



MEDIATION OF DISPUTES INVOLVING DOMESTIC VIOLENCE

Adopted at the OAFM Annual General Meeting, June 1994. Amended by unanimous Board Resolution October 27, 2013. Many of the concepts and recommendations come from the "Report from the Toronto Forum on Woman Abuse and Mediation, June 1993".

INTRODUCTION (FROM TORONTO REPORT)

History:

In June of 1991, the Ontario Association for Family Mediation launched an effort to involve North American professional dispute resolution associations in the development of joint policy statements regarding women abuse and mediation. This effort was a direct response to the concerns raised by women's and children's advocates. In May of 1992, 14 mediators representing officially and unofficially the Academy of Family Mediators, Family

Mediation Canada, the Ontario Association for Family Mediation and the Society of Professionals in Dispute Resolution met with approximately 50 women's and children's advocates for the purpose of hearing their serious concerns about mediation in cases of abuse. Representatives of the black, native, immigrant and handicapped women's communities were invited to address the additional concerns of these groups. In March of 1993, representatives of most major family mediation associations met with several leaders and front line workers who assist abused women and children, including women of colour, immigrant women and men who batter. Together they prepared joint recommendations for presentation at the 1993 meetings of the mediation associations. It was agreed that these recommendations would address primarily:

1. the education and training of mediators,
2. the skilful screening of candidates for mediation,
3. safety issues in mediation,
4. alternatives to mediation for abused women.

The concern behind these recommendations was the alarming police statistics that show that more than 95% of complaints to police about abuse are made by women against male perpetrators. A recent survey by Statistics Canada revealed that approximately half of all women have experienced at least one

incident of violence since the age of sixteen and 25% of all women have experienced violence at the hands of a current or past marital partner. This incidence is higher in separated or divorced women.

Approved by the Board April 30, 2016

The Toronto Forum concluded that “violence against women and its impact on children continue to pose serious questions for dispute resolution professionals and the practice of mediation.

Women’s advocates, mediators, mental health workers, lawyers and the judiciary are increasingly working together to understand the complex consequences of women abuse. In recent years,

efforts at dialogue and collaboration have increased among mediators and women’s advocates. They are starting, albeit cautiously, to address co-operatively and constructively the benefits and risks associated with mediation and the unique needs of abused women”.

A Word about Language:

The Toronto Forum chose to use the phrase “Women Abuse” to highlight the fact that complaints about physical abuse, stalking and endangerment in intimate relationships are made primarily by women against men. Where abuse is directed at men by women or where abuse occurs in same sex relationships, the same principles and safeguards must apply. Throughout the rest of this document the term domestic violence or abuse will refer to any woman, man or child who experiences the use or threat of physical, psychological, emotional or economic intimidation, coercion or force in an intimate relationship. The concern in mediation is the impact that abuse has on its victim. Abuse functions to secure power and control for the abuser and to undermine the safety, security, self esteem and autonomy of the abused person.

Abuse is defined broadly to include, but not be limited to:

1. physical violence, including assault (pushing, shoving, slapping, choking, hitting, biting, kicking, etc);
2. sexual assault;
3. kidnapping, confining;
4. use of or threat with a weapon;
5. threats against children;
6. unlawful entry;
7. destruction or theft of personal property;
8. violence against pets;
9. stalking, harassment;
10. psychological and verbal abuse including sarcastic; degrading and humiliating comments and name calling;
11. controlling and/or manipulative behaviour;

12. withholding of economic and other resources;

13. penalizing the abused person for asserting his/her independence or autonomy, etc.

The following standards of practice acknowledge that “parties to mediation must be able to negotiate safely, voluntarily, and competently in order to reach a fair agreement. Mediation cannot be fair if one of the parties is unable to mediate effectively and competently. “Abuse in intimate relationships poses serious safety risks and may significantly diminish a person’s ability to mediate”. For this reason, mediators need to identify “which cases are inappropriate for mediation, which are appropriate for specialized mediation and which may proceed in the usual way”.

OAFM SAFETY STANDARDS

Assumption: Mediation in cases of Domestic Violence is probably inappropriate.

Family mediation cases in which there is or has been domestic violence are complicated and can be dangerous to the participants and the mediator. Therefore, beginning mediators and mediators

not trained or experienced in domestic violence should not accept referrals of these cases, but rather should refer them for screening to a more appropriate resource (such as a lawyer or woman’s advocate) or to an experienced mediator who has considerable professional experience in dealing with cases involving domestic violence. Another choice would be for an inexperienced mediator to co-mediate with someone who has considerable professional experience dealing with domestic violence in order to screen for appropriateness.

1. Parties to mediation must be able to negotiate safely, voluntarily, and competently in order to reach a fair agreement. If the level of domestic violence is sufficient to jeopardize a party’s ability to negotiate without fear of duress, the case cannot be mediated. The criterion should be the victim’s ability to participate effectively.

2. There must be no mediation concerning the violence, itself. For instance, an offer to stop the abuse in exchange for something else cannot be allowed in the mediation process.

3. When safety is an issue, the mediator’s obligation is to provide a safe environment for cooperative problem-solving or, when this does not seem workable, to help the clients consider more appropriate alternatives.

4. Above all, the mediator must promote the safety of all participants in the mediation process and its outcome.

OAFM STANDARDS FOR ASSESSING WHETHER MEDIATION MAY BE APPROPRIATE

1. Prior to commencing mediation, all clients must be screened for any occurrences of abuse and/or power imbalance to determine which cases are inappropriate for mediation, which require additional safeguards, in addition to, or instead of mediation, and which should be referred to other resources.

- ❖ Conduct initial screening separately with the parties. This could be done a variety of ways. For example, preliminary screening could take place within a brief telephone contact. This must be supplemented by a face-to-face interview, and may include using a structured questionnaire, basic information can be gathered which includes details about any history of abuse. If screening is not done separately, a victim may be unwilling to reveal the presence of abuse and/or may be placed at risk for revealing the abuse.
- ❖ Screening must continue throughout the mediation process.

2. The issue of voluntariness is critical when it comes to creating a safe place for couples to meet and negotiate.

- ❖ OAFM recommends that mediation be voluntary on the part of the participants. It would be acceptable to mandate couples to orientation sessions at separate times during which information could be given about available options for resolving family law disputes (litigation, mediation, arbitration, custody assessments, lawyer assisted negotiation, etc. and about the impact of separation and divorce on parents and children).
- ❖ Inquiries about abuse must be made during the separate orientation sessions, before mediation is offered as an option.

3. Clients should be strongly encouraged to consult with lawyers prior to mediation and certainly before an agreement is finalized.

4. Mediators must be knowledgeable about abuse. Training for mediators needs to include the following:

- ❖ Issues related to physical and psychological abuse and its effect on family members;
- ❖ The impact that abuse (including witnessing abuse) has on children;
- ❖ Effective techniques for screening, implementing safety measures, and safe termination;
- ❖ Referral to appropriate resources, in addition to, or instead of mediation;
- ❖ Sensitivity to cultural, racial and ethnic differences that can impact the mediation process that may be relevant to domestic violence.

5. Where a decision is made that mediation may proceed, mediators need to meet standards of safety, voluntariness, and fairness. When mediators have concerns, they should inform their clients that they are not neutral about violence or safety. Mediators should inform clients that they have a positive obligation to report past or present child abuse and threats of future abuse to any of the participants.

Procedural guidelines

1. Obtain training about abuse and become familiar with the literature.

2. Never mediate the fact of the abuse.
3. Never support a couple's trading non-violent behaviour for obedience.
4. Set ground rules to optimize the protection of all parties
5. When appropriate and possible, arrange separate waiting areas and separate arrival and leaving times, permitting the victim to arrive last and leave first with a reasonable lag in time for safety purposes.
6. Use separate meetings throughout the mediation process when appropriate, necessary, and/or helpful.
7. Consider co-mediation with a male/female mediation team, as an option.
8. Allow a support person to be present in the waiting room during screening, and/or during the mediation session.
9. Maintain a balance of power between the couple, and, if this is not possible, terminate the mediation process and refer the couple to an appropriate alternative. Such alternatives might include shelters, therapists, abuse prevention groups, and attorneys.
10. Where fairness of outcome may be an issue, the mediator should refer the clients to their counsel, financial advisor, support person, or other relevant resource for information and advice.
11. Terminate the mediation if either of the participants is unable to mediate safely, competently, and without fear or coercion. Precautions should be taken in terminating to assure the safety of the parties. For example, the mediator should not reveal information to one party or to the court that could create a risk for the other party.
12. Consider offering a follow up session to assess the need for a modification of the agreement.

THE OAFM BOARD AFFIRMED THE FOLLOWING GUIDELINES:

- ❖ OAFM encourages its members to work with the diverse cultural and ethnic groups serving adults and children to improve public awareness and the development of a wider range of options and services for victims of abuse.
- ❖ OAFM agrees to incorporate this policy within their standards of practice outlining the conduct expected of mediators in cases of abuse and clarifying that mediators must not be neutral with regard to violence or safety. The Standards of Practice should reflect that safety must take priority over neutrality.
- ❖ OAFM agrees to work with government to develop standards to govern the practice of mediation.

- ❖ OAFM requires all Accredited Members to participate in a minimum of fourteen hours training on domestic violence including screening, safety measures, safe termination, and alternatives to mediation, when mediation is not appropriate.