

PREAMBLE TO GUIDELINES FOR MEDIATION IN CASES INVOLVING ISSUES OF DOMESTIC VIOLENCE

The Committee on Ethics of the Georgia Commission on Dispute Resolution studied the issue of mediation in cases involving allegations of domestic violence. It is apparent that mediation is a process that continues to evolve. Those who believe in the value of mediation hold strong views about whether it is appropriate in cases involving issues of domestic violence. Many feel that mediation of some issues is appropriate. It is also clear that advocates of battered women have equally strong views about mediation's inappropriateness in these cases.

The Committee on Ethics conducted a hearing on June 28, 1994. Experienced mediators, the Chair of the Committee on Family Violence, judges, and a program director participated in the meeting. The Committee also read a number of articles and studies from other states concerning this issue. The Director has talked with advocates for battered women and men who have worked with batterers' groups for years. From all this investigation and discussion, the Committee presented certain guidelines to the entire Commission, which were adopted at the December 1994 meeting of the whole Commission.

The Committee on Ethics found that there are two diverse and very well-reasoned arguments as to whether mediation is appropriate for cases that involve domestic violence or allegations of serious domestic violence. The first is that mediation is never appropriate in these cases by the very nature of and premise of mediation. The other is that if the cases are carefully screened and the mediator is trained to handle these cases, mediation can be used to reach a settlement of some issues. It was clear from all sources that violence itself cannot be the subject of mediation and that mediation is not a substitute for counseling, education, and legal sanctions. This led to the clearest guideline, that no criminal cases involving domestic violence should be referred to mediation. The violent act or acts must be dealt with through the actual court procedure in order to emphasize the seriousness of the act and the fact that domestic violence, where proved, is indeed against the law.

The Committee does not agree with those who believe that mediation is never appropriate in cases involving domestic violence. The Committee finds compelling the argument that to automatically exclude these cases denies a victim of domestic violence the opportunity to use what can be a very worthwhile alternative to the battleground of the courtroom. Thus, the Committee recommended Guidelines that reflected this philosophy, and the Commission adopted them in 1995.

The Strategic Planning Committee of the Georgia Commission on Dispute Resolution reviewed the Guidelines for Mediation in Cases Involving Issues of Domestic Violence in 2002-2003. The Committee adheres to the general principles expressed in the 1995 guidelines that cases involving allegations of domestic violence should not be automatically excluded from the mediation process. The Committee focused on the intake and screening procedures required in these guidelines. Based on information from programs across the state, the Committee proposed amendments to the guidelines that would: allow all alleged victims of domestic violence to choose, based upon informed consent, whether or not to utilize mediation; enable ADR programs to more consistently apply the screening guidelines; clarify the nature of informed consent to

participate in mediation; provide that all alleged victims of domestic violence are referred to a specially trained mediator; and, place the responsibility of assessing the benefit of participating in the mediation process on the alleged victim and her/his attorney rather than the program director.

Thus, the Commission on Dispute Resolution approved the following revised guidelines on May 20, 2003 to be implemented by all the ADR programs no later than November 1, 2003.

**GUIDELINES FOR MEDIATION IN CASES INVOLVING ISSUES
OF DOMESTIC VIOLENCE¹**

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

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

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

1. Criminal cases that involve domestic violence should not be referred to mediation from any court.

2. Cases arising solely under the Family Violence Act should not be referred to mediation from any court.²

3. All court programs should screen domestic relations cases for domestic violence through intensive intake.³ Those domestic relations cases referred to mediation directly from the bench are also subject to the domestic violence screening process. Intake procedures should be designed to identify those cases which involve allegations of domestic violence.

The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution will develop guidelines to assist courts in designing appropriate intake procedures and training for intake personnel.

Existing programs should send a description of present intake and screening procedures to the Georgia Commission on Dispute Resolution for review. New programs should include such a description on any rules submitted to the Commission for approval.

¹ Approved by the Georgia Commission on Dispute Resolution on May 20, 2003, to replace the Guidelines adopted April 6, 1995.

² A case filed as a divorce action or other domestic relations matter that contains a count under the Family Violence Act is not precluded from referral to mediation and should be screened pursuant to these guidelines; provided, however, that issues related to protection from violent behavior are not an appropriate subject of mediation or negotiation. This provision was added by the Commission on Dispute Resolution on March 22, 2005.

³ While it is intended that the intake and screening protocol will be routinely applied to all domestic relations cases, programs can also use the screening process when allegations of domestic violence arise in other types of cases such as juvenile court and probate court matters.

4. When intake and screening procedures are in place ⁴ and there are mediators available who have advanced domestic violence training, and the alleged victim chooses to proceed with mediation, those cases may be referred to mediation. However, only mediators who have received special training should mediate such cases. The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution will assist courts in developing appropriate training.

5. Every program should have no less than two mediators who have received special training in domestic violence.

6. If allegations of domestic violence arise in the context of a mediation, any mediator who has had no special training in handling cases involving domestic violence should in most instances conclude the mediation and send the case back to the court. In concluding the mediation, the mediator should take precautions to guard the safety of the participants, particularly the alleged victim, and of the mediator.

⁴The term “intake” refers to the procedure for identifying cases involving allegations of domestic violence, and the term “screening” refers to discussion with the alleged victim to determine whether s/he chooses to proceed with mediation.

GUIDELINES FOR SCREENING FOR DOMESTIC VIOLENCE
BY THE COURT AND THE ADR PROGRAM

Approved by the Georgia Commission on Dispute Resolution: May 20, 2003

I. SCREENING

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

All ADR programs should seek to educate the public about mediation in general and about the factors which should be considered in gauging the appropriateness of mediation in a case involving allegations of domestic violence. Mediation brochures and parenting seminars for divorcing couples may be vehicles for dissemination of this information.

A. PHASE ONE

Initial Screening of All Domestic Relations Cases

(a) At the initial screening stage, the ADR program should determine whether either party has filed a petition under the Family Violence Act.

For purposes of these guidelines, a petition filed pursuant to the Family Violence Act against the other party is considered an indication of domestic violence, as is any verbal or written statement alleging domestic violence made in pleadings or in the screening process.

If there is or has been a petition filed under the Family Violence Act, the program should proceed to Phase II of the screening process.⁵

(b) If there has been no petition for a protective order under the Family Violence Act, it is the responsibility of the program to continue with Phase I of the screening process and inquire about domestic violence in every domestic relations case. This screening inquiry may be accomplished by various means such as: contact with the attorneys and parties; written questionnaires; a “check-off” question on a referral to mediation notice or a written communication to the parties that they should contact the program if there are any allegations of domestic violence. If programs review pleadings for allegations of domestic violence, the absence of such allegations

⁵ A case that is filed solely pursuant to the Family Violence Act should not be referred to mediation, and, if referred, should be returned to the court process as inappropriate for mediation. The Guidelines apply to domestic relations cases, other than cases filed solely under the FVA, that may contain a claim for relief under the FVA among other claims. The purpose of Subsection (I)(A)(a) is to indicate that a petition for or order granting relief pursuant to the FVA, whether past or pending, is a clear indication to the screener that domestic violence allegations are or have been a factor in the case that has been referred to mediation, and that the screener should proceed with the informed consent interview process with the alleging party so that the party can make a decision about whether or not to participate in mediation. This provision is not intended to imply that cases filed solely pursuant to the FVA should be referred to mediation. This explanatory footnote was added by the Commission on Dispute Resolution on March 22, 2005.

in the pleadings does not end the screening inquiry. Programs that screen pleadings for domestic violence must also use other means of screening in every domestic relations case. It then becomes the responsibility of the parties and their attorneys to inform the ADR program of any domestic violence allegations. When the party and/or attorney has indicated that there may be domestic violence, it is the responsibility of the program to follow up on these indications of domestic violence and continue with Phases II and III of the screening process.

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

(d) If there is an indication of domestic violence in Phase I, then the program will contact the party alleging domestic violence to obtain further information as set forth in Phase II. If that party is represented by counsel, her or his attorney must be contacted first and given an opportunity to participate in further screening should s/he choose to do so.

B. PHASE TWO

Further Screening Where There Is an Indication of Domestic Violence

1. Further Screening: The means by which a program elicits this screening information is to be determined by each program and, ultimately, approved by the Georgia Commission on Dispute Resolution. Screening techniques should include personal contact, either by telephone interview or face-to-face interview. The person conducting the screening interview shall be a trained mediator who has had advanced domestic violence mediation training. In selecting the screening technique, personnel should be aware that the screening process itself could place a victim at risk, and must therefore ensure that the screening is conducted under safe and confidential circumstances.

If direct contact reveals that there is in fact no allegation of domestic violence (because the indication in Phase I resulted from a miscommunication, clerical error, etc.), then the case may be scheduled for mediation in the normal manner. If there is an allegation of domestic violence, the process continues in order to ensure that the alleged victim is fully informed about the mediation process before making a decision whether to proceed with mediation.

2. Informed Consent:

Informed consent involves two aspects of information to be discussed with the alleged victim: (1) information about the mediation process; and (2) information about how the individual's circumstances may affect her or his ability to function in the mediation setting. Because the dynamics of a relationship characterized by a pattern of violent and abusive behavior may manifest in mediation, an alleged victim of such behaviors is provided with choice in order to avoid further victimization or endangerment.

The Ethical Standards for Neutrals (Appendix C, Chapter 1, Alternative Dispute Resolution Rules) place primacy on the principles of self-determination and voluntariness. These standards also require that parties be fully informed about the mediation process. In keeping with these principles, and the necessity of protecting participants, an alleged victim of domestic violence

will be given the opportunity to exercise choice about whether to proceed with mediation prior to assignment of the case. To ensure that the alleged victim's choice to proceed with mediation is self-determined, s/he must be provided with sufficient information about the process to make an informed choice. At a minimum, the nine items set forth in "Ethical Standard I. Self-Determination/Voluntariness, A" must be explained. This information may be conveyed informally in conversation between screening staff and the alleged victim, and may be discussed in conjunction with the following screening questions. (Please see Appendix A of this document.) While mediation is oriented towards the future, past and/or present patterns of party interaction can have a significant impact upon the process. Questions about party interaction are a valuable tool for ensuring that the alleged victim has enough information about the mediation process to make an informed decision about whether s/he wishes to proceed with mediation. For this reason, ADR programs should make a good faith effort through some screening technique to discuss the following questions with the party alleging domestic violence. The purpose of this process extends beyond obtaining information and should assist the party in focusing on barriers and the capacity to mediate.

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

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

C. PHASE THREE **Referral to Mediation if Domestic Violence Alleged**

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

- (a) If the person alleging domestic violence declines mediation, the case will be released for process through the court system, and the court will simply be notified that mediation was not appropriate.
- (b) If the alleged victim chooses to proceed with mediation, the case should be sent to mediation unless the program or the court determines that there is a compelling reason (such as extreme violence) that this particular case should not be referred.
- (c) If the party alleging domestic violence chooses to mediate, the program must take appropriate steps to ensure that the safeguards set forth in Section II herein are in place for the mediation session.

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

1. The program should exercise care to avoid disclosure of the parties' place of residence by either the program staff or the mediator.
2. The mediator conducting the session should have received special training in dealing with issues of domestic violence in the context of mediation.
3. The alleged victim should have an attorney or advocate available for the entire session or sessions. If the alleged victim does not have an attorney, s/he should be invited to bring an advocate or friend to the mediation session to be available for consultation and to see him/her safely to his/her car.
4. Arrangements should be made for the parties to arrive and leave the mediation session separately.

5. The session itself should be made safe through adequate security and any other necessary means.

6. Arrangements should be made for the session to be held entirely in caucus if that is necessary.

7. At the earliest possible point in the mediation the mediator should explore power dynamics in order to 1) confirm the comfort of each party with the mediation format and 2) confirm the ability of each party to bargain for him/herself.

III. CONFIDENTIALITY IN SCREENING FOR DOMESTIC VIOLENCE

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

APPENDIX A
Guidelines for Phase II Screening

I. Contacting the alleged victim:

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

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

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

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

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

II. Information to be included in the screening interview:

- a. Neutrality: an explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome; explanation that the mediator will not allow abusive behavior of which she or he is aware and will have skills in balancing power, but will not in any way serve as an advocate for the alleged victim.
- b. Confidentiality: an explanation of confidentiality of the mediation session and any limitations on the extent of confidentiality;
- c. Termination: an explanation that the mediation can be terminated at any time by either party or the mediator;
- d. Legal counsel: an explanation that the alleged victim may bring an attorney to the mediation or consult her/his attorney by telephone during the mediation as needed; and an explanation that if s/he does not have an attorney, s/he may bring another advocate or friend;

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