November 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 10

Case Management for Safety in Domestic Relations Cases

10.4 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

A. Confidentiality in Friend of the Court Records Generally

Insert the following text before the September 2005 update to page 435:

Transcripts generated from court proceedings and filed with the court clerk "are a part of the record for purposes of a sealing order" issued pursuant to MCR 8.119(F). *UAW v Dorsey*, ___ Mich App ___, ___ (2005).

September 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 10

Case Management for Safety in Domestic Relations Cases

10.4 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

A. Confidentiality in Friend of the Court Records Generally

Insert the following "**Note**" after the quote of MCR 8.119(F), on page 435:

> **Note**: When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.* MCR 8.119(F) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c).

CHAPTER 12

Domestic Violence and Access to Children

12.7 Parenting Time

B. Terms for Parenting Time

Insert the following text before the last sentence of the only full paragraph on page 512:

When a party requests specific parenting time provisions, the trial court errs by not considering the request. *Pickering v Pickering*, ___ Mich App ___, ___ (2005).

August 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 8

Enforcing Personal Protection Orders

8.5 Initiating Criminal Contempt Proceedings by Warrantless Arrest

Insert the following "**Note**" after the first paragraph on page 328:

> **Note:** A petitioner who obtains a PPO does not have a constitutionally protected right to have it enforced even when officers have probable cause to believe that a violation has occurred. *Town of Castle Rock v Gonzales*, 545 US ___, ___ (2005).

CHAPTER 9

Statutory Firearms Restrictions in Domestic Violence Cases

9.5 Restrictions Arising from Conviction of a Felony

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons

Add the following text to the July 2004 update to this subsection:

The Michigan Supreme Court affirmed the Court of Appeals' holding. *People v Perkins*, ___ Mich ___, ___ (2005).

May 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

B. Statements by Witnesses Made Unavailable by an Opponent

Insert the following text before the August 2004 update to page 165:

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza,* ___ F3d ___, ___ (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:

> "[T]he Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability. *See Crawford*, 541 U.S. 36, 124 S. Ct. at 1370 ('[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds'); *Reynolds v United States,* 98 U.S. 145, 158–59 (1879) ('The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.')."

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture only applies when a criminal defendant kills or otherwise prevents a witness from testifying with a specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

APPENDIX D

Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation

Screening Resources for Courts & Mediators

In April 2005, the State Court Administrative Office released an updated Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation Model Screening Protocol. Replace pages 611 to 630 with the following new Model Screening Protocol and add the Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation Abbreviated Domestic Violence Screening Questionnaires to the end of Appendix D.

DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION

MODEL SCREENING PROTOCOL

Provided by:
Office of Dispute Resolution
State Court Administrative Office
Michigan Supreme Court

April, 2005

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Model Court Protocol for Domestic Violence and Child Abuse Screening in Matters Referred to Domestic Relations Mediation

I. Purpose & Presumption Against Mediation

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 and fairness in the mediation process. Mediation presumes that participants can maintain a balance of power with the help of a mediator in order to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous and unfair if the imbalance of power is great or if the imbalance is unrecognized.

When domestic violence is present among parties in a dispute, the abuser's desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the victim from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the victim, the children, and the mediator to a risk of 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 victim'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 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.

When domestic violence is present, the case should be presumed inappropriate for mediation.

The decision whether to order, initiate or continue mediation should be made on a case-by-case basis.

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

II. Referral to Mediation Under MCR 3.216

Under MCR 3.216 cases may be referred to mediation on written stipulation of the parties, on written motion of a party, or on the court's initiative. The court may not submit contested cases to evaluative mediation unless all parties so request.

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

A party may 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:

a) child abuse or neglect;
b) domestic abuse, unless attorneys for both parties will be present at the mediation session;
c) 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;
d) reason to believe that one or both parties' health or safety would be endangered by mediation; or
e) for other good cause shown.

III. Court, Party, and Mediator Screening

Three tiers of screening for domestic violence and child abuse are implemented: by the court, by the parties, and by the mediators.

A. Court Screening

The court recognizes that mediation is not an appropriate process for all cases and that an agreement is not necessarily the appropriate outcome of all cases referred to mediation.

Screening by the court for domestic violence and child abuse/neglect will help the court 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 case).

Prior to referral to mediation, the court shall conduct screening for domestic violence and child abuse[1]. The court will require parties to complete and file with the court a simple domestic violence screening form that addresses matters of public record, such as the existence of current or expired personal protection orders, pending or resolved domestic violence criminal cases, pending child abuse/neglect proceedings. Because the

[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 ability to negotiate. Court personnel would also provide referrals to 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 / neglect, or if other statutes / 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.

screening form is discoverable, it shall be limited to matters of public record to avoid placing victims of domestic violence at risk of further abuse. *See SCAO form MC 282, "Domestic Violence Screening for Referral to Mediation."*

If a party has revealed domestic violence in the form, the court will refer the abused party to a domestic violence service provider organization to discuss options, conduct safety planning, consider services, and consider whether mediation is a safe option. The public education notice *"Is Mediation Right For You?"* can be used to provide referral information if local domestic violence service provider information is included in the notice.

If the court determines that the case is not appropriate for mediation, the court will not order mediation.

B. Parties' Education and Self-screening

Prior to referral to mediation, parties will be provided by the court with clear, understandable educational materials about mediation, including:

- 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
- information about domestic violence
- self-screening for domestic violence and child abuse
- procedures for objecting to mediation
- rights regarding confidentiality and termination of mediation
- referral to local domestic violence service providers.

See the model public education notice "Is Mediation Right For You?"

C. Mediator Screening

Mediators have the opportunity to conduct the most extensive screening for domestic violence and child abuse/neglect without providing the abuser with access to the information disclosed by the victim. 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. The mediator's job includes continually assessing whether a case is better resolved in mediation, or by other means. 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, and if initiated should not continue, unless all parties and the mediator believe that a safe, fair, non-coercive process will occur.

Once domestic violence among the parties has been determined, mediation should only be conducted when:

- the victim provides informed consent to mediation
- the victim has reviewed and demonstrated an understanding of the materials
- provided concerning mediation
- the victim has been advised to consult with an attorney and a domestic violence service provider
- the victim provides compelling reasons to mediate
- safety measures for mediation are taken

Mediators should not be evaluated on the basis of the number of agreements reached in mediated cases. To avoid a conflict of interest when mediators are paid per session, or to avoid other dis-incentives for screening out inappropriate cases for mediation, a mediator who determines that a matter is inappropriate for mediation should be positioned on the roster as if the matter had not been assigned.

It is possible that parties' self-screening and court screening will not reveal domestic violence and child abuse/neglect. This requires that mediators continually screen for domestic violence and child abuse/neglect. To achieve a fair and safe process, it is essential that both parties possess the requisite skills and capacity to mediate, and that any mediation is conducted with established safety precautions.

In-person screening by mediators should be conducted in each case, following the procedures outlined in the "Mediator In-Person Screening Protocol."

April, 2005

Mediator In-Person Screening Protocol

Structure, Guidelines, Considerations in Decision Not to Mediate,
Safe Termination, Referral and Assistance

In-Person Screening by Mediators

This screening tool is designed to screen out cases that are inappropriate for mediation, including cases that involve domestic violence, child abuse, substance abuse or mental health issues. Some victims of domestic violence and/or child abuse 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 themselves as victims of abuse the first time an inquiry is made about violence or abuse in their lives.

Victims may be willing to self identify in circumstances where they think that the inquiring professional will believe their allegations, where it is safe to share, where the victim trusts the information will be handled responsibly by the system, and where the victim has identified the violence as abuse. If they do identify the abuse, it is common for many victims and perpetrators to minimize the abuse.

Structure for Screening Interview

1. The person conducting the screening must be trained in domestic violence pursuant to SCAO Training Standards and Procedures.
2. In-person screening must be undertaken before joint sessions are held.
3. Telephone screening should not be conducted as the screener cannot be certain that the abuser is not present/listening during the screening, compromising victim 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 telephone screening.
4. Screening of each party must be conducted separately, preferably scheduled at different times or locations. Interviewing one party directly after the other is to be avoided. In no event should parties be asked to wait in a room together before or after a screening.
5. When scheduling a screening, 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 safety concerns about coming to the screening location, the mediator should consider declaring the case inappropriate for mediation.
6. Conduct screenings in an environment that allows the greatest degree of privacy possible. Once a screening session begins, the session should not be interrupted.
7. At the election of a party, screening may be conducted with an attorney or advocate present. The other party's attorney or advocate must <u>not</u> be present during the screening.

Guidelines for the Screening Interview

1. Observe behavior during the scheduling phone call, in the waiting room, and during screening to pick up cues that could indicate an abusive relationship.
2. Preface screening with reassurances to reduce awkwardness. *See Mediator Introduction to Screening Interview*.
3. A policy of confidentiality consistent with applicable statutes and court rules must be maintained during the screening process. Each party must be informed of the policy. *See Mediator Introduction to Screening Interview.*
4. Explain the goals and process of mediation. Inquiries should be made about the advocacy and negotiation skills of each party, the capacity of each to acknowledge the independent interests of the other party, the decision-making practices of the relationship, and the distribution of the personal and economic resources of the parties.

   The mediator should complete the following *Screening Questionnaire* to identify ability to negotiate, practices of abuse, coercion, and threats by a party, and any impact of the practices on the other. Give each party 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.
5. 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.
6. The words "the other party" are used throughout the screening questionnaire as a generic term. However, the mediator may want to adopt language that more closely reflects the actual relationship between the parties e.g. spouse, partner, etc.
7. It is important that participants clearly understand that it is appropriate to decide that mediation may not be the best process for them. Participants should be assured that participation in the screening process fulfills the requirement for court ordered mediation. Participants should understand that it is not a "failure" to terminate mediation and that there are no legal repercussions for doing so.

   It is the mediator's responsibility to terminate mediation if she or he believes either of the participants is unable to mediate safely, competently, and without fear of coercion. Monitoring by the mediator is a continuous responsibility throughout the mediation process.
8. Do not make judgments about 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. The focus should be on the existence of fear/intimidation. Mediation is not advisable when fear is present and almost never advisable when there has been domestic violence.
9. Do not mediate divorce or custody issues during the screening.

10. Parties whose cases are deemed inappropriate for mediation will be considered to have fully complied with a courts order for mediation by participating in the screening process.

Mediator In-Person Screening Protocol

Structure, Guidelines, Considerations in Decision Not to Mediate,
Safe Termination, Referral and Assistance

Party: _____ Date: _____

Case No.: _____ Counsel for Party: _____

Mediator Introduction to Screening Interview

☐ **Preface to Screening Interview with Assurances to Reduce Awkwardness**

> "The reason I meet with parties individually is to give you and the other party the opportunity to tell me about concerns you might have about mediation and your situation. I will also be asking you specific questions about how you and the other party got along, so that I can assess whether mediation is appropriate for you and how I might help you. Further, this meeting is an opportunity for me to discuss the process of mediation, so that you can decide whether mediation is appropriate for you."

☐ **Inform the Parties and their Attorneys of the Policy to Keep Screening Sessions Confidential and the Exceptions to that Policy.**

Mediation is confidential. Confidentiality means that the mediator cannot disclose any information that you provide unless:

- You and the other party agree that the information can be disclosed.
- The mediator informs you and you agree in writing before mediation starts that the mediator may disclose other information such as child abuse or threats of harm.
- You or the other party disclose child abuse or neglect, or threat of harm to another person, and the mediator has a statutory responsibility to report child abuse or neglect, or threat of harm.
- 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, i.e. the number of sessions, who attended, whether or not an agreement was reached, whether or not the fee was paid, whether the parties provided information requested by the mediator, and general information necessary for program evaluation.

☐ **Explain the Goals and Process of Mediation.**

"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 are voluntary. My role during mediation would be to help you reach agreement, not to make a decision or recommendation 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 mediate 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 materials reviewed by your attorney."

[If the parties have requested evaluative mediation explain that process. If a settlement is not reached during evaluative mediation, the mediator, within a reasonable period after the conclusion of mediation shall prepare a written report to the parties setting forth the mediators' proposed recommendation for settlement purpose only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court. MCR 3.216 (I)(2)]

Questionnaire

(Ask all of the following. Feel free to take notes.)

Section 1: General

☐ a) Is there anything you would like to ask me or tell me before we continue? Are there any special needs that you require to have this discussion (language interpretation or other special accommodations)?

_____

_____

_____

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

_____

_____

_____

☐ c) Why don't you tell me about your situation?

_____

_____

_____

☐ d) Could you tell me about how the decision to divorce and/or separate was reached?

_____

_____

_____

Section 2: Control, Coercion, Intimidation, Fear

☐ a) When you look back over time, how were decisions made in your marriage?

_____

_____

_____

☐ b) What happens when you speak your mind and express your point of view to [insert name]?

_____

_____

_____

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

_____

_____

_____

☐ d) Do you have any concerns about how the two of you will make decisions in mediation?

_____

_____

_____

☐ e) During mediation sessions, you and [insert name] may meet in the same room to talk about all the issues and problems that need to be resolved. Do you have any concerns about sitting in the same room with [insert name] or mediating with [insert name]?

If yes, ask the following questions:

i. What are your concerns?

_____

_____

ii. If your attorney was present with you during the mediation sessions, would you still have these concerns?

_____

_____

iii. If you and [insert name] were in separate rooms during the mediation sessions, would you still have these concerns?

_____

_____

iv. If you and [insert name] came at separate times, would you still have these concerns?

_____

_____

☐ f) Has [insert name] ever prevented you from having contact with family or friends, or with your children? If so, what happened?

_____

_____

_____

☐ g) Has [insert name] ever denied you access to money for food, shelter, medical needs, clothing, etc.? If so, what happened?

_____

_____

_____

☐ h) Has [insert name] ever threatened to hurt or kill him/herself? If so, what happened?

_____

_____

_____

☐ i) Has your partner ever forced you to do something that made you uncomfortable? If so, what happened?

_____

_____

_____

Section 3: Violence/Fear of Violence

☐ a) Has there ever been any physical confrontation between you an [insert name]? If so, 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. Has [insert name] ever felt afraid of you? What is he/she afraid of?

_____

_____

_____

☐ c) Do you ever become afraid of yourself or others based on the look from [insert name] oor actions of [insert name]? If so, tell me about it.

_____

_____

_____

☐ d) Has [insert name] ever pushed, shoved, hit, kicked, choked you or restrained you, or pulled your hair? If so, what happened?

_____

_____

_____

☐ e) Has [insert name] ever used or threatened to use a weapon to harm you? If so, what happened?

_____

_____

_____

☐ f) Has [insert name] ever threatened to kill or injure you? Has [insert name] ever threatened to kill or injure a family member, friend or coworker? If so, what happened?

_____

_____

_____

☐ g) 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?

_____

_____

_____

☐ h) Have you or any family members ever sought medical treatment as a result of an injury caused by [insert name]? If so, what happened?

_____

_____

_____

☐ i) 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, or sending you many unwanted letters, emails, faxes or gifts? If so, what happened?

_____

_____

_____

☐ j) Have any of these events involved the children? If so, what happened?

_____

_____

_____

☐ k) Has there ever been an order that was meant to limit contact between the two of you, for example, a Personal Protection Order or a no contact order that was a condition of bail? Please describe.

_____

_____

_____

☐ l) Have either of you ever had a PPO issued against you by anyone? If so, what happened?

_____

_____

_____

☐ m) Have either of you ever been found in contempt of court for violating a PPO? If so, what happened?

_____

_____

_____

☐ n) Are you afraid that [insert name] will harm you during the mediation or after you leave because of what you say in mediation?

_____

_____

_____

☐ o) Are you in immediate danger?

_____

_____

_____

If yes to 3o:

1. **Discontinue use of screening questionnaire and proceed to *SAFETY PLANNING* (page 28); and**
2. **Terminate mediation. See *SAFE TERMINATION* (page 24).**

"Since you are in immediate danger, let's arrange for you [and your children] to get to a safe place. I will not be mediating your case."

If yes to any one of 3a-3n:

If there is a yes answer to any one of questions 3a-3n, this is an indication that you should advise the party that mediation is NOT appropriate. However, do not terminate until the entire questionnaire is completed. Information gathered in the following sections may be useful if the party wishes to mediate despite the mediator's advice. This will assist the mediator to make the decision whether or not to mediate.

Section 4: Violence/Dangerousness Assessment

☐ a) Have you or any one else ever called the police because of problems in your home? If so, what happened?

_____

_____

_____

☐ b) Have you or [insert name] ever been arrested for, or convicted of, any crime? If so, what happened?

_____

_____

_____

☐ c) Are there any guns or other weapons in the home? What kind? How many?

_____

_____

_____

Section 5: Attorney Awareness of Violence

☐ (If lawyer is not present) Have you told your lawyer about these things (Sections 3 & 4)? It is important for your lawyer to know about these matters.

_____

_____

_____

Section 6: Children

☐ 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 threatened to take the children or threatened to stop you from seeing them, or stopped you from seeing them. Please describe.

_____

_____

_____

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

_____

_____

_____

Section 7: Other Considerations Regarding Ability to Negotiate

☐ a) Do either of you have a problem with alcohol or drugs? (If yes, how recent? What is the current status of treatment?) Is there a problem with alcohol or drugs in either of your families? If so, please describe.

_____

_____

_____

☐ b) Do either of you have a history of mental illness or emotional problems? Is there a history of mental illness or emotional problems in either of your families? (If yes, how recently? What is the current status of treatment?) Tell me about it.

_____

_____

_____

☐ c) Have either of you ever attempted or considered hurting or killing yourself? (If yes, how recently? What is the current status of treatment?) Please describe.

_____

_____

_____

Section 8: Catch-All

☐ a) Is there anything else you think I should know about you, [insert name] or your family?

_____

_____

_____

Section 9: Mediation Process Discussion

If the mediator believes that mediation will not go forward, skip this section and go to the "Decision to Not to Mediate" section. Return to this section if mediation ultimately will go forward.

"Now let's talk more about the process of mediation."

☐ a) **Discuss process of mediation.**

"In mediation, we will start by gathering information, then will look at what the issues are, options for resolving them, and how to resolve them in a way that is agreeable to both of you [and in the best interests of your children]. When you have agreements, I will send them to you and your attorneys to look over and make changes. The final draft will be given to the attorneys to file with the court documents. In light of the confidentiality of mediation as discussed earlier, I will report to the judge only that you attended mediation, and whether or not you reached an agreement."

☐ b) **Discuss differences between mediation and the traditional legal process.**

"In mediation, the two of you will discuss the issues and reach your own resolutions that are agreeable to both of you. In the traditional legal process, your lawyers might do the negotiation for you, or you could take the issues to the Friend of the Court or a judge."

☐ c) **Discuss need for lawyer, if party does not have a lawyer.**

"Mediation is a cooperative process, where the two of you are working together to reach a resolution. However, you will each need legal advice and knowledge of what the court would decide in your situation. I must remain neutral and cannot give you that advice. So I advise you to get a lawyer to give you legal advice, and advice about what might happen in court. You could either retain a lawyer or consult a lawyer. I would suggest that you get advice (1) prior to negotiating, and (2) after the agreement has been reached but before you sign your agreement, to see if there might be problems with it."

☐ Has the divorce been filed? _____

- ☐ What is the current status of legal process? _____
- ☐ What are the upcoming court dates? _____
- ☐ Discuss fees. _____

Section 10: Preparation for Mediation

☐ a) What would you like to see as an outcome of mediation?

_____

_____

_____

☐ b) What are the issues you think will be the most difficult for you and [insert name] to resolve?

_____

_____

_____

Revised April, 2005

Decision Not to Mediate

1. A Party is in Immediate Danger

(Individual answered "Yes" to Question 30 in the Questionnaire)

If a party is in immediate danger, the mediator should advise the party that mediation is not appropriate. There are no circumstances under which mediation should proceed. *Go to Safety Planning (page 28) and then to Safe Termination of Mediation (page 24).*

To the Abused Party:

"Since you are in immediate danger, let's get you [and your children] to a safe place. I will not be mediating your case. Let's get a Safety Plan in place." *See Safety Planning (page 28). See Safe Termination of Mediation (page 24).*

To the Abusive Party:

See Safe Termination of Mediation (page 24).

2. No Apparent Immediate Danger, but the Abused Party Discloses Violence by or Fear of the Other Party

(Individual answered "No" to Question 30 but a "Yes" to any other question in Section 3 in the Questionnaire.)

If a party answers yes to any question in Section 3, (other than question 30) or if violence or fear of the other party is otherwise identified, the mediator should **advise the parties that mediation is not appropriate**. The abusive party's willingness to proceed with mediation is irrelevant.

Advise Against Mediation:

"I do not think it is advisable for you to participate in mediation." *See Safe Termination of Mediation (page 24).*

- ☐ 1. If the abused party concurs with the advice not to mediate, there are no circumstances under which mediation should proceed.
- ☐ 2. If the abused party disagrees with the advice against mediation an wants to mediate, then mediation should proceed only if ALL of the following apply:
  - ☐ a) The situation is not dangerous for the abused party or the mediator. For *Dangerous Assessment* consider answers to Questionnaire Sections 2, 3, 4, 6 and 7.
  - ☐ b) The mediation is conducted by a skilled mediator knowledgeable abut domestic violence.
  - ☐ c) The attorney for the abused party or an advocate for the abused party (such as an advocate from the local domestic violence program or a friend or family member of the abused party) will be present during the mediation.
  - ☐ d) The mediation is conducted within a specialized process under specific conditions to address concerns for safety and ability to make decisions without coercion or fear. *See Specialized Process for Mediating When Domestic Violence/Control Exists (page 25).*

☐ e) Both parties agree to this process and these specific conditions.

☐ f) The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely and in good faith. Consider answers to Questionnaire Section 2. *See Determining Ability to Negotiate: Existence of Control, Coercion or Intimidation (page 22)*

Determining Ability to Negotiate: Existence of Control, Coercion or Intimidation

The following indicate that a party may not have the ability to negotiate. The mediator must determine whether the presence of an attorney or advocate, and/or the adherence to specialized mediation conditions will provide the party with the ability to negotiate. If the mediator assesses that one or both parties do not have the ability to negotiate (even with an attorney or advocate present or under other specialized conditions) the mediation should not go forward despite the abused party's wishes. *See Mediator Standards of Conduct, Standard 2*.

- Party indicates that most decisions were made by the other party, or that s/he has serious concerns about how decisions will be made during mediation.
- Party has not been able in the past to speak her/his mind or express her/his point of view.
- Party indicates that she/he backs down if there has been a disagreement.
- Party has concerns about sitting in the same room during mediation.
- Party has been denied access to food or money, or has been prevented from contacting friends, family, or children.
- Either party indicates that there is a history of non-compliance with court orders by either party.
- Party seems unable to articulate her/his point of view to mediator.
- There is a history of substance abuse or mental illness.

1. Non-Violent, but Abusive/Controlling

(Individual answered "No" to all questions in Section 3 but a "Yes" to any question in Section 2d-2i, or answers to Section 2a-c indicated the existence of *Control, Coercion or Intimidation*.)

If in screening, abusive and controlling dynamics appear central to one party's relationship with the other, the mediator must determine whether either party lacks the ability to negotiate under any circumstances, or whether mediation could go forward under specific conditions with a skilled mediator. Mediation should proceed only if ALL of the following apply:

☐ 1. The situation is not dangerous for the abused party or the mediator. For *Dangerous Assessment* consider answers to Questionnaire Sections 2, 3, 4, 6 and 7.

☐ 2. The mediation is conducted by a skilled mediator knowledgeable about domestic violence.

☐ 3. The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely, and in good faith, with or without an attorney or advocate present for the abused party, or with or without specific conditions to address concerns for safety and ability to make decisions without coercion or fear. Consider answers to Questionnaire Section 2. *See Determining Ability to Negotiate: Existence of Control, Coercion or Intimidation (page 22).*

☐ 4. If, to ensure the ability to negotiate, the abused party requires the presence of an attorney or advocate during mediation, or a specialized process to which both parties agree, the mediation must be conducted with those accommodations. *See Specialized Process for Mediating When Domestic Violence/Control Exist (page 25).*

☐ 5. The abused party wants to mediate.

If the mediator determines that mediation should not proceed, see *Safe Termination of Mediation.*

2. Non-Violent an Non-Abusive and Controlling, but Either Party Otherwise Lacks Capacity to Mediate

(Individual answered "No" to all questions in Sections 2 and 3 but a "Yes" to any question in Sections 7.)

Regardless of the existence of domestic violence or child abuse, if screening reveals any of the following the mediator must determine whether either party lacks the ability to negotiate under any circumstances, or whether mediation could go forward under specific conditions with a skilled mediator.

- There is a history of substance abuse or mental illness that is not presently controlled.
- A party is not able to negotiate for her/himself or articulate her/his needs.
- A party is unable to reach an agreement voluntarily.

Mediation should proceed only if ALL of the following apply.

☐ 1. The situation is not dangerous for the parties or the mediator. For *Dangerous Assessment* consider answers to Questionnaire Sections 2, 3, 4, 6 and 7.

☐ 2. The mediation is conducted by a skilled mediator knowledgeable about the substance abuse, mental illness or other circumstances affecting a party's ability to negotiate.

☐ 3. The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely, and in good faith, with or without an attorney or advocate present, or with or without specific conditions to address concerns about safety and circumstances affecting the ability to negotiate. *See Determining Ability to Negotiate Existence of Control, Coercion, or Intimidation (page 22).*

☐ 4. If, to ensure the ability to negotiate, a party requires the presence of an attorney or advocate during mediation, or a specialize process to which both parties agree, the mediation must be conducted with those accommodations. *See Specialized Process for Mediating When Domestic Violence/Control Exist (page 25).*

☐ 5. The parties want to mediate.

If the mediator determines that mediation should not proceed, see *Safe Termination of Mediation (page 24).*

Safe Termination of Mediation

Anytime during the course of mediation, if either party decides to withdraw, or the mediator finds that mediation is not safe because of domestic violence or child abuse, the mediation should be terminated in the following manner.

1. If domestic violence or child abuse is revealed for the first time after mediation has commenced, the mediator shall interrupt the proceeding and conduct a screening of each party separately to determine 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 fully and fairly. If the party subject to the abuse and the mediator agree that neither domestic violence nor child abuse is an inhibiting factor, the mediation shall proceed. The mediator shall discuss and plan safety precautions with the abused party. If either the abused party or the mediator determines that the mediation is inappropriate, mediation should be terminated.
2. Consult privately with the abused party to determine whether safety arrangements are necessary. If possible, make arrangements for the parties to leave separately, with the abused party leaving first and allowing reasonable time for departure. Consider whether to alert law enforcement or other security of the potential for violence and arrange for escort of the abused party to transportation. Do not reveal the destination or means of transportation of the abused party to the other party.
3. Without endangering the abused party, provide the abused party with information and referrals for assistance, including safety planning. Elicit how the abuser is likely to respond to mediation being terminated.
4. If you learn of a threat of imminent danger of physical harm to any person, take appropriate safety measures.
5. On the form that goes to the court check the box that says not appropriate for mediation. Do not provide any explanation.
6. There are two positions to consider with regard to advising the parties about the reasons for termination of mediation.

    - Some domestic violence victim advocates and professionals who work with batterers in batterer intervention programs believe that, due to safety concerns, the mediator should NOT advise the parties that the reason for termination is domestic violence or child abuse, regardless of whether the victim or the abuser discloses the violence. Other valid reasons for termination that could be provided to the parties include: mediation policies and procedures, parties too far apart in positions or interests, inability to negotiate, unwillingness to compromise, substance abuse or mental illness (if known to both parties).
    - Some mediators believe that if the abuse is disclosed by the abuser or by both parties, it is appropriate to advise the parties that the reason for termination is domestic violence. If a mediator chooses this approach, the mediator must be careful to provide each party with the same information regarding the reasons for termination and place responsibility on the abuser, without violating confidentiality. If the violence is disclosed only by the victim, the mediator should NOT advise the parties that the reason for termination is domestic violence.

Suggested Language: Termination of Mediation After Screening

To the Abused and Abusive Party

> "I have decided not to mediate this case. Many cases are not appropriate for mediation. It is my experience that with situations like yours, mediation does not work. This screening process fulfills the requirement for court ordered mediation. It is not a "failure" to terminate 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. Your options may include negotiation between your attorneys, referral to Friend of the Court for investigation and recommendation and/or motion to the court for a decision. If your dispute involves custody, parenting time, or support and you are not represented by an attorney you may contact the Friend of the Court and ask them to provide you with the forms and instructions necessary to proceed."

Suggested Language: Termination after Mediation has Commenced

> "After observing the issues between you and your interactions with each other, I know from my experience that it would be very difficult for you to reach agreements. So rather than taking up your time and resources, I am terminating this mediation. It is not a "failure" to terminate 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. Your options may include negotiation between your attorneys, referral to Friend of the Court for investigation and recommendation and/or motion to the court for a decision. If your dispute involves custody, parenting time, or support and you are not represented by an attorney you may contact the Friend of the Court and ask them to provide you with the forms and instructions necessary to proceed."

Specialized Process for Mediating When Domestic Violence/Control Exists

The following are suggestions for specialized conditions that may accommodate safety concerns, and may provide a party with the ability to negotiate and make decisions without coercion or fear.

- Take all discussions of fear and safety seriously.
- Require the presence of an attorney or advocate for the abused or vulnerable party during mediation.
- Talk with the abused party about what safety precautions she/he would like to see in place.
- Mediate the case separately with each party. Do not schedule sessions with the parties back to back.

- If not mediating separately, suggest that the abused party arrive 10 minutes after the abuser and leave 10 minutes before the abuser. Have separate waiting areas for the parties and do not leave the parties alone together.
- Allow an advocate, friend or family member of the abused party to accompany the abused party to the mediation sessions and wait in the waiting room.
- Check with the abused party between sessions to assess safety and ability to negotiate.
- Continually reevaluate the safety of the situation for the abused party and the abused party's ability to negotiate. Terminate mediation if there are concerns for the abused party's safety or if the mediator believes that the abused party cannot negotiate fairly.
- Co-mediate in order to better oversee and direct the process in difficult mediations.
- Facilitate the crafting of specific and detailed agreements to reduce the opportunity for the abuser to take advantage of ambiguities. **Mediated agreements can**:
  - 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.
  - Provide for supervised parenting time, with supervising third parties clearly identified.
  - 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 (e.g., whether the abusive party or the abusive party's attorney may telephone the abused party, whether written or electronic communications is permitted).
  - Arrange parenting time so that the parties will not meet. Drop-off and pick-up times could be different for the abused party and the abuser, so that each party will have left the drop-off site before the other arrives.
  - 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, and increase length only if things are going well. Place limits on overnight visits.
  - Prohibit the noncustodial party from drinking or using drugs before or during parenting time.
  - Require a bond to assure compliance with the agreement.
  - Limit the abusive party's access to firearms.
  - Permit refusal of parenting time upon violation of any condition of the agreement.
  - Permit cancellation of parenting time if the noncustodial party is more than 20 or 30 minutes late.
  - Specify how disputes between the parties will be resolved.

- Build in automatic return dates for the court, or the parties with a mediator, to review how the agreement is working.
- Require surrender of 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

Safety Planning

A safety plan is a tool to help victims identify ways to stay safe. Most victims of domestic violence have a variety methods that have helped keep them safe in the past. The mediator should take all discussions of fear and safety seriously. If the mediator has any questions at all during the course of the discussion with the party, call the National Domestic Violence Hotline for consultation at 1-800-799-SAFE(7233). Following are several options to consider depending upon the situation:

1. Ensure that there is a safe and private area in the office where the mediator can speak to the abused party alone.

2. Offer the use of a phone so that the abused party can contact the local domestic violence program and/or the National Domestic Violence Hotline 1-800-799-SAFE(7233). Both of these organizations have trained professionals who are able to offer confidential services and should be able to help the abused party create a safety plan.

Suggested Language for Safety Planning Assistance

"I am concerned for your safety. None of this is your fault. I would like you to consider contacting some professionals to help you come up with a plan to stay safe today. Most communities have organizations that provide services to survivors of domestic violence. These services often include confidential shelter, counseling, advocacy, support groups and [counseling for your children]. The phone number to our local domestic violence program is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE(7233). The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. Please use my phone."

1. If the abused party does not want to contact the Hotline, the mediator may want to ask the party's permission to call the Hotline for consultation. The Hotline should be able to walk the mediator through some basic safety planning strategies. The mediator should assure the abused party that the Hotline is confidential and that the mediator will not disclose any personal information.

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

2. The party may be able to identify friends or family that have been helpful in the past or who are able to offer a place to stay. The mediator should offer the use of her/her phone so that the party can contact friends or family, if the party wishes to do so.

3. Discuss with the party what she/he will do with any paperwork that she/he is taking home, especially if she/he still lives with the abusive party.

4. 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 ensure that she/he will be safe during 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?"

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

Referral and Assistance

1. If a screener for mediation or a mediator concludes that domestic violence or child abuse has occurred, the abused party shall be provided with information about and referral to a domestic violence advocacy agency for safety planning and other services. The information shall be provided only when the other party is not present. If the mediator does not know the local shelter number she or he can get the number from the National Domestic Violence Hotline at 1-800-799-SAFE (7233).

2. The mediator should provide the abused party with information and brochures about domestic violence, child abuse, and referrals for assistance. Free general domestic violence brochures are available from the National Domestic Violence Hotline by calling 1-800-799-SAFE (7233). Local domestic violence programs also should have free brochures.

3. The mediator should discuss with the party what she/he will do with any paperwork and brochures that she/he is taking home, especially if she/he still lives with the abusive party.

4. If a person is in imminent danger, the mediator should do safety planning with that person whenever possible.

Suggested Language for Referral and Assistance

> "Most communities have organizations that provide services to survivors of domestic violence. These services often include confidential shelter, counseling, advocacy, support groups and [counseling for your children]. The phone number for our local domestic violence program is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE(7233). 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?"

On-Going Screening for All Cases

On-going screening for domestic violence should take place in all cases. It is the mediator's responsibility to terminate mediation if she or he believes either of the participants is unable to mediate safely, competently, and without fear of coercion. Monitoring by the mediator is a continuous responsibility throughout the mediation process. 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, one party unwilling to comply with the ground rules or specialized process for mediation, or one party dominating the sessions.

If any behaviors lead you to conclude that a party may not be able to mediate safely and fairly, reconsider the *Decision Not to Mediate* (page 20). If you determine that mediation should not proceed, see *Safe Termination of Mediation* (page 24).

DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION

Acknowledgments

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RESOURCES

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IS MEDITATION 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 unless requested, does not provide recommendations for resolving your dispute. 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. Mediation is confidential. Confidentiality means that the mediator cannot disclose any information that you provide unless:

- You and the other party agree that the information can be disclosed.
- The mediator informs you, and you agree in writing before mediation starts, that the mediator may disclose other information such as child abuse or threats of harm.
- You or the other party disclose child abuse or neglect, or threat of harm to another person, and the mediator has a legal responsibility to report child abuse or neglect, or threat of harm.
- 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 the number of sessions, who attended, whether or not an agreement was reached, whether or not the fee was paid, whether the parties provided information requested by the mediator, and general information necessary for program evaluation.

2. You can select your own mediator. In most cases, parties can agree who will serve as their mediator. If you and the other party cannot agree, the court will select a mediator from a roster of trained and experienced mediators.

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, and you have chosen *evaluative* mediation, you can ask the mediator to provide you with recommendations for settlement. If 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:

- be less time consuming
- be less expensive
- allow you to express all your opinions about the issues and results you want in an informal setting
- give you more control over the outcome of your dispute
- lead to fewer court proceedings after a judgment has been entered
- be less emotionally stressful
- provide a more fair outcome for both parties

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, so that your case can have a fair and safe outcome.

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 considered for mediation, you are entitled to a hearing in front of a judge to decide whether mediation is appropriate for you for any of these **three** reasons:

1. You have a Personal Protection Order (PPO).

How do I tell the court that I have a Personal Protection Order?
File the enclosed "Motion to Remove Case from Mediation"* with a copy of your PPO or information about your PPO.

2. You or the other party is involved in a child abuse or neglect proceeding.

How do I tell the court that there is a child abuse/neglect case?
File the enclosed "Motion to Remove Case from Mediation"* with any information about the child abuse/neglect case.

3. You file a "Motion to Remove Case from Mediation" because you believe that mediation will not be fair or safe for you.

What are the reasons that I can ask the court to remove my case from mediation?
A court might not order you into mediation if:

1. There are good reasons, such as: the other party has been arrested for or convicted of domestic violence; there is a pending criminal domestic violence case; 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 history of depression or attempted suicide; past attempts at mediation have failed.
2. There is reason to believe that your health or safety would be endangered by mediation.
3. You are not able to negotiate for yourself and will not have a lawyer with you during mediation.
4. There has been domestic violence and you will not have a lawyer with you during mediation.
5. The case involves child abuse or neglect.

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

You or your attorney must

- ❑ 1. Within 14 days of receiving an order for mediation file a written "motion to remove case from mediation" and a notice of hearing to remove the case from mediation. (See motion and notice in the enclosed motion packet.*)
- ❒ 2. Within 14 days of receiving an order for mediation serve a copy of your motion and notice to the other party's attorney, or to the other party if the other party is not represented by an attorney.
- ❒ 3. You may be entitled to have the filing fees waived if you cannot afford the motion fees. Ask the court mediation 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?

There are over 45 programs in Michigan offering 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 at:

***If the motion or motion packet is not enclosed, contact the court's Mediation Clerk and ask for a copy.**

At this hearing, the judge will decide if you should try mediation. If you believe that you should not have to try mediation for reasons like those mentioned above, fill out and file the motion to remove case from mediation.

DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION

ABBREVIATED DOMESTIC VIOLENCE SCREENING QUESTIONNAIRES

Provided by:
Office of Dispute Resolution
State Court Administrative Office
Michigan Supreme Court

April, 2005

Purpose and Use of Abbreviated Domestic Violence Screening Questionnaires

To promote safety for litigants, their children, and mediators, the complete, unabbreviated Domestic Violence Screening Questionnaire (developed in 2001) should be used in every possible instance of screening for domestic violence[*]. All mediators and Friend of the Court and Community Dispute Resolution Program center staff conducting case intake should be trained on and be familiar with the complete Domestic Violence Screening Protocol document, including the complete Questionnaire.

Recognizing that special circumstances may exist at Friend of the Court and Community Dispute Resolution Program (CDRP) offices in which time constraints make the use of the complete Questionnaire difficult, two abbreviated versions were created in 2005 for use in the following limited situations **only**.

Abbreviated Questionnaire 1 is for use only when limited time is available in advance of meeting with the parties, but parties are not yet together at the mediation site. This Questionnaire contemplates the circumstance of CDRP centers or Friend of the Court offices having insufficient time to use the complete protocol in advance of parties appearing at the center or court office but where some limited time is available for screening.

Abbreviated Questionnaire 2 is for use only when parties are present at court and have proceeded through a security check, prior intake was not conducted, and mediation is to take place immediately. This Questionnaire contemplates the circumstance where parties have been ordered by the judge to attempt mediation at a location within the court, and the only opportunity for screening is literally "in the hall."

SAFETY NOTE: In using the abbreviated questionnaires, it is absolutely essential that court records have been checked for:

1. Personal Protection Orders or similar civil protection orders issued in other states;
2. "No-contact" orders issued in criminal cases (e.g., pretrial release orders, probation or parole orders); and
3. Pending child abuse and neglect cases prior to bringing the parties together.

Neither abbreviated questionnaire is intended to replace the use of the complete Questionnaire when time and circumstances permit its use.

---

[*] Domestic violence is a pattern of controlling behaviors, some of which are criminal, that includes but is not limited to physical assaults, sexual assaults, emotional abuse, isolation, economic coercion, threats, stalking, and intimidation. These behaviors are used by the batterer in an effort to control the intimate partner. The behavior may be directed at others with the effect of controlling the intimate partner.

In the event that a party's response to a question does elicit concern over the presence of domestic violence, court and CDRP center staff and mediators must be ready to expand upon the party's response by referencing back to the complete Questionnaire document. In assessing the level of potential danger, the answers in sections 2, 3, 4, 6 and 7 of the complete Questionnaire are particularly helpful. Mediators using an abbreviated Questionnaire should also be alert during the mediation process for signs that a party is in anger or otherwise has a compromised ability to negotiate, and be prepared to safely terminate the mediation if domestic violence concerns arise during the mediation session.

Following the Questionnaires is guidance for mediators in determining whether mediation should take place, how to safely terminate a mediation once begun, and safety planning considerations.

Abbreviated Domestic Violence Screening Questionnaire 1

This Questionnaire is for use only by Friend of the Court and Community Dispute Resolution Program center staff and mediators when time and circumstances do not permit use of the complete screening Questionnaire in advance of meeting with the parties, but where parties are not yet together at the mediation site.

☐ 1. Is there anyone else in the room with you? (Assumes a telephone contact.) Can you speak freely?

_____

_____

_____

☐ 2. What types of concerns would you have about sitting in the same room with [insert name] or mediating with [insert name]?

_____

_____

_____

If concerns are noted, ask the following questions:

☐ a. Is there anything we could do to address your concerns?

_____

_____

☐ b. If your attorney was present with you during the mediation sessions, would you still have these concerns?

_____

_____

☐ c. If you and [insert name] were in separate rooms during the mediation sessions, would you still have these concerns?

_____

_____

☐ 3. Has there ever been any physical confrontations or threats between you and [insert name]? If so, what happened?

_____

_____

_____

☐ 4. Do you ever feel afraid of [insert name]? Tell me about the time you felt most afraid. What makes you afraid? Has [insert name] ever felt afraid of you? What makes him/her afraid?

_____

_____

_____

☐ 5. 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, sending you many unwanted letters, emails, faxes or gifts? If so, what happened?

_____

_____

_____

☐ 6. Has there ever been an order that was meant to limit contact between the two of you, for example, a PPO, a no-contact order as a condition of bail, or other such order?

_____

_____

_____

☐ 7. If so, have either of you ever violated any of these orders? Has a court ever found that either of you have violated any of these orders?

_____

_____

_____

☐ 8. Are you afraid that [insert name] will harm you during the mediation or after you leave because of what you said during mediation? Please describe.

_____

_____

_____

☐ 9. Is there an open abuse or neglect case involving your children? If so, please tell me about it.

_____

_____

_____

☐ 10. Do you have any concerns about the safety of the children? Please tell me your concerns.

_____

_____

_____

☐ 11. When you and [insert name] fight and/or are angry with each other, what happens?

_____

_____

_____

☐ 12. Do you think you will be able to speak up for yourself in mediation?

_____

_____

_____

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Abbreviated Domestic Violence Screening Questionnaire 2

This Questionnaire is for use only by Friend of the Court and Community Dispute Resolution Program center staff and mediators when mediation is conducted at the court, parties have proceeded through security, a check for Personal Protection Orders and child abuse and neglect cases has been completed, and time and circumstances do not permit use of the complete screening Questionnaire.

☐ 1. Do you have any concerns about sitting in the same room with [insert name] or mediating with [insert name]?

_____

_____

_____

If yes, ask the following questions:

☐ a. What are your concerns?

_____

_____

☐ b. If your attorney was present with you during the mediation sessions, would you still have these concerns?

_____

_____

☐ c. If you and [insert name] were in separate rooms during the mediation sessions, would you still have these concerns?

_____

_____

☐ 2. Have there ever been any physical confrontations or threats between you and [insert name]? If so, what happened?

_____

_____

_____

☐ 3. Has there ever been an order that was meant to limit contact between the two of you, for example a PPO, a no-contract order as a condition of bail, or other such orders? If so, please describe.

_____

_____

_____

☐ 4. Do you ever feel afraid of [insert name]? What makes you afraid? Has [insert name] ever felt afraid of you? What makes him/her afraid?

_____

_____

_____

☐ 5. Are you afraid that [insert name] will harm you during the mediation of after you leave because of what you say in mediation? If so, please describe.

_____

_____

_____

☐ 6. Can you speak up for yourself in mediation?

_____

_____

_____

Decision Not to Mediate

1. **A Party is in Immediate Danger**

   If a party is in immediate danger, the mediator should advise the party that mediation is not appropriate. There are no circumstances under which mediation should proceed. Go to Safety Planning (page 6) and then to Safe Termination of Mediation (page 4).

   To the Abused Party:

   "Since you are in immediate danger, let's get you [and your children] to a safe place. I will not be mediating your case. Let's get a Safety Plan in place." *See Safety Planning (page 6). See Safe Termination of Mediation (page 4).*

   To the Abusive Party:

   See Safe Termination of Mediation (page 4).

2. **No Apparent Immediate Danger, but the Abused Party Discloses Violence by or Fear of the Other Party**

   If violence or fear of the other party is otherwise identified, the mediator should advise the parties that mediation is not appropriate. The abusive party's willingness to proceed with mediation is irrelevant.

   Advise Against Mediation:

   "I do not think it is advisable for you to participate in mediation." *See Safe Termination of Mediation (page 4).*

   ☐ 1. If the abused party concurs with the advice not to mediate, there are no circumstances under which mediation should proceed.

   ☐ 2. If the abused party disagrees with the advice against mediation and wants to mediate, then mediation should proceed only if ALL of the following apply:

   ☐ a) The situation is not dangerous for the abused party or the mediator. In assessing the level of potential danger, the answers to the questions in sections 2, 3, 4, 6 and 7 of the complete Questionnaire are particularly helpful.

   ☐ b) The mediation is conducted by a skilled mediator knowledgeable abut domestic violence.

   ☐ c) The attorney for the abused party or an advocate for the abused party (such as an advocate from the local domestic violence program or a friend or family member of the abused party) will be present during the mediation.

   ☐ d) The mediation is conducted within a specialized process under specific conditions to address concerns for safety and ability to make decisions without coercion or fear. *See Specialized Process for Mediating When Domestic Violence/Control Exists (page 5).*

   ☐ e) Both parties agree to this process and these specific conditions.

☐ f) The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely and in good faith. *See Determining Ability to Negotiate: Existence of Control, Coercion or Intimidation (page 2).*

Determining Ability to Negotiate: Existence of Control, Coercion or Intimidation

The following indicate that a party may not have the ability to negotiate. The mediator must determine whether the presence of an attorney or advocate, and/or the adherence to specialized mediation conditions will provide the party with the ability to negotiate. If the mediator assesses that one or both parties do not have the ability to negotiate (even with an attorney or advocate present or under other specialized conditions) the mediation should not go forward despite the abused party's wishes. *See Mediator Standards of Conduct, Standard 2.*

- Party indicates that most decisions were made by the other party, or that s/he has serious concerns about how decisions will be made during mediation.
- Party has not been able in the past to speak her/his mind or express her/his point of view.
- Party indicates that she/he backs down if there has been a disagreement.
- Party has concerns about sitting in the same room during mediation.
- Party has been denied access to food or money, or has been prevented from contacting friends, family, or children.
- Either party indicates that there is a history of non-compliance with court orders by either party.
- Party seems unable to articulate her/his point of view to mediator.
- There is a history of substance abuse or mental illness.

If the mediator determines that mediation should not proceed, s*ee Safe Termination of Mediation (page 4)*.

1. Non-Violent, but Abusive/Controlling

If in screening, abusive and controlling dynamics appear central to one party's relationship with the other, the mediator must determine whether either party lacks the ability to negotiate under any circumstances, or whether mediation could go forward under specific conditions with a skilled mediator. Mediation should proceed only if ALL of the following apply:

☐ 1. If the situation is not dangerous for the abused party or the mediator. In assessing the level of potential danger, the answers to the questions in sections 2, 3, 4, 6 and 7 of the complete Questionnaire are particularly helpful.

☐ 2. The mediation is conducted by a skilled mediator knowledgeable about domestic violence.

☐ 3. The mediator assesses that the parties have the ability to negotiate voluntarily, fairly, safely, and in good faith, with or without an attorney or advocate present for the abused party, or with or without specific conditions to address concerns for safety and ability to make decisions without coercion or fear. *See Determining Ability to Negotiate: Existence of Control, Coercion, or Intimidation (page 2).*

☐ 4. If, to ensure the ability to negotiate, the abused party requires the presence of an attorney or advocate during mediation, or a specialized process to which both parties agree, the mediation must be conducted with those accommodations. *See Specialized Process for Mediating When Domestic Violence/Control Exist (page 5).*

☐ 5. The abused party wants to mediate.

If the mediator determines that mediation should not proceed, s*ee Safe Termination of Mediation (page 4).*

2. Non-Violent and Non-Abusive and Controlling, but Either Party Otherwise Lacks Capacity to Mediate

Regardless of the existence of domestic violence or child abuse, if screening reveals any of the following, the mediator must determine whether either party lacks the ability to negotiate under any circumstances, or whether mediation could go forward under specific conditions with a skilled mediator.

- There is a history of substance abuse or mental illness that is not presently controlled.
- A party is not able to negotiate for her/himself or articulate her/his needs.
- A party is unable to reach an agreement voluntarily.

Mediation should proceed only if ALL of the following apply:

☐ 1. The situation is not dangerous for the parties or the mediator.

☐ 2. The mediation is conducted by a skilled mediator knowledgeable about the substance abuse, mental illness or other circumstances affecting a party's ability to negotiate.

☐ 3. The mediation is conducted by a skilled mediator knowledgeable about the substance abuse, mental illness or other circumstances affecting a party's ability to negotiate.

☐ 4. The mediation is conducted by a skilled mediator knowledgeable about the substance abuse, mental illness or other circumstances affecting a party's ability to negotiate.

☐ 5. The parties want to mediate.

Safe Termination of Mediation

Anytime during the course of mediation, if either party decides to withdraw, or the mediator finds that mediation is not safe because of domestic violence or child abuse, the mediation should be terminated in the following manner.

1. If domestic violence or child abuse is revealed for the first time after mediation has commenced, the mediator shall interrupt the proceeding and conduct a screening of each party separately to determine 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 fully and fairly. If the party subject to the abuse and the mediator agree that neither domestic violence nor child abuse is an inhibiting factor, the mediation shall proceed. The mediator shall discuss and plan safety precautions with the abused party. If either the abused party or the mediator determines that the mediation is inappropriate, mediation should be terminated.
2. Consult privately with the abused party to determine whether safety arrangements are necessary. If possible, make arrangements for the parties to leave separately, with the abused party leaving first and allowing reasonable time for departure. Consider whether to alert law enforcement or other security of the potential for violence and arrange for escort of the abused party to transportation. Do not reveal the destination or means of transportation of the abused party to the other party.
3. Without endangering the abused party, provide the abused party with information and referrals for assistance, including safety planning. Elicit how the abuser is likely to respond to mediation being terminated.
4. If you learn of a threat of imminent danger of physical harm to any person, take appropriate safety measures.
5. On the form that goes to the court check the box that says not appropriate for mediation. Do not provide any explanation.
6. There are two positions to consider with regard to advising the parties about the reasons for termination of mediation.
    - Some domestic violence victim advocates and professionals who work with batterers in batterer intervention programs believe that, due to safety concerns, the mediator should NOT advise the parties that the reason for termination is domestic violence or child abuse, regardless of whether the victim or the abuser discloses the violence. Other valid reasons for termination that could be provided to the parties include: mediation policies and procedures, parties too far apart in positions or interests, inability to negotiate, unwillingness to compromise, substance abuse or mental illness (if known to both parties).
    - Some mediators believe that if the abuse is disclosed by the abuser or by both parties, it is appropriate to advise the parties that the reason for termination is domestic violence. If a mediator chooses this approach, the mediator must be careful to provide each party with the same information regarding the reasons for termination and place responsibility on the abuser, without violating confidentiality. If the violence is disclosed only by the victim, the mediator should NOT advise the parties that the reason for termination is domestic violence.

Suggested Language: Termination of Mediation After Screening

To the Abused and Abusive Party

> "I have decided not to mediate this case. Many cases are not appropriate for mediation. It is my experience that with situations like yours, mediation does not work. This screening process fulfills the requirement for court ordered mediation. It is not a "failure" to terminate 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.
>
> Your options may include negotiation between your attorneys, referral to Friend of the Court for investigation and recommendation and/or motion to the court for a decision. If your dispute involves custody, parenting time, or support and you are not represented by an attorney you may contact the Friend of the Court and ask them to provide you with the forms and instructions necessary to proceed."

Suggested Language: Termination after Mediation has Commenced

> "After observing the issues between you and your interactions with each other, I know from my experience that it would be very difficult for you to reach agreements. So rather than taking up your time and resources, I am terminating this mediation. It is not a "failure" to terminate 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.
>
> Your options may include negotiation between your attorneys, referral to Friend of the Court for investigation and recommendation and/or motion to the court for a decision. If your dispute involves custody, parenting time, or support and you are not represented by an attorney you may contact the Friend of the Court and ask them to provide you with the forms and instructions necessary to proceed.

Specialized Process for Mediating When Domestic Violence/Control Exists

The following are suggestions for specialized conditions that may accommodate safety concerns, and may provide a party with the ability to negotiate and make decisions without coercion or fear.

- Take all discussions of fear and safety seriously.
- Require the presence of an attorney or advocate for the abused or vulnerable party during mediation.
- Talk with the abused party about what safety precautions she/he would like to see in place.
- Mediate the case separately with each party. Do not schedule sessions with the parties back to back.

- If not mediating separately, suggest that the abused party arrive 10 minutes after the abuser and leave 10 minutes before the abuser. Have separate waiting areas for the parties and do not leave the parties alone together.
- Allow an advocate, friend or family member of the abused party to accompany the abused party to the mediation sessions and wait in the waiting room.
- Check with the abused party between sessions to assess safety and ability to negotiate.
- Continually reevaluate the safety of the situation for the abused party and the abused party's ability to negotiate. Terminate mediation if there are concerns for the abused party's safety or if the mediator believes that the abused party cannot negotiate fairly.
- Co-mediate in order to better oversee and direct the process in difficult mediations.
- Facilitate the crafting of specific and detailed agreements to reduce the opportunity for the abuser to take advantage of ambiguities. **Mediated agreements can**:
  - 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.
  - Provide for supervised parenting time, with supervising third parties clearly identified.
  - 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 (e.g., whether the abusive party or the abusive party's attorney may telephone the abused party, whether written or electronic communications is permitted).
  - Arrange parenting time so that the parties will not meet. Drop-off and pick-up times could be different for the abused party and the abuser, so that each party will have left the drop-off site before the other arrives.
  - 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, and increase length only if things are going well. Place limits on overnight visits.
  - Prohibit the noncustodial party from drinking or using drugs before or during parenting time.
  - Require a bond to assure compliance with the agreement.
  - Limit the abusive party's access to firearms.
  - Permit refusal of parenting time upon violation of any condition of the agreement.
  - Permit cancellation of parenting time if the noncustodial party is more than 20 or 30 minutes late.
  - Specify how disputes between the parties will be resolved.
  - Build in automatic return dates for the court, or the parties with a mediator, to review how the agreement is working.
  - Require surrender of 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.

Safety Planning

A safety plan is a tool to help victims identify ways to stay safe. Most victims of domestic violence have a variety methods that have helped keep them safe in the past. **The mediator should take all discussions of fear and safety seriously.** If the mediator has any questions at all during the course of the discussion with the party, call the National Domestic Violence Hotline for consultation at 1-800-799-SAFE(7233). Following are several options to consider depending upon the situation:

1. Ensure that there is a safe and private area in the office where the mediator can speak to the abused party alone.
2. Offer the use of a phone so that the abused party can contact the local domestic violence program and/or the National Domestic Violence Hotline 1-800-799-SAFE(7233). Both of these organizations have trained professionals who are able to offer confidential services and should be able to help the abused party create a safety plan.

Suggested Language for Safety Planning Assistance

> "I am concerned for your safety. None of this is your fault. I would like you to consider contacting some professionals to help you come up with a plan to stay safe today. Most communities have organizations that provide services to survivors of domestic violence. These services often include confidential shelter, counseling, advocacy, support groups and [counseling for your children]. The phone number to our local domestic violence program is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE(7233). The National Hotline can provide you with confidential advocacy and support and also refer you to the nearest domestic violence program. Please use my phone."

3. If the abused party does not want to contact the Hotline, the mediator may want to ask the party's permission to call the Hotline for consultation. The Hotline should be able to walk the mediator through some basic safety planning 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 for Obtaining Permission to Call the Hotline:

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

4. The party may be able to identify friends or family that have been helpful in the past or who are able to offer a place to stay. The mediator should offer the use of her/her phone so that the party can contact friends or family, if the party wishes to do so.
5. Discuss with the party what she/he will do with any paperwork that she/he is taking home, especially if she/he still lives with the abusive party.

6. 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 ensure that she/he will be safe during 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?"
7. Offer the use of a phone to contact the police to file a report or to request an escort, if the party wishes.

Referral and Assistance

1. If a screener for mediation or a mediator concludes that domestic violence or child abuse has occurred, the abused party shall be provided with information about and referral to a domestic violence advocacy agency for safety planning and other services. The information shall be provided only when the other party is not present. If the mediator does not know the local shelter number she or he can get the number from the National Domestic Violence Hotline at 1-800-799-SAFE (7233).
2. The mediator should provide the abused party with information and brochures about domestic violence, child abuse, and referrals for assistance. Free general domestic violence brochures are available from the National Domestic Violence Hotline by calling 1-800-799-SAFE (7233). Local domestic violence programs also should have free brochures.
3. The mediator should discuss with the party what she/he will do with any paperwork and brochures that she/he is taking home, especially if she/he still lives with the abusive party.
4. If a person is in imminent danger, the mediator should do safety planning with that person whenever possible.

Suggested Language for Referral and Assistance

"Most communities have organizations that provide services to survivors of domestic violence. These services often include confidential shelter, counseling, advocacy, support groups and [counseling for your children]. The phone number for our local domestic violence program is _____. You can also call the National Domestic Violence Hotline at 1-800-799-SAFE(7233). 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?"

On-Going Screening for All Cases

On-going screening for domestic violence should take place in all cases. It is the mediator's responsibility to terminate mediation if she or he believes either of the participants is unable to mediate safely, competently, and without fear of coercion. Monitoring by the mediator is a continuous responsibility throughout the mediation process. 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, one party unwilling to comply with the ground rules or specialized process for mediation, or one party dominating the sessions.

If any behaviors lead you to conclude that a party may not be able to mediate safely and fairly, reconsider the *Decision Not to Mediate* (page 1). If you determine that mediation should not proceed, see *Safe Termination* (page 4).

DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION

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IS MEDITATION 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 unless requested, does not provide recommendations for resolving your dispute. 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. Mediation is confidential. Confidentiality means that the mediator cannot disclose any information that you provide unless:

- You and the other party agree that the information can be disclosed.
- The mediator informs you, and you agree in writing before mediation starts, that the mediator may disclose other information such as child abuse or threats of harm.
- You or the other party disclose child abuse or neglect, or threat of harm to another person, and the mediator has a legal responsibility to report child abuse or neglect, or threat of harm.
- 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 the number of sessions, who attended, whether or not an agreement was reached, whether or not the fee was paid, whether the parties provided information requested by the mediator, and general information necessary for program evaluation.

2. You can select your own mediator. In most cases, parties can agree who will serve as their mediator. If you and the other party cannot agree, the court will select a mediator from a roster of trained and experienced mediators.

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, and you have chosen *evaluative* mediation, you can ask the mediator to provide you with recommendations for settlement. If 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:

- be less time consuming
- be less expensive
- allow you to express all your opinions about the issues and results you want in an informal setting
- give you more control over the outcome of your dispute
- lead to fewer court proceedings after a judgment has been entered
- be less emotionally stressful
- provide a more fair outcome for both parties

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 knows about these reasons, so that your case can have a fair and safe outcome.

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 considered for mediation, you are entitled to a hearing in front of a judge to decide whether mediation is appropriate for you for any of these **three** reasons:

1. You have a Personal Protection Order (PPO).

How do I tell the court that I have a Personal Protection Order?
File the enclosed "Motion to Remove Case from Mediation"* with a copy of your PPO or information about your PPO.

2. You or the other party is involved in a child abuse or neglect proceeding.

How do I tell the court that there is a child abuse/neglect case?
File the enclosed "Motion to Remove Case from Mediation"* with any information about the child abuse/neglect case.

3. You file a "Motion to Remove Case from Mediation" because you believe that mediation will not be fair or safe for you.

What are the reasons that I can ask the court to remove my case from mediation?
A court might not order you into mediation if:

1. There are good reasons, such as: the other party has been arrested for or convicted of domestic violence; there is a pending criminal domestic violence case; 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 history of depression or attempted suicide; past attempts at mediation have failed.
2. There is reason to believe that your health or safety would be endangered by mediation.
3. You are not able to negotiate for yourself and will not have a lawyer with you during mediation.
4. There has been domestic violence and you will not have a lawyer with you during mediation.
5. The case involves child abuse or neglect.

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

You or your attorney must

- ❑ 1. Within 14 days of receiving an order for mediation file a written "motion to remove case from mediation" and a notice of hearing to remove the case from mediation. (See motion and notice in the enclosed motion packet.*)
- ❑ 2. Within 14 days of receiving an order for mediation serve a copy of your motion and notice to the other party's attorney, or to the other party if the other party is not represented by an attorney.
- ❑ 3. You may be entitled to have the filing fees waived if you cannot afford the motion fees. Ask the court mediation 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?

There are over 45 programs in Michigan offering 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 at:

***If the motion or motion packet is not enclosed, contact the court's Mediation Clerk and ask for a copy.**

At this hearing, the judge will decide if you should try mediation. If you believe that you should not have to try mediation for reasons like those mentioned above, fill out and file the motion to remove case from mediation.

April 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.1 Chapter Overview

On page 63, add the following text to the end of the first paragraph:

In *People v Wilson*, ___ Mich App ___ (2005), the Court of Appeals addressed the issue of what constitutes a "domestic violence case." The Court stated:

> "Domestic violence includes any of the assaults. Indeed, even murder may be characterized as domestic violence. Domestic violence is not a specific crime, but a description of circumstances surrounding a violent crime in which the perpetrator and victim have a pre-existing relationship that may be categorized as a 'domestic' relationship."

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.3 Audiotaped Evidence

B. Hearsay Objections to Audiotaped Evidence

2. Excited Utterance Exception Under MRE 803(2)

On page 168 before the last paragraph, insert the following text:

In *People v Walker,* ___ Mich App ___, ___ (2005), the defendant beat his live-in girlfriend with a stick and threatened to "blow her back out" with a handgun. Two hours after the beatings had stopped, the victim jumped from a second-story balcony, ran to a neighbor's house, and asked the neighbor to call the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. The defendant argued that the statements should not have been admitted because of the two-hour delay between the assault and the victim's escape, during which time the victim fell asleep and had time to "compose herself enough to jump from a second story window." The defendant also argued that this delay provided the victim with time to fabricate the assault. The Court of Appeals rejected the defendant's argument and upheld the admission of the statements as "excited utterances." The Court of Appeals reiterated the Michigan Supreme Court's holding in *People v Smith*, 456 Mich 543, 551 (1998), that there is no express time limit for excited utterances: the focus is on whether the declarant was still under the stress of the event at the time the statement was made. The Court found that the facts of this case, including the testimony of the neighbor and police officer that the victim was upset, crying, shaking, and hysterical, supported the trial court's determination that the statements were properly admitted. *Walker, supra* at ___.

The Court of Appeals also found that the crime victim's statements made to the neighbor and police officer did not constitute "testimonial statements" for the purposes of the Confrontation Clause. The defendant argued that pursuant to *Crawford v Washington,* 541 US 36 (2005), admission of the victim's statements violated the Confrontation Clause because they were "testimonial statements." The Court rejected the defendant's argument and stated:

> "We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause."

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CHAPTER 3

Common "Domestic Violence Crimes"

3.8 Misdemeanor Stalking

B. Legitimate Purpose Defense to Stalking

On page 83 after the last paragraph, insert the following text:

In *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005), the Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq*. MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a

licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

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CHAPTER 3

Common "Domestic Violence Crimes"

3.6 Deferred Sentencing for Domestic Assault and Parental Kidnapping

A. Deferred Proceedings Under the Domestic Assault Statutes

On page 76 at the end of the paragraph beginning "Orders of probation . . . ," insert the following text:

Effective January 1, 2005, 2004 PA 220 amended MCL 769.4a(3). The order of probation under MCL 769.4a may require the defendant to participate in a drug treatment court.

CHAPTER 3

Common "Domestic Violence Crimes"

3.6 Deferred Sentencing for Domestic Assault and Parental Kidnapping

B. Deferred Sentencing in Parental Kidnapping Cases

On page 79, insert the following text after the first sentence of the second paragraph:

The "terms and conditions" of the probation order may include participation in a drug treatment court. MCL 750.350a(4).*

*Effective January 1, 2005. 2004 PA 223.

CHAPTER 4

Promoting Safety in Criminal Proceedings

4.14 Sentencing Domestic Violence Offenders

B. Choosing a Sentencing Option — Conditions of Probation

On page 151, after the second paragraph, insert the following text:

Effective January 1, 2005, the court may also require a probationer to participate in a drug treatment court. MCL 771.3(2)(g).*

*2004 PA 219.