MEDIATION: INFORMED CONSIDERATIONS IN FAMILY LAW CASES WHEN DOMESTIC VIOLENCE IS AN ISSUE

Reasons for mediation over litigation

- Costs less
- Parties control discussion and outcome
- More personal attention
- Faster resolution
- Greater confidentiality
- Greater flexibility
- Protects children from conflict
- Less adversarial
- More creative and tailored
- Greater post-divorce stability

Goals of mediation?

- A major goal of mediation is to provide the parties to a dispute with a forum in which to be heard and to understand the other party’s perspective.
- The parties to the mediation make the decision, not the mediator;
- The success of mediation as a process of facilitated negotiation depends on the disputants’ ability to assess their situation and to make decisions about their own behaviors in settling the dispute.
Understanding Mediation

- Facilitator not Decider or Recommender
- Not a 3rd party evaluation of case
- Mediators are trained in the mediation process
- Mediators may or may not be trained about dynamics of domestic abuse

Pros and Cons in Family Law Cases

- Limited time and resources devoted to mediation not effective for custody or visitation dispute.
- Venting in mediation may cause more problems than it helps.
- Complexity of family law matters may require attorney mediators.
- Mandatory mediation has been criticized as interfering with the attorneys’ proper representation of their clients.

Mediation and Domestic Violence

- Varying degrees of abuse;
- Need a voluntary, un-coerced agreement;
- Often impossible in dv cases given the inherent power imbalance between an abuser and victim;
- Fear vs. Entitlement
- If a relative equality of power cannot be achieved, mediation is an inappropriate method of dispute resolution for the situation.
  - Academy of Family Mediators and the Association of Family and Conciliation Courts, 1995;
  - American Bar Association Family Law Section Task Force, 1997;

Behavioral Definition of Domestic Violence

- A pattern of behaviors including a variety of tactics that occur over time.
  - Some physically injurious and some not.
  - Some criminal and some not.
- Assaultive and coercive behaviors, including physical, sexual and psychological attacks, technological abuse, as well as economic coercion.

Domestic Violence is NOT Caused By:

- Anger
  - Using anger to get power & control
  - Not an anger management problem
- Stress
  - Defense in other crimes?
- The Victim: DV is within the control of the abuser, not the victim
  - Removes batterer’s responsibility
  - Supports minimization, denial and blame

Power and Control Wheel
Control, Control, Control

- Control is exerted over the battered victim’s movements, emotions, thoughts and potentially every aspect of her life.
- Must understand the pattern of behavior over time to understand the victim’s experiences and responses.

Psychological Assaults

- Threats of violence and harm
- Attacks against property or pets and other acts of intimidation
- Emotional abuse
- Isolation
- Use of children
- Minimization, denial and blame
- Looks different depending on status
  - E.g. victim with a disability or immigrant victim

Rape and Sexual Assault

- A 2007 study funded by NIJ on women who had been physically assaulted by an intimate partner found that two-thirds of the women had also been sexually assaulted by that partner. (NIJ Journal No. 256, Jan 2007)
- Complicated in DV cases by:
  - Failure of many victims to realize they have the right to say no to an intimate partner;
  - The reluctance of many victims to describe the assault to police, prosecutor, judge;
  - Slow recognition of legal system to understanding marital rape.
- Devastating psychological and physical consequences.
Coercive Control

- A pattern of coercive control that may be primarily made up of psychological abuse, sexual coercion, or economic abuse, that is punctuated by one or more acts of frightening physical violence, credible threat of physical harm, or sexual assault.
- Intimidation, isolation and control

Domestic Violence vs. Coercive Control

- Assault crime vs. Liberty crime
- Discrete acts vs. Ongoing
- Gender neutral and may be mutual vs. Gender specific
- Violence to hurt vs. Violence to subjugate
- Measured by frequency, severity & means vs. Measured by entrapment

The Internalization of Rules over Time: The Process of Self-Censorship

- As time goes on in a battering relationship, specific rules and their attached consequences give way to a general climate of increasingly subtle control, where the batterer needs to do less and less to structure his family’s behavior.
Understanding the Culture of Battering

- Subtle phrases and modes of interaction;
- A gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse.
- It is a threat that carries weight because similar threats with their corresponding consequences have been carried out before, perhaps many times.

Mediators must also consider that the risks associated with domestic violence extend to the children

- Domestic violence is one of the leading risk factors for the physical and emotional safety of children
- ¾ of children who witness abuse directed at their mothers exhibit clinically significant behavior problems
- Boys who witness their father’s violence may learn to be abusive and are 10 times more likely than boys from nonviolent homes to engage in spouse abuse when they are adults
- Of men who abuse women, 40% to 60% also abuse children
  (Office of Juvenile Justice and Delinquency Prevention. (November 2000)).

Children and Domestic Violence

- Abuse is likely to start or escalate during pregnancy.
- About half of the children growing up in violent homes are also physically abused by the batterer.
- Fathers who batter mothers are 2 times more likely to seek sole physical custody of their children than are non-violent fathers.
How frequently will violence be an issue?

- Research indicates 10% to 50% of women entering divorce mediation have experienced domestic violence.

- Understand separation assault
  - The risk of homicide is highest in the first two months of separation; (Wilson & Martin, 1993)
  - 73% of battered women seeking emergency medical services sustained injuries after leaving the batterer; (McGee, 2005)
  - Nearly 75% of reported assaults take place after the separation of the parties (US Dept. of Justice)

Screening for Domestic Violence

- Can’t rely on reports to law enforcement or medical personnel
  - Domestic violence is one of the most chronically underreported crimes.
  - Only approximately one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalkings perpetrated against females by intimate partners are reported to the police.

- MUST ASK SPECIFIC QUESTIONS ABOUT at least two separate determinations:
  - History of Abuse
  - Current Abuse

- Separation abuse is common and frequently life-endangering.

Domestic violence screening

- Clients should be interviewed separately and in a safe environment to assess:
  - The risks and/or threats of homicide and suicide
  - The safety needs of their children
  - Each client’s ability to mediate voluntarily and competently
  - The extent of power imbalances and their impact on the mediation process
  - The need for safe and appropriate alternatives to mediation
  - Once parties enter mediation, the mediator has an obligation to continue screening for abuse and assessing the parties comfort level with the mediation process.

Screening (Continued)

- Ask explicit questions about specific incidents of pushing and hitting
- Look for nonverbal cues and other body language for evidence of intimidation and power disparities
- When domestic violence is not recognized and explicitly taken into account, mediators allow the most critical factor in the parties’ situation to go unacknowledged.
- Simply asking directly about the occurrence of abuse has been shown to increase reporting in a medical setting from 7% (for written self reports) to 29%.

Compatible when dv present?

- “Mediation is a process by which parties in equivalent bargaining positions voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. A process which involves both parties mediating the issue of violence implies that the victim is somehow at fault.”

Yes? No? Maybe?

- Controversial.
- Some believe that mediation is never appropriate when domestic violence has taken place, and others believe that it is always appropriate and should be mandatory.
- Perhaps there’s a middle ground: mediation is sometimes appropriate but that this decision must be made on a case-by-case basis in consultation with the abuse survivor.
Mediation is predicated on the assumption that the parties have a relatively similar degree of decision-making power in the situation. However, domestic violence arises under circumstances where an imbalance of power is entrenched in the relationship. Perpetrators of domestic violence may use the legal system to further manipulate and abuse their victims. Mediation may endanger victims by placing them in a situation where they have to see their abusers in person and discuss issues that threaten the abuser’s sense of control.

The decision to mediate

- The ultimate decision about whether to mediate must rest with the abuse victim.
- In order to make an informed decision, the victim will need to examine her personal situation and compare the specific options actually available to her.
- These considerations and options will vary from case to case.

Mediation with history of dv—potential benefits for certain cases

- Trained and experienced mediators who employ a variation of the standard mediation process.
- Modifications to the mediation process to address concerns about mediation of domestic violence cases.
  - Include victim advocates or the victim’s attorney: individuals who balance negotiating power.
  - Private caucusing with the parties to encourage disclosure about intimidation or abuse and check on the victim’s safety.
  - Use of prerequisites to mediation, such as counseling or protective orders to encourage victims and abusers to obtain outside help.
  - Screening by mediators to determine whether there has been abuse in the relationship.
Only empowering when:

- Survivor understands the process and agrees to mediate;
- The mediator understands DV and screens for it in a meaningful way; and
- Safety planning is part of the mediation process.

Rights participants to mediation should have:

- Have the right to an impartial mediator, who continues to evaluate his/her impartiality throughout the process
- Have the right to participate in mediation with support of an attorney and/or a support person
- Have the right to request that they be permitted to “opt-out” of a court ordered mediation, or not participate in mediation if there is no court order
- Have the right to have appropriate safety measures implemented
- Have the right to have an attorney review any proposed settlements reached in mediation
- Have the right to suspend or terminate the process
- Have the right to hold the mediator to standards of professional conduct, and to complain to appropriate authorities when that does not happen

Mediation with history of dv-potential serious consequences for certain cases

- Some research has found that battered women were more likely to be abused after separation if they went through mediation rather than adjudication with lawyers.
- The study reported that attorneys were more likely than mediators to use particular strategies to “challenge” the batterer.
- Enlisting law enforcement through orders of protection or police involvement.
Potential mediation concerns for survivors

- Access by abuser to survivor at known place and time/security concerns
- No appeal
- Potential for coercion -- imbalance of power
- One more person for the abuser to "charm"
- "Looking forward" doesn't address/acknowledge the abuse or require abuser accountability
- Fear of retaliation
- "Opting out" makes survivor look uncooperative
- If goal is settlement, survivor may be asked to or feel like she has to give up too much

Mediation and safety

- If not carefully structured, mediation can endanger the victim’s physical safety.
  - Abused parties are in the best position to assess their safety and to know whether mediation is a viable option for them.
- Court personnel, attorneys and mediators should be trained about domestic violence.
- Program policies should allow the mediation process to be stopped if the abused party believes her safety is jeopardized or if the abuser is using the process for dubious motives.
- The mediation location should be safe.
- Escort to and from the mediation location should be arranged for the abused party if she feels it is necessary.

Shuttle or Separate Mediation

- Shuttle Mediation: separate the parties into different rooms, with the mediator moving between the two rooms during the negotiations.
- Separate mediation: involves the parties appearing in the mediator’s office on completely different days.
- In both cases, the victim may be more at ease and she can rely on the mediator to transfer information between the parties.
- However, neither of these forms of separate mediation will negate the effect of the past fears of the victim, nor her fears of what may occur in the future.
Assignment of cases for trial or alternative dispute resolution

- In Wyoming, a district court may, or at the request of any party shall, assign the case to mediation.
- There is no opt-out provision set forth in the rule nor are there minimum requirements other than the person assigned to conduct the dispute resolution be an active judge or to a retired judge, retired justice, or other "qualified person."
- W.R.C.P 40(b).

Court Sanctioned Mediation (ABA Policy)

- Mediators must be properly trained in identifying victims of domestic violence and how to mediate properly under such circumstances.
- Victims are the best source for determining the threat of the perpetrator to the victim in mediation and must be given the option to opt-out of mediation at any time before or during mediation.
- In a proceeding concerning the custody or visitation of a child if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.

ABA Commission on Domestic Violence – Policy 00A109B

ABA Model on DV & Mandatory Mediation

- 1. A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties.
- 2. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:
  - a. Mediation is requested by the victim of the alleged domestic or family violence;
  - b. Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
  - c. The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.
ABA Model on DV & Mandatory Mediation

- The American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.

Recommendations

- Appropriate safety measures should be undertaken.
- It should be a voluntary, not mandatory, option for abuse survivors.
- Mediators should be trained to screen for and otherwise recognize abuse.
- Specialized training should be offered.
- Specialized procedures for individual cases.
- Sufficient time and resources necessary.

When fairness is not possible, mediation is not appropriate.
Thank You

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