to speak for or control the other party, or one party dominating the sessions.

If mediation involves multiple sessions or if a period of time has elapsed between the screening interview and the first mediation session, the mediator should inquire whether any abuse has occurred in the interim.

If the mediator determines that mediation should not continue, or if a party decides to withdraw from mediation for safety reasons, the guidelines for Safely Concluding Mediation (Section H, Page 25) can be followed.

D. Preparing for the Screening Interview

1. General considerations

   a. The person conducting the screening must be trained in domestic violence screening pursuant to SCAO Training Standards and Procedures.

   b. In-person screening must be undertaken before joint sessions are held.

   c. Screening of each party must be conducted separately, preferably scheduled at different times and/or locations. Interviewing one party directly after the other

should be avoided. In no event should parties be asked to wait in a room together before or after a screening.

d. Screening should be conducted in an environment that allows the greatest degree of privacy possible. Once a screening session begins, the session should not be interrupted.

e. At the election of a party, screening may be conducted with an attorney or advocate present. To protect confidentiality, the other party's attorney or advocate must not be present during the screening.

2. Talking with the parties about screening

a. When scheduling a screening, a mediator should inquire whether a party has any safety concerns about coming to the screening location. Arrangements should be made to respond to the safety concerns of the parties. If there are any safety concerns about coming to the screening location, the mediator should consider declaring the case inappropriate for mediation.

b. A mediator should observe behavior during the scheduling phone call, in the waiting room, and during the screening to pick up cues that could indicate an abusive relationship.

c. Consistent with applicable statutes and court rules, confidentiality must be maintained during the screening process. In addition, the mediator must explain the extent and limits of confidentiality for communications made during individual conversations with each party.

d. A mediator should explain the goals and process of mediation.

A sample introduction appears at Section E(2).

3. Electronic screening

a. Web-based video or audio, or telephone (electronic) screening is not a preferred way to conduct screening, because the screener cannot be certain that the abuser is not present or listening during the screening, which may compromise safety, confidentiality, or ability to speak freely. Also, comfortable rapport with the parties resulting in disclosure of abuse is less likely to be established via electronic screening.

b. If electronic screening cannot be avoided, the screener should try to determine if the person she/he is speaking with can speak freely. Examples include:

> "I realize that it is not always safe for folks to share their concerns about mediation (on the phone, via Skype, through the web, etc.) so before we get

started, I'd like to be sure that it's OK for me to talk to you about mediation in your divorce case."

"Are you free and safe for the next ____ minutes to honestly talk with me about whether or not mediation is appropriate in your divorce proceedings?"

"If it is unsafe for you to talk right now, is there another time I can call when it will be safe for you to talk freely?"

If there is another time to talk on the phone: "If talking on the phone is a problem for you, what would be another way for us to discuss mediation in your case?"

If the individual is presently safe, but expresses concerns about danger arising during the call. "Is there a word or phrase you can say to me during our conversation that will let me know you are unsafe? If that happens, is there another time I can call you later? Is there another way for us to discuss mediation in your case?"

E. Completing the Screening Questionnaire with the Parties

1. Working with the questionnaire

   a. The mediator should complete the Screening Questionnaire to identify the parties' ability to negotiate, tactics of abuse, coercion, threats by a party, and any impact of the tactics on the other. The mediator should give the parties the opportunity to express concerns about the mediation process and to assess whether mediation is an appropriate way to reach an agreement about the issues in their case.

   b. During the screening interview, ask questions slowly and wait for answers. Each item in the Screening Questionnaire should be asked and fully explored. Ask follow-up questions, if necessary, and note answers in the comment section. If counsel is present, explain that the process will move faster if the screener proceeds without interruption.

   c. Do not make judgments about the truth of allegations of abuse. Mediators are not investigators. There is no need to establish the truth of the allegations. The mediator's role is to determine whether the case is appropriate for mediation.

   d. Do not mediate divorce or custody issues during the screening. Also, never mediate issues of violence and abuse.

   e. It is important for participants to understand that mediation may not be the best process for them, and that parties whose cases are deemed inappropriate for mediation will be considered to have fully complied with the court's order for mediation by participating in the screening process.

f. Mediation is not advisable when fear is present and almost never advisable when there had been domestic violence.

2. Sample introductory statement about the questionnaire

"The reason I meet with the parties individually is to give each of you the opportunity to tell me about concerns you might have about mediation and your situation. I will be asking you specific questions about how you and [insert name] get along, so that we can assess whether mediation is appropriate in your situation. In general, I will treat all information provided during mediation sessions as confidential. I won't repeat to [insert name of the other party, that party's attorney] or even your attorney without your permission, unless there is a threat of harm to [insert name of other party, that party's attorney] or your attorney. I will not give information obtained during this interview or during mediation to any outside person or organization unless both of you agree in writing, with exceptions that are covered in the court rules. Some of the exceptions are:

- allegations of child abuse or neglect;
- threat of bodily harm to another person; and,
- future criminal activity.

If you want to read the court rule that also lists other exceptions, I can provide it to you.

The goal of mediation is for the two of you to reach an agreement on some or all of the issues in your case. All agreements must be voluntary. My role during mediation would be to help you reach an agreement, not to make a decision or a recommendation to the court on the issues.

I am neutral in the sense that I am not advocating for either one of you, or for a particular outcome. I would not give an opinion as to who is right or wrong, or as to what the agreements ought to look like.

If we decide to continue mediation and use the usual process, I will meet with you and the other party together. Another option would be to meet separately."

I don't give legal advice. If you have counsel, I recommend that you keep your attorney informed about the mediation process, seek legal advice from your attorney and have any of our material reviewed by your attorney."

3. If the parties have requested evaluative mediation, explain that if the parties do not reach agreement on all contested issues, the mediator will include written recommendations for settlement in a report that is provided only to the parties, and not the court. See MCR 3.216(I)(2).

F. Concluding Mediation or Continuing Mediation with Accommodations

This section presents several common scenarios that mediators may encounter upon completing the screening questionnaire, along with suggested best practices for concluding mediation or continuing it with accommodations where appropriate.

1. There is an active court or parole "no contact" order, or open child abuse or neglect case.

   Courts should not refer cases that have active personal protection orders, other "no contact" orders, or an open abuse or neglect case without first conducting a hearing. See Appendix 6 for court responsibility.

2. A party is in immediate danger.

If at any time an individual indicates that he/she is in immediate danger, or has answered "Yes" to the question, "Do you feel you are in danger right now?", (Section 3(p) in the Screening Questionnaire), mediation should be concluded and the following steps should be taken:

- Advise the parties that mediation is not appropriate, following the procedures in Section I (Safely Concluding Mediation).

- Ask the abused party if he/she is willing to talk with you about safety options. If so, follow the procedures in Section G (Exploring Safety Options).

3. The abused party appears to be in no immediate danger, but discloses fear of the other party, the presence of violence, intimidation, or control.

   a. If a party is not in immediate danger, the case should nevertheless be presumed inappropriate for mediation if Screening Questionnaire answers indicate the existence of fear, violence, control, coercion, or intimidation. The following steps should be taken:

      - Inform the abused party of your recommendation that mediation not proceed.

      - Explore whether the abused party agrees or disagrees with this recommendation.

      - If the abused party agrees, inform both parties of the decision to decline mediation, following the procedures in Section H (Safely Concluding Mediation). There are no circumstances under which mediation should proceed; the abusive party's desire to mediate is not relevant.

- If the abused party disagrees that mediation should be concluded:
    - Determine whether either party lacks the ability to negotiate under any circumstances, or whether mediation could proceed with accommodations, See (c) below.
    - Be sure that the abused party has provided compelling reasons to mediate, and has freely requested and provided informed consent to mediation based on an understanding of the information provided concerning the process.
    - Advise the abused party to consult with an attorney and a domestic violence service provider.

b. If the abused party nevertheless wishes to continue mediation, mediation should continue only under the following circumstances:

- Accommodations can be put in place that will enable the parties to:
    - Speak up and negotiate for themselves.
    - Feel safe and secure during and after the mediation.
    - Reach a voluntary, uncoerced agreement.
- Talk with the abused party about what safety precautions he/she needs in order to feel safe and consider his/her response to the questions at Section 2, questions 2-5 of the Screening Questionnaire, regarding safety concerns and possible accommodations to the mediation process). The accommodations must directly respond to the abused party's safety needs and concerns. Even where accommodations are in place, the mediator must continually reevaluate the safety of the situation for the abused party and the abused party's ability to negotiate. The mediator should conclude the mediation if there are concerns for the abused party's safety or if the mediator believes that the abused party cannot negotiate fairly.
- Both parties agree to the accommodations.
- The mediator has adequate training and expertise to continue mediation where domestic violence has been identified.
- The mediator continually assesses that the parties have the ability to negotiate voluntarily and safely under the circumstances in which mediation will continue.

c. Possible accommodations that may provide a party with the ability to negotiate and make voluntary decisions include:

- Require both parties to retain separate legal counsel.

- Suggest or require that one or both attorneys or an advocate for the abused or vulnerable party be present during mediation.

- Set up the room to address concerns about safety and comfort. For example, ask the abused party if he/she would like to be seated closer to the door or further from the door.

- State unequivocally that violence and intimidation are unacceptable behavior, no matter what the reason for it. Establish ground rules for the mediation and conversation between the parties to reduce fear and intimidation.

- Use alternative meeting configurations, such as meeting with party's attorney present, meeting in separate rooms, or meeting at separate times. (NOTE: If conducting mediation sessions with each party at separate times, do not schedule the sessions back to back).

- If not mediating at separate times, suggest that the abused party arrive 10 minutes after the abuser and leave 10 minutes before the abuser.

- Do not leave the parties alone together, even in the waiting room.

- Allow a support person for the abused party to accompany the abused party in the mediation session and/or wait in the waiting room.

- Check with the abused party between sessions to assess safety and ability to negotiate.

- When mediating in a joint session, use caucus as a safety valve and a check on the process.

- Consider co-mediation in order to better oversee and direct the process in difficult mediations. Co-mediation might be conducted by mediators reflecting the gender of the parties, or involve specific professions of origin (e.g., financial experts, mental health professionals, attorneys) as appropriate to the subject matter of the mediation.

- Require the parties to craft an agreement that contains sufficient specificity to promote safety and minimize opportunities for continuing abuse and control. Examples appear in Appendix 3.

4. A party lacks capacity for other reasons

- Regardless of the existence of domestic violence or child abuse or neglect, screening may reveal other circumstances that impede a party's capacity to negotiate for him/herself, or to give informed consent to an agreement. These may include mental health or substance abuse issues. (See Section 6 of the Screening Questionnaire).

- If the responses to the Screening Questionnaire reveal impediments to mediation other than domestic violence considerations, proceed with mediation only if the process could go forward with additional support resources to address the specific impediment to mediation.

G. Exploring Safety Options

A mediator should take all discussions of fear and safety seriously and ensure that there is a safe and private area where the mediator and abused party can discuss safety options alone. Once the decision has been made to conclude mediation, the following steps can be taken without compromising mediator neutrality.

1. Calling for help

a. Most victims of domestic violence have a variety of methods that have helped keep them safe in the past. However, if the mediator or the abused party has any questions at all about safety, they can call a local domestic violence advocacy agency or the National Domestic Violence Hotline for consultation.

Local agencies are listed by county at www.michigan.gov/dhs; Michigan Domestic and Sexual Violence Prevention & Treatment Board (click on "Michigan's Resource Directory"). They are listed by city at www.mcedsv.org, Michigan Coalition to End Domestic & Sexual Violence (click on "Help?").

The Hotline number is 1-800-799-SAFE (7233); TTY 1-800-787-3224

b. If the abused party wants to call a local advocacy agency or the Hotline, the mediator can offer the use of a phone for this purpose. Allow the abused party privacy in making this call. Local programs and the Hotline have trained professionals who are able to offer confidential services and should be able to help the abused party discuss safety options.

Suggested language for calling for encouraging a party to call for help:

> "I am concerned for your safety. None of this is your fault. I would like you to consider talking with a professional with experience in helping people explore their safety options. In our community [NAME LOCAL ADVOCACY AGENCY] can help people in your situation with

counseling, advocacy, support groups and counseling for your children. They also can provide emergency shelter if you need it. The phone number is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE (7233); TTY 1-800-787-3224. The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. You can use my phone if you'd like."

c. If the abused party does not want to contact a local agency or the Hotline, the party can be asked whether he/she would like the mediator to call on the party's behalf, without disclosing identifying information about the party.

   Local programs and the Hotline should be able to walk the mediator through some basic safety strategies. The mediator should assure the abused party that the Hotline is confidential and that the mediator will not disclose any personal information.

   Suggested language if the party does not want to make a call her/himself:

   "I am concerned for your safety and want to make sure that I am giving you correct information. Would it be ok with you if I called a local program or the National Domestic Violence Hotline to help me give you referrals and assistance in coming up with safety options? I will not give them any identifying information about you."

   If the party declines an offer for the mediator to call the Hotline, the mediator should not override this decision.

d. Mediators can always call a local program or the Hotline for general advice about domestic violence questions outside of the context of a consultation with a specific client.

2. Addition always to address safety concerns

a. Offer the use of a phone so that the party can contact friends or family, if the party wishes to do so.

b. Provide written information about domestic violence and child abuse, as well as information about local domestic violence advocacy agencies and the National Domestic Violence Hotline. Local agencies and the Hotline should be able to supply written information free of charge. You can make this information available in places where abused individuals can take it discreetly, such as restrooms. **If you give this information to the abused party, only do this when the other party is not present.**

c. Explore with the party what she/he will do with any paperwork or written information that she/he is taking home, especially if she/he still lives with the abusive party.

d. Consider what the party will do when she/he leaves the mediator's office and where she/he will go. Work with the party to explore safety options for the rest of the day. Ask questions like:

> "What is your mode of transportation and is it safe? Where is your car parked? Do you have a safe place to spend the night?"

e. Offer the use of a phone to contact the police or to request an escort, if the party wishes.

Suggested language for referral and assistance:

> "Most communities have organizations that provide services to survivors of domestic violence. These services often include counseling, advocacy, support groups and [counseling for your children]. They also include emergency shelter, if you need it. The phone number for our local domestic violence advocacy agency is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE (7233); TTY 1-800-787-3224. The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. Here are brochures and information for you to read over. Will taking this information home with you be dangerous?"

H. Safely Concluding Mediation

1. General considerations

a. If the mediator determines that mediation is not safe, or if either party decides to withdraw from mediation for safety reasons, the mediation should be concluded. In this case the mediator should check the appropriate box on the status report provided to the court. To protect confidentiality, no further explanation should be given to the court. The decision to conclude mediation should be communicated to the clients as described below.

b. A decision to conclude mediation based on safety issues should be separately communicated to the parties. The mediator should speak privately and separately with the parties, with the abused party first, and address the following considerations:

- How the abuser is likely to respond to mediation being concluded, so that safety options can be explored.

- Ask the abused party whether safety arrangements are necessary. This may include asking for assistance from law enforcement or other security personnel, if the abused party consents. Do not contact law enforcement against the wishes of the abused party unless there is an emergency.

- How arrangements can be made for the part to leave separately, with the abused party leaving first and allowing reasonable time for departure of the other party.

- Safeguarding the destination or means of transportation of the abused party to the other party.

- How both parties will be informed that the report to the court will indicate only that the case is not appropriate for mediation or that agreement was not reached, without any further explanation.

2. Concluding mediation <u>during</u> initial screening

a. If only one party has disclosed domestic violence, the disclosing party may be told that domestic violence is the reason for declining to pursue mediation further. To preserve the disclosing party's confidentiality, the non-disclosing party must be given a different reason in all cases.

b. If both parties have disclosed domestic violence, the mediator may explain to each party that domestic violence is the reason for declining to pursue mediation further. To protect confidentiality, the explanation provided must be based solely on the disclosure of abuse made by that particular party. The parties may also be given another reason, in the mediator's discretion.

c. Suggested language for concluding mediation during screening**,** directed to both the abused and abusive parties:

> "I have decided to conclude mediation in this case. Many cases are not suitable for mediation. It is my experience that with situations like yours, mediation does not work. [If necessary, insert reasoning appropriate to each party, as described above.]This screening process fulfills the requirement for court ordered mediation. I will be reporting to the court only that this case is not suitable for mediation. I will not be giving the court any further explanation. It is not a "failure" if you don't continue mediation and there are no legal repercussions for doing so. I would suggest that you review this case with your attorney or seek legal advice as to your next steps. Your options may include negotiation between your attorneys, referral to Friend of the Court, or asking the court for a decision."

3. Concluding mediation after initial screening (ongoing screening)

a. If domestic violence is revealed for the first time after the initial screening has been completed and the parties have begun meeting together, the mediator should:

- Interrupt the proceedings and separate the parties. If the mediator was aware of domestic violence prior to undertaking mediation, it is generally not appropriate for the parties to participate in a session together. Consult with the abused party first.

- Further inquire of each party whether mediation is appropriate and whether the party who has been subject to the abuse understands the potential impact of abuse on the party's ability to participate in mediation.

b. If the party subject to the abuse and the mediator agree that domestic violence is not an inhibiting factor, the mediation may proceed. The mediator shall discuss and plan safety precautions with the abused party.

c. If either the abused party or the mediator determines that the mediation is inappropriate, mediation should be concluded. See Section H.1, Safe Termination, General Considerations, on making a decision whether to mediate and Section F.3, with accommodations despite the presence of domestic violence or child abuse.

d. If only one party has disclosed domestic violence, the disclosing party may be told that domestic violence is the reason for concluding the mediation. To protect confidentiality, the other party must be given some other reason.

e. If both parties have disclosed domestic violence, the mediator may explain to each party that domestic violence is the reason for concluding mediation. To protect confidentiality, the explanation provided must be based solely on the disclosure of abuse made by that particular party. The parties may also be given another reason, at the mediator's discretion.

f. Suggested language for concluding after screening**,** directed to both the abused and abusive parties:

> "After considering the issues between both of you and observing your interactions with each other, I know from your experience that it would be very difficult for you to reach agreements. So rather than taking up your time and resources, I am concluding this mediation [if necessary, insert reasoning appropriate to each party, as described above].
>
> It is not a "failure" to end mediation without an agreement, and there are no legal repercussions for doing so. I will be reporting to the court only that your case was terminated without an agreement, with no further

explanation. I would suggest that you review this case with your attorney or seek legal advice. Your options may include negotiation between your attorneys, referral to Friend of the Court, or asking the court for a decision."

4. Possible ways to explain concluding mediation without mentioning domestic violence.

The following reasons could be given for explaining a decision to conclude mediation without referring to domestic violence:

- Unwillingness or inability to follow mediation policies and procedures.
- Parties are too far part in positions or interests.
- Inability to negotiate.
- Unwillingness to compromise.
- Unwillingness to follow the mediator's ground rules.
- Substance abuse or mental illness (if known to both parties).

APPENDIX 1

SCREENING QUESTIONNAIRE

Section 1: General

a) Is there anything you would like to ask me or tell me before we continue?

_____

_____

_____

b) Please tell me about your situation.

_____

_____

_____

c) Could you tell me about how the decision to divorce or separate was reached?

_____

_____

_____

d) Do you want to mediate? If so, why? If not, why not?

_____

_____

_____

Section 2: Control, Coercion, Intimidation, Fear

a) When you look back over time, how were decisions made in your marriage/relationship? Please provide examples. How did you feel about the way decisions were made? Possible follow-up questions as appropriate: How did you make major decisions, for instance, where your children went to school? In making major purchases?

_____

_____

_____

b) What happens when you speak your mind and express your point of view to [insert name]? (Possible follow up questions as appropriate: What happens specifically? Can you give me some examples? What does it look like? And then what happens…, and then what happens…, and then what happens…., etc.)

_____

_____

_____

c) Has [insert name] ever interfered with your relationships with family or friends, or with your children? (Follow up questions as appropriate: Can you tell me more about it? Can you give me some examples?)

_____

_____

_____

d) Has [insert name] ever made it difficult for you to have money you need for things for yourself or the family? (Follow up questions as appropriate: Tell me more about it. Can you give me some examples?)

_____

_____

_____

e) When you and [insert name] disagree, fight and/or are angry with each other, what happens?

_____

_____

_____

1) Would you feel more comfortable if your attorney was present with you during the mediation sessions?

Yes _____ No ____

2) Would you feel more comfortable if you and [insert name] were in separate rooms during the mediation sessions?

Yes _____ No ____

3) Would you feel more comfortable if you and [insert name] arrived and departed at separate times or weren't in the building at the same time?

Yes _____ No ____

4) (If the mediator and parties are comfortable with available technology) Would you feel more comfortable if the mediation took place over the telephone, internet, or by video conference?

Yes _____ No ____

Section 3: Violence/Fear of Violence

Caution: If there is a "yes" answer to questions 3a-3p, advise the party that mediation may NOT be appropriate. If the abused party still wants to mediate, continue through the screening process.

a) Have there ever been any physical confrontations between you and [insert name]? (Follow up questions as appropriate to determine whether mediation can safely occur: Can you tell me what happened? Have there been any other physical confrontations? Can you tell me what happened?)

_____

_____

_____

b) Do you ever feel afraid of [insert name]? What are you afraid of? Tell me about the time you felt most afraid. Do you think that [insert name] has ever felt afraid of you? What do you think he/she may be afraid of?

_____

_____

_____

c) Do you ever feel afraid for yourself, your children, or others based on a look from [insert name] or actions of [insert name]? If so, tell me about it.

_____

_____

_____

d) Has [insert name] ever caused you to feel threatened or harassed by following you, interfering with your work or education, making repeated phone calls to you, using social media or sending you unwanted letters, emails, text messages, faxes, or gifts? Can you tell me more about it?

_____

_____

_____

e) Have either of you ever been arrested? If so, what happened?

_____

_____

_____

f) Have either of you been convicted of a crime? If so, what happened?

_____

_____

_____

g) Is there currently or has there ever been an order limiting contact between the two of you, for example, a Personal Protection Order or a No Contact Order? Can you tell me more about this?

_____

_____

_____

h) Has there ever been a violation of the order, whether or not the violation was ever reported? Can you tell me about that?

_____

_____

_____

i) Have you or [insert name] ever applied for an order to limit contact between the two of you (for example, a PPO) that was denied?

Yes _____ No ____

Can you say more about that?

_____

_____

_____

j) Are either of you currently restrained from contacting any other person by a PPO or other court order?

_____

_____

_____

k) Has [insert name] ever pushed, shoved, hit, kicked, spit on, choked, strangled, restrained, or pulled your hair? If so, what happened?

_____

_____

_____

l) Has [insert name] ever damaged or destroyed your property or harmed or threatened to harm your pets? Your children's property or pets? If so, what happened?

_____

_____

_____

m) Are there any guns or other weapons in your home/either of your homes? If so, do you have any concerns about them?

_____

_____

_____

n) Does [insert name] carry a gun outside of the home? If so, does this cause you any concern?

_____

_____

_____

o) Has [insert name] ever used a weapon in a way that felt threatening to you, or threatened your children? Can you tell me more about it?

_____

_____

_____

p) Have you ever been afraid that [insert name] would kill or injure you or anyone else close to you? Has [insert name] ever threatened to hurt or kill him/herself? Can you tell me more about it?

_____

_____

_____

NOTE: **If there is a "YES" answer to the following question, discontinue the screening process. <u>If the parties are together in a mediation session, safely terminate the process and explore safety options.</u>**

q) Do you feel you are in danger right now?

Yes _____ No ____

Section 4: Children (if applicable)

a) How are the children doing?

_____

_____

_____

b) Do you have any concerns about the safety of the children? If so, please describe.

_____

_____

_____

c) Has [insert name] ever talked about taking the children away from you? Has [insert name] ever interfered with or prevented you from seeing them? Please describe.

_____

_____

_____

d) Is there an open abuse or neglect case involving your children? Tell me about it.

_____

_____

_____

Section 5: Attorney Awareness of Violence

(If attorney is not present) Have you ever told your attorney what you've told me? It is generally important for your attorney to know about things we've talked about. Is there a concern you have about telling your attorney?

Yes _____ No ____

_____

_____

_____

Section 6: Other Considerations Regarding Ability to Negotiate

Note: In addition to domestic violence, the following are other factors that may affect a parties' ability to mediate. This is not an exhaustive list of screening questions that impact a parties' ability to negotiate. The issues may or may not be present in cases involving domestic violence.

a) Do you believe alcohol or drug use have ever caused difficulties for either of you? (If so, how recent? What is the current status of treatment?) If yes, how do you think this may impact mediation?

_____

_____

_____

b) Do you believe mental health (illness) issues or emotional problems have ever caused difficulties for either of you? (If yes, how recently? What is the current status of treatment?) If yes, how do you think this may impact mediation?

_____

_____

_____

Section 7: Conclusion

Is there anything I haven't asked you about that you'd like to tell me?

_____

_____

_____

Now that we have had a chance to discuss your situation and mediation, how do you feel about going forward with mediation? Do you feel any pressure to mediate?

_____

_____

_____

Appendix 2

Mediator Standards of Conduct
State Court Administrative Office
Michigan Supreme Court

Standard VI. Safety of Mediation

A. Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness or other mental impairment; and inability to understand or communicate in the language in which mediation will be conducted.

1. In general, "reasonable efforts" may include meeting separately with the parties prior to a joint session or administering screening tools.

2. In domestic relations cases, "reasonable efforts" should include meeting separately with the parties prior to a joint session and administering the "Mediator Screening Protocol" for domestic violence, published by the State Court Administrative Office.

3. If an impediment to mediation exists and cannot be overcome by accommodations that specifically mitigate it, the mediation process should not be continued unless:

   a. After being provided with information about the mediation process, a party at risk freely requests mediation or gives informed consent to it;

   b. The mediator has training, knowledge, or experience to address the impediment;

   c. The mediator has discussed with the party at risk whether an attorney, advocate, or other support person should attend the mediation; and

   d. The mediator has assessed that a party can determine and safely convey and advocate for his or her needs and interests without coercion, fear of violence, or other repercussions or consequences that would put the party at risk.

B. Where it appears that minor children or vulnerable adults may be affected by an agreement, a mediator should encourage participants to consider their safety.

The complete set of standards appears at:
http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf

APPENDIX 3

Examples of Protective Provisions In Custody and Parenting Time Agreements

1. Mediators should facilitate the crafting of specific and detailed agreements governing parenting time to reduce the opportunity for manipulating ambiguities or to minimize contacts between the parties.

2. Mediated agreements should avoid non-specific provisions such as "reasonable parenting time," "parenting time as agreed by the parties," or "parenting time to be arranged later." The terms of a parenting time agreement should be stated unambiguously, with pick-up and drop-off locations, times, and days of the week clearly specified.

3. Arrangements for joint physical and legal custody are also problematic in cases involving domestic violence. Upon separation, many abusers continue their tactics of coercive control, focusing on custody and parenting time arrangements as a means of access to their former partners. Thus, the children of a domestic violence perpetrator face these continuing risks:

   - They may be exposed to further violence against the abused parent committed at times when both parents meet to drop them off or pick them up.

   - Because many abusers are serial perpetrators, they may be exposed to violence against the abusive parent's new partner.

   - They may become "tools" of abuse. Many perpetrators threaten children, use them to convey threatening messages to the abused parent, or use them to do surveillance of the abused parent.

   - Their relationships with the abused parent may be undermined by the abusive parent.

   - Abusers with joint legal may undermine their former partner's decisions about medical care, education, sports activities, and other aspects of life, to the detriment of the children's best interests.

4. Mediated agreements can provide for protective conditions of custody and parenting time, for example:

   - Provide for supervised parenting time, with supervising third parties clearly identified.

   - Identify individuals who may not be present during parenting time.

- Provide safe, neutral locations for parenting time, whether supervised or unsupervised.

- Specify how the parties may communicate with each other to make arrangements for parenting time.

- Arrange parenting time so that the parties will not meet.

- If the parties must meet to transfer children, require that the transfer take place in the presence of a third party and in a protected setting. Use available resources for supervised visitation and exchange of children such as programs provided by local domestic violence service providers or other local agencies.

- Provide for short, daytime visits in a public place.

- Place limits on overnight visits.

- Allow parenting time to be cancelled if the noncustodial party is under the influence of drugs or alcohol during parenting time.

- Limit a party's access to firearms.

- Permit cancellation of parenting time if a party is more than a specified number of minutes late to begin parenting time.

- Specify how disputes between the parties will be resolved.

- Require surrender of a passport prior to exercising parenting time, or take other steps to deter abduction, if there is a risk of a party abducting or fleeing with the children.

APPENDIX 4

Scripts

Script for electronic screening (page 17):

"I realize that it is not always safe for folks to share their concerns about mediation (on the phone, via Skype, through the web, etc.) so before we get started, I'd like to be sure that it's OK for me to talk to you about mediation in your divorce case."

"Are you free and safe for the next ____ minutes to honestly talk with me about whether or not mediation is appropriate in your divorce proceedings?"

"If it is unsafe for you to talk right now, is there another time I can call when it will be safe for you to talk freely?"

If there is another time to talk on the phone: "If talking on the phone is a problem for you, what would be another way for us to discuss mediation in your case?"

If the individual is presently safe, but expresses concerns about danger arising during the call. "Is there a word or phrase you can say to me during our conversation that will let me know you are unsafe? If that happens, is there another time I can call you later? Is there another way for us to discuss mediation in your case?"

Script for introduction to the questionnaire (page 19):

"The reason I meet with the parties individually is to give each of you the opportunity to tell me about concerns you might have about mediation and your situation. I will be asking you specific questions about how you and [insert name] get along, so that we can assess whether mediation is appropriate in your situation. In general, I will treat all information provided during mediation sessions as confidential. I will not give information obtained during this interview or during mediation to any outside person or organization unless both of you agree in writing, with exceptions that are covered in the court rules. Some of the exceptions are:

- allegations of child abuse or neglect;
- threat of bodily harm to another person; and,
- future criminal activity.

If you want to read the court rule that also lists other exceptions, I can provide it to you.

What you tell me in this meeting I won't repeat to [insert name of the other party, that party's attorney] or even your attorney without your permission, unless there is a threat of harm to [insert name of other party, that party's attorney] or your attorney.

The goal of mediation is for the two of you to reach an agreement on some or all of the issues in your case. All agreements must be voluntary. My role during mediation would be to help you reach an agreement, not to make a decision or a recommendation to the court on the issues.

I am neutral in the sense that I am not advocating for either one of you, or for a particular outcome. I would not give an opinion as to who is right or wrong, or as to what the agreements ought to look like.

If we decide to continue mediation and use the usual process, I will meet with you and the other party together. Another option would be to meet separately."

I don't give legal advice. If you have counsel, I recommend that you keep your attorney informed about the mediation process, seek legal advice from your attorney and have any of our material reviewed by your attorney."

Script for encouraging party to call for help (page 23):

"I am concerned for your safety. None of this is your fault. I would like you to consider talking with a professional with experience in helping people explore their safety options. In our community [NAME LOCAL ADVOCACY AGENCY] can help people in your situation with counseling, advocacy, support groups and counseling for your children. They also can provide emergency shelter if you need it. The phone number is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE (7233); TTY 1-800-787-3224. The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. You can use my phone if you'd like."

Script for mediator to contact advocacy agency (page 24):

"I am concerned for your safety and want to make sure that I am giving you correct information. Would it be ok with you if I called a local program or the National Domestic Violence Hotline to help me give you referrals and assistance in coming up with safety options? I will not give them any identifying information about you."

Script for referring a party to an advocacy agency (page 25):

> "Most communities have organizations that provide services to survivors of domestic violence. These services often include counseling, advocacy, support groups and [counseling for your children]. They also include emergency shelter, if you need it. The phone number for our local domestic violence advocacy agency is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE (7233); TTY 1-800-787-3224. The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. Here are brochures and information for you to read over. Will taking this information home with you be dangerous?"

Script for concluding mediation during screening, directed to both the abused and abusive parties (page 26):

> "I have decided to conclude mediation in this case. Many cases are not suitable for mediation. It is my experience that with situations like yours, mediation does not work. [If necessary, insert reasoning appropriate to each party, as described above.] This screening process fulfills the requirement for court ordered mediation. I will be reporting to the court only that this case is not suitable for mediation. I will not be giving the court any further explanation. It is not a "failure" if you don't continue mediation and there are no legal repercussions for doing so. I would suggest that you review this case with your attorney or seek legal advice as to your next steps. Your options may include negotiation between your attorneys, referral to Friend of the Court, or asking the court for a decision."

Script for concluding mediation after screening, directed to both the abused and abusive parties (page 27):

> "After considering the issues between both of you and observing your interactions with each other, I know from your experience that it would be very difficult for you to reach agreements. So rather than taking up your time and resources, I am concluding this mediation [if necessary, insert reasoning appropriate to each party, as described above].
>
> It is not a "failure" to end mediation without an agreement, and there are no legal repercussions for doing so. I will be reporting to the court only that your case was terminated without an agreement, with no further explanation. I would suggest that you review this case with your attorney or seek legal advice. Your options may include negotiation between your attorneys, referral to Friend of the Court, or asking the court for a decision."

Appendix 5

Is Mediation Right for You?

What is Domestic Relations Mediation?

Mediation is a process which allows you and another party to resolve your dispute outside of the traditional court process. Unlike hearings or a trial, in mediation you and the other party work together to identify solutions to problems. The mediator, a trained neutral person, does not say who is right or wrong, and does not provide recommendations for resolving your dispute unless you both agree. Mediation can be quickly arranged, and frequently saves time and money compared to the traditional court process. Because mediation promotes cooperation, the emotional costs of resolving your dispute also may be reduced. You can choose to try mediation, or a judge may order you to try mediation. Here are some more things you should know about mediation:

1. In general, mediation is confidential. Some of the exceptions to confidentiality are:

- You and the other party agree that the information can be disclosed.
- You or the other party tell the mediator about child abuse or neglect.
- You or the other party tell the mediator about threats of bodily harm.
- You or the other party tell the mediator about planned future criminal activity.
- Information is necessary to resolve a dispute regarding the mediator's fee.

The mediator also is required to report to the court certain basic facts about mediation, such as who attended, whether or not an agreement was reached and general information necessary for program evaluation, depending on local court practice.

2. You and the other party may agree on who will be your mediator or you and the other party may agree to use a CDRP center. The court has a list of mediators who meet requirements set by the State Court Administrative Office. These requirements include training to screen for domestic abuse and other issues that may interfere with mediation. If you and the other party cannot agree, the court will select a mediator from this list.

3. Reaching an agreement is voluntary. Most people who try mediation do resolve all their issues through mediation. However, if you and the other party cannot agree on some issues, you can ask the mediator to tell you about other ways to reach an agreement. If a settlement is not reached, your case continues in the court process.

What are the Benefits of Mediation?

Compared to the traditional adversarial court process, mediation may:

- take less time
- cost less
- allow you to express all your opinions about the issues and results you want in an informal, private setting
- give you more control over the outcome of your dispute
- lead to fewer court proceedings after a judgment has been entered

How Do I Know if Mediation is Appropriate in My Case?

Mediation is Appropriate
and works best when both parties:

- ✓ do not use fear, force, threats, violence, or intimidation to get what they want
- ✓ commit to respecting and listening to the other's opinions and interests
- ✓ feel free to openly and safely express needs and concerns

Mediation is NOT Appropriate
and does not work when the other party:

- ✓ uses fear, force, threats, violence or intimidation to get what they want
- ✓ does not respect or listen to your opinions and interests
- ✓ makes you afraid to openly express needs and concerns

If you think that mediation is not appropriate for your case for any of these reasons, it is important for you to let the court and the mediator know about these reasons.

IF YOU THINK THAT MEDIATION IS NOT APPROPRIATE FOR YOUR CASE, PLEASE READ THE OTHER SIDE OF THIS NOTICE.

What if I do not want my case to go to mediation?

If your case is being ordered to mediation, you can ask the court to decide whether mediation is right for you. This request is made by filing a "Motion to Remove Case from Mediation" with the court. You can get the form to file this motion from the court clerk's office. After you file the motion, the court will hold a hearing in front of a judge or referee to decide if mediation is right for you. The following are reasons why the court may decide not to order mediation:

1. **You or the other party now has a Personal Protection Order (PPO).**

2. **You or the other party are now or have been involved in a child abuse or neglect proceeding.**

3. **There has been domestic abuse and you will not have a lawyer with you during mediation.**

4. **There is reason to believe that your health or safety would be endangered by participating in mediation.**

5. **You are not able to negotiate for yourself and will not have a lawyer with you during mediation.**

6. **You have another good reason not to participate in mediation. Good reasons might include: the other party has been arrested for or convicted of domestic violence; there is a pending criminal domestic violence case; there is now or has been a protective order issued against the other party; the other party has a past history of violating court orders; the other party has threatened to harm or kill you or has harmed you; the other party has threatened to harm or kill the children; there is a history of depression or attempted suicide; past attempts at mediation have failed.**

How do I file a "Motion to Remove Case from Mediation?"

1. Within 14 days of receiving an order for mediation, file your "Motion to Remove Case from Mediation" with the court clerk, and serve it on the other party or that party's attorney. Ask the court clerk for SCAO Form MC 276.

2. You will be asked to pay a fee to file your motion. However, you may be able to have the fee waived if you cannot afford it. Ask the court clerk for SCAO Form MC 20, "Affidavit and Order for Suspension of Fees/Costs."

What is domestic violence?

Domestic violence is a pattern of behavior. It is one person scaring another into doing what the abuser wants. Abusers use physical and sexual violence, threats, money, emotional and psychological abuse to control their spouse or intimate partners and get their way. Many people don't think of themselves as victims of domestic violence. However, if you answer yes to any of the following, you may want to consider filing a motion to remove your case from mediation.

- ❑ Have you ever been physically hurt or threatened by the other party?
- ❑ Have you been hit, kicked, slapped, pushed or shoved by the other party?
- ❑ Has the other party threatened you with a weapon?
- ❑ Have you ever been forced or pressured to have sex when you did not want to?
- ❑ Has the other party ever physically hurt or threatened to hurt your children?
- ❑ Has the other party ever threatened to kill your friends, family or pets?
- ❑ Are you afraid of the other party?

Programs serving each county in Michigan offer confidential counseling, shelter, support groups, and safety planning to survivors of domestic violence. You can get the number for your local domestic violence program, and confidential crisis counseling and support, by calling the National Domestic Violence Hotline at:

1-800-799-SAFE (7233)

Or by calling your local Domestic Violence Program.

Appendix 6

Court Responsibility

I. Court Referral of Cases to Mediation; Exceptions

Under Michigan Court Rule 3.216, cases may be referred to mediation on written agreement of the parties, on written motion of a party, or on the court's own initiative. The court may not submit contested cases to evaluative mediation unless all parties request it.

Parties who are subject to a personal protection order or who are involved in a child neglect or abuse proceeding should not be referred to mediation without a hearing to determine whether mediation is appropriate.

A party can object to mediation by filing a written motion to remove the case from mediation. A timely motion must be heard before the case is mediated. Cases may be exempt from mediation on the basis of the following:

- Child abuse or neglect;
- Domestic abuse, unless attorneys for both parties will be present at the mediation session;
- Inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
- Reason to believe that one or both parties' health or safety would be endangered by mediation; or
- For other good cause shown.

II. Court Obligations to Screen; Parties' Self-Reporting

Although the primary focus of this protocol is on mediator screening, by court rule, courts must conduct their own screening for domestic violence and child abuse or neglect. Additionally, parties should be encouraged to self-report the presence of domestic violence, if not on a form provided by the court, then in any way a party feels comfortable.

Court screening and opportunities for self-reporting should take place before a case is referred to mediation. Because the level of risk from domestic violence may fluctuate over time in response to changes in the parties' situation or case developments, court screening and opportunities for self-reporting should also be in place throughout the life of a case.

1. Court screening

Courts screening for domestic violence and child abuse/neglect will help identify cases that are inappropriate for mediation. Screening will also help the court identify cases that, under MCR 3.216, *require a hearing* before they may be referred to mediation (i.e. current personal protection order or pending child abuse/neglect cases).

Courts must examine their own records in screening for domestic violence and child abuse. [1]

If domestic violence is identified, the court must not order parties to mediation without holding a hearing. The court should also provide the abused party with information about a local domestic violence service provider organization to discuss options, conduct safety planning, consider services, and consider whether mediation is a safe option.

The model public education notice *"Is Mediation Right For You?"* appearing in Appendix 5, can be used to provide referral information if local domestic violence service provider information is included in the notice. For a list of domestic violence service agencies by county, see www.michigan.gov/domesticviolence.

If the court determines that the case is not appropriate for mediation, the court should not order the parties to mediation.

2. Party education and self-reporting

Because evidence of domestic abuse may not appear in public records, parties need opportunities to self-report it prior to mediation and throughout the life of a case.

To help parties decide whether they can safely and meaningfully participate in mediation, a court should provide them with clear, understandable educational materials prior to mediation, including information about:

- The advantages and disadvantages of mediation;
- The circumstances under which mediation may be ordered with or without a hearing;
- Considerations for determining whether mediation is appropriate for their case;

[1] Ideally, specially trained court personnel would conduct separate and private individual conferences with each party to explore concerns about domestic violence, safety of parties and children, and issues concerning the parties' ability to negotiate. Court personnel would also provide information about appropriate services, including local domestic violence service providers. Due to safety concerns, information revealed by the parties during these conferences should be confidential and should not be disclosed, except where there is a duty to warn, allegations of child abuse or neglect, or if other statutes or court rules require disclosure. Ensuring confidentiality of information revealed during the conferences, and establishing protocols regarding location or storage of this information is a prerequisite to instituting extensive screening by the court.

- Domestic violence;
- Self-screening for domestic violence and child abuse/neglect;
- Procedures for objecting to mediation;
- Rights regarding confidentiality and termination of mediation; and
- Local domestic violence service providers.

As mentioned above, the model public education notice “Is Mediation Right For You?” can be helpful in providing some basic information.

Parties who decide that mediation is not appropriate for their case should file a motion to object to mediation.

Appendix 7

Resources

Bancroft, L, and Silverman, J.," The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics," Sage Publications, 2002. (For professionals handling cases involving domestic violence).

Bancroft, L., "Why Does He Do That? Inside the Minds of Angry and Controlling Men," Berkley Publishing Group, 2002. (For victims of domestic abuse).

Special Issue on Domestic Violence and Family Court, 46 Family Court Review, Issue 3, July, 2008. (Includes Report from the Wingspread Conference on Domestic Violence in the Family Courts).

Field, J.K., "Screening for Domestic Violence: Meeting the Challenges of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases," 39 Family Court Review4, 2002.

Fuller, J. and Lyons, R., "Mediation Guidelines," 33 Willamette Law Review 905, 1997.

Domestic Violence Benchbook: A Guide to Civil and Criminal Proceedings, Michigan Judicial Institute, Third Edition, 2004-2012.

Ver Steegh, "Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence," 9 William and Mary Journal on Women and the Law, 145, 2003.