



JUDICIAL ROUNDTABLE DISCUSSION: MEDIATION
Summary of the Roundtable Proceedings
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JUDICIAL ROUNDTABLE DISCUSSION: MEDIATION Summary of the Roundtable Proceedings

EXECUTIVE SUMMARY

This report provides a summary of the proceedings at the National Judicial Institute on Domestic Violence (NJIDV) Judicial Roundtable Discussion on Mediation. An interdisciplinary group of stakeholders convened for 1.5 days to discuss concerns associated with the use of mediation in cases where domestic violence is an issue, research on the practice of mediation across the country, the limits, value and potential of alternative dispute resolution processes to meet the needs of victims of violence, and how the family court structure can improve to support the enhancement of mediation in cases of domestic violence, if deemed appropriate.

At the conclusion of the discussion, it was apparent that stakeholders' concerns around the use of mediation in domestic violence cases persist, in part due to widespread challenges within the court and its processes generally. Nevertheless, participants did reach some consensus on how to increase safety for victims of domestic violence during mediation.

Participants were substantially in agreement, with some dissent, that mediation may pose a risk for victims of domestic violence due to the possible imbalance of power between the parties in a coercively controlling violent relationship. However, participants were also in agreement that mediation may meet the needs of domestic violence victims if it is voluntary, informed, and includes the following additional safeguards:

- Mediators are educated on domestic violence and cultural competency;
- Screening for coercively controlling violence occurs before mediation so that all parties are fully aware of the circumstances and options in advance of

participation (however, there is diversity of opinion over whether mediators or third parties should conduct the screening); and

- The process is flexible and individualized based on participant needs (such as use of shuttle mediation, if parties need to be separated during the process).

All participants agreed that cross-training on mediation, the dynamics of domestic violence, and the implications of mediation processes for domestic violence cases is essential, for mediators, judges and court personnel. Participants advised that OVW should assist the field and support the enhancement of mediation through the development of guiding principles on mediation in domestic violence cases.

OVERVIEW OF THE ROUNDTABLE

Roundtable participants included judges presiding on family, juvenile, magistrate, and criminal court benches, retired judges, mediators, court-sponsored dispute resolution services staff, law professors, public defenders, advocates against domestic violence, policy advisors, social science analysts, and representatives from the Office on Violence Against Women (OVW), U.S. Department of Justice.

The roundtable was facilitated by Judge Susan Breall, Unified Family Court, Dependency Department, Superior Court of California, County of San Francisco; and Judge Marshall Murray, Lead Judge, Family Court Division, Milwaukee County, Wisconsin, Court.

Judge Breall and Judge Murray offered opening remarks inviting participants to take a second look at mediation in the context of current trends in which courts are experiencing increasing requests for the use of mediation. The objectives of the roundtable were reviewed, which were as follows:

As a result of this Roundtable Discussion, you will be better able to:

- Articulate the pros and cons of mediation in domestic violence cases;
- Evaluate measures used in mediation that are utilized to safeguard litigants who have experienced violence; and
- Provide recommendations for how courts should handle mediation in cases where domestic violence is an issue.

DISCUSSION: What Do We Mean by Mediation?

Judge Breall and Judge Murray facilitated a large group discussion to identify the variation of how mediation is used, or prohibited, in domestic violence cases in different jurisdictions. Various participants responded as follows, with each bullet respective to a different jurisdiction:

- Mediation may be ordered. The order will note findings of domestic violence, and mediators (who work for a partnership between the county and a nonprofit) must have a Master's Degree and be trained in domestic violence;
- Litigants are presented a list of services during initial case management conferences, which include confidential "early neutral evaluations" for which there is a screening tool for domestic violence. In this jurisdiction, judges have adjusted how they talk about alternative dispute resolution services in order to take into account power and control issues;
- Judges may suggest voluntary mediation, or – if mediation is mentioned by the parties – point out the voluntary nature of mediation. Individual domestic violence screenings are conducted and power imbalance is assessed, and no mediation is conducted if either is found. Parties may also go to a nonprofit mediation center before filing a case, where similar screenings occur. Screening seeks to distinguish between abusive tactics (e.g. one party uses any method to obtain and enforce control over the other) and high-conflict tactics (e.g. struggle between parties for control). In the case of abusive tactics, screeners will recommend consultation with a domestic violence expert to ascertain whether the parties

understand the process and are ready to proceed. The mediation may proceed if the domestic violence expert so recommends, an advocate is allowed to support the victim, and the parties voluntarily consent. In cases considered “high conflict,” mediation may proceed using a two-mediator model.

- Although court staff are titled “mediators” when working with parties at the final stages of the Protective Order process, their services are more conferencing than mediation (e.g. seeking consent to a protective order);
- Many attorneys and former judges work as private mediators, with little regulation and no court monitoring. Many private mediations occur before cases are filed; and
- Protective Orders are never mediated. Generally, all cases go through a court coordinator, who screens for domestic violence. If domestic violence is found, the case may not be mediated. All mediators must go through court-approved training that includes domestic violence topics, but it’s designed only to facilitate screening.

OVERVIEW: Processes Called “Mediation”

Nancy Ver Steegh, professor of law at Hamline School of Law, presented an overview of the processes called mediation and the concerns arising from each process.

Processes called mediation may vary with respect to the following elements: model; role of mediator; profession and training of mediator; private or court-based; issues allowed to be considered; number of sessions; attorney participation; and voluntary versus mandatory.

Most jurisdictions permit mediations pursuant to judicial discretion. Although some jurisdictions have specific provisions pertaining to domestic violence, there is patchy guidance with respect to screening (such as the need to screen for domestic violence throughout the case and not only at inception).

The 2000 Model Standards of Practice for Family and Divorce Mediation¹ suggests the following:

“The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions, and reach their own agreements.”

Models of mediation include: facilitative (most common); evaluative (similar to facilitative, includes mediator’s recommendations); or transformative (focus on the interaction between people versus the dispute).²

Socioeconomic differences are the greatest drivers of which mediation models and processes are used. Parties with the resources to use private mediators benefit from multiple sessions, choice of mediator and model, the involvement of attorneys, and creative problem-solving based upon individual interests. Alternatively, challenges associated with court-annexed

¹ Association of Family and Conciliation Courts, *Model Standards of Practice for Family and Divorce Mediation* (2000) available at <http://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf?ver=2013-08-21-072320-000>

² Nancy Ver Steegh, *What Do We Mean By Mediation?* (Presented on August 17, 2016). See also Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996), available at <http://scholarship.law.ufl.edu/facultypub/668>. But see E. Patrick Mcdermott, *What's Going on in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75 (2004).

mediation include limited time, little or no choice of mediator or model, high caseloads, limited attorney participation, use of mediation as a docket control/management tactic, and mandatory nature (in some jurisdictions).

Professor Ver Steegh explained that hallmarks of traditional, facilitative mediation include³:

- Full disclosure of the resolution process to the parties;
- Consideration of how mediation might impact a party experiencing domestic violence;
- Use of the facilitative, voluntary, confidential, and informed consent models;
- Safety considerations;
- A focus on the interests of the parties;
- Good faith participation;
- Autonomous decision-making by parties; and
- The mediator acting as a neutral third party.

In practice, various processes are labeled “mediation” which may, or may not, feature these attributes.

³ *Id.*

SCENARIOS

Participants were divided into four groups, and each group was asked to review and discuss a different scenario in the context of three discussion questions:

1. What additional information do you need?
2. Under what circumstances could the victim make an informed decision on whether to engage in mediation?
3. What might make this process work for this victim and her family?

Group 1 reviewed and discussed the following scenario:

Amanda and Barry

Amanda and Barry are married and have one child, 6 months old. Amanda and Barry are both professionals making 100K plus per year. They lived, together until recently, in a two-bedroom apartment in a large urban city in the Northeast part of the United States. There is no protection order in place. Their jurisdiction requires mediation in family law matters. Amanda has alleged that Barry is abusive. She alleges one incident of physical violence in which Barry shoved her up against the wall and screamed in her face. She did not suffer any injuries. Amanda alleges that Barry frequently accused her of infidelity, which she denies, and states that Barry had become extremely suspicious of her every act, accusing her daily of indiscretions based on innocuous details, such as a bath mat being wet for too many hours after her shower or the existence of dirt in a low trafficked area of the house. Amanda alleges that she started to become paranoid herself, always waiting to be accused of something and felt as if she was “constantly walking on eggshells.” After the incident in which she was shoved against the wall, Amanda asked for a divorce. She states that she does not want to divorce because she loves Barry, but can no longer live with his accusations and under a constant state of suspicion. She has trouble maintaining her composure when she sees Barry. She is willing to share custody of their baby, but Barry wants full custody. Barry maintains that Amanda is cheating on him but has no direct evidence of this. Barry demonstrates anger at court hearings. Neither party has an attorney. They are in a jurisdiction where there is mandatory mediation for family law matters, however, the mediator in this case declined to mediate based on Amanda’s allegation. The case was sent back to the judge. In court, both parties maintain they would prefer to use mediation. What should the judge do?

During discussion, Group 1 reported that the following additional information would be needed:

- Parties' age, extent of available financial and other resources available, and mental health or substance abuse diagnoses;
- Whether the parties had any prior contact with the court system, to help determine how much they understand the processes;
- Whether domestic violence advocates or police have been previously involved;
- Nature of the screening used in advance of mediation, to learn more about why the mediator declined this case;
- Influence of confidentiality on what the mediator may report; and
- Whether the child witnessed the violence, current status of the child, and the nature of any parenting arrangements.

Group 1 further reported that – in order to make an informed decision on whether to engage in mediation – parties must know the details of the process, whether the process is binding or non-binding, potential outcomes, and clarity that mediation is not intended to be reconciliation or therapy.

Group 1 concluded by reporting that mediation processes might work in this scenario if a safe space was ensured, services were available for the perpetrator, the victim/survivor was properly connected with an advocate, and the child was monitored and provided wraparound services going forward.

Group 2 reviewed and discussed the following scenario:

Hanako and Hiro

Hanako and Hiro have been married for 10 years and have two children, ages 9 and 6. They are both first generation Japanese Americans and live in a predominantly Japanese community. Hiro is a chef and Hanako is a homemaker. Hiro filed for divorce and custody and alleges that Hanako has been physically violent to him in the past, scratching him on the face during an argument. Hiro called the police during that incident but Hanako was not arrested. Hanako, in response, alleged that Hiro is the one who is violent, and has been throughout their entire relationship. Hanako alleges that Hiro has prohibited her from working, forbids any relationship with family members, and prevents her from making any decisions regarding their children. Hanako alleges that Hiro has repeatedly forced her to have sexual intercourse, has slapped her on a regular basis and is physically abusive to her elder child, a boy. He is very strict with their younger child, a girl, but his daughter adores him. Their older child wishes to live with his mother. Hiro wants full custody of both children, and Hanako also wants full custody, child support, and spousal support. Hiro has an attorney, Hanako does not.

In this jurisdiction, parties in family law matters can participate in mediation even when there are allegations of domestic violence, unless there is a protection order in place. Hanako and Hiro have begun mediation.

During discussion, Group 2 reported that the following additional information would be needed:

- Whether the mediation was voluntary, who was present, whether the parties were screened separately and confidentially, and whether alternatives were offered;
- Whether the parties consulted with advocates;
- Whether an interpreter was made available and if cultural considerations (like immigration status) influenced outcomes; and
- Whether the mediator was trained in intimate partner violence dynamics and cultural competency.

Group 2 further reported that – in order to make an informed decision on whether to engage in mediation – the parties should have a clear idea of all available processes, understand

what they are giving up by choosing one process over another, understand how safety considerations are being accounted for, be educated about the dynamics of intimate partner violence, be provided an interpreter, and have access to advice from an advocate or counsel.

Group 2 concluded by reporting that mediation processes might work in this scenario if the victim/survivor had the benefit of an advocate or attorney familiar with intimate partner violence, and if the mediation was conducted using shuttle methods where the parties are not in the same room.

Group 3 reviewed and discussed the following scenario:

Concepcion and Jorge

Concepcion and Jorge are married and have three children, all under 5 years of age. Concepcion is a childcare provider and Jorge is a janitor. They struggle to make ends meet. Concepcion filed for an order of protection after Jorge threatened her with a firearm. In her petition, she stated that Jorge has physically abused her many times in the past and owns several illegal firearms. Jorge denied the allegations. The court issued a protection order and Concepcion was granted temporary custody of the children. Concepcion asked the court to dismiss the order two weeks later and the court granted her request. Two months after the dismissal, they are now in court for a divorce and custody case. Concepcion does not want Jorge to have any contact with the children and Jorge wants joint custody. Jorge and Concepcion are in a jurisdiction that does not permit mediation in cases where there is a protection order in place. Concepcion and Jorge have told the judge they wish to go through mediation. Neither party has an attorney.

During discussion, Group 3 reported that the following additional information would be needed:

- Whether the victim/survivor asked to dismiss the protective order;
- Whether or not she is safe;
- Circumstances leading to the filing for divorce;

- Information and documentation about any prior incidents of abuse, and whether the children saw violent acts;
- Whether the court has appointed a guardian ad litem for the children and/or if child welfare is involved in the case;
- Information about potential substance abuse and the location of firearms;
- Whether an interpreter is needed and if there are any immigration issues; and
- Whether there are any issues regarding the involvement of extended family.

Group 3 further reported that – in order to make an informed decision on whether to engage in mediation – the process must be explained in the language that the parties best understand, the mediator should be trained in domestic violence issues, the children’s safety must be the primary focus, and sufficient time must be allotted for informed decision-making.

Group 3 concluded that the mediation process might work in this case if other safety-oriented precautions are initiated, such as a protection order, economic relief, and removal of any firearms.

Group 4 reviewed and discussed the following scenario:

Lindsay and Davida

Lindsay and Davida were in a relationship but were not married. They have one child together, Michaela. Michaela is the biological child of Lindsay. Davida is her mother through adoption. Davida is a banker and Lindsay is a waitress. Davida and Lindsay live in a rural location in a very conservative Christian area and face a great deal of community discrimination because of their sexual orientation. Lindsay and Davida are in a custody dispute after separating due to domestic violence. Both parties allege that the other party is violent. Lindsay has called the police on several occasions and sought medical care due to Davida’s violence, and alleges that any violence she has engaged in against Davida was self-defense. Davida has accused Lindsay of being an unfit mother and has alleged that Lindsay has been violent against her as well. Lindsay and Davida are

in a jurisdiction where family matters involving domestic violence cannot go through mediation unless the victim asks for mediation and provides affidavits supporting the request. Lindsay has requested mediation and in her affidavit, states that she cannot afford litigation and feels that she will be at an unfair disadvantage in litigation because she cannot afford representation as Davida can. She also alleges that she fears having to question Davida in court, since she will not have an attorney. Davida opposes using the mediation process and wants to proceed to litigation. Davida has an attorney, Lindsay does not.

During discussion, Group 4 reported that the following additional information would be needed:

- Reports of previous police calls to the house and whether there are any arrest reports;
- More information about the parties' interactions, including financial and other forms of coercion, and whether either party has ever sought medical attention;
- More information about the child, including age, school record, nature of custody arrangement, engagement with mental health professionals, impact of cultural pressures (due to the sexual orientation of the parties and nature of the community), evidence of abuse, and involvement of child welfare; and
- More information about the basis for Lindsay's belief that she can't litigate effectively, and whether access to resources might put her in a better position.

Group 4 further reported that – in order to make an informed decision on whether to engage in mediation – the parties should be prompted to consult an advocate, be provided complete information on mediation and litigation processes, and be informed of their rights and responsibilities.

Group 4 concluded by reporting that mediation processes might work in this scenario if separate mediation rooms were made available for shuttle mediation, and if the parties' good faith motivations were properly ascertained to determine the true possibility of resolution.

SCENARIOS: POINTS OF CONSENSUS

Discussion of the scenarios revealed the following points of consensus:

- Rather than incident-based evaluations, screenings should evince a historical perspective on couple and family dynamics as well as the impact of any violence on children;
- Parties should be educated on what mediation means and how it applies to specific conflicts, like child custody, availability of resources, and the right to a party-centered instead of court-centered processes;
- Screening and safety planning must take into account coercively controlling violence and its impact on decision-making;
- There should be considerations for the autonomy of a victim/survivor who desires to make an informed decision to mediate;
- Education on cultural competency should be required for mediators;
- All stages of the process should be trauma-informed;
- Sessions should include sufficient time;
- Parties should have detailed information about the nature of the process (such as whether shuttle methods will be used) prior to opting in or out;

- Clarity regarding the mediator’s role with respect to children (such as whether the mediator is to act in a child’s best interests or prioritize facilitating a settlement) and the extent to which the child should participate and have a voice or representation in the mediation process;
- Mediation should always be voluntary, but screening for domestic violence should always be mandatory;
- Disclosure of policies and procedures should not be cookie-cutter templates, but instead tailored to the parties’ specific needs. However, there still must be a baseline set of standards;
- Domestic violence training must go beyond screening, and go deeper into how domestic violence dynamics can have an influence throughout the entire process; and
- The door to see the judge must always be left open.

NATIONAL INSTITUTE OF JUSTICE STUDY ON MEDIATION

Connie Beck, Ph.D., Associate Professor, Clinical Psychology Program, Policy and Law, University of Arizona, presented “Intimate Partner Violence in Couples Mediating Divorce Disputes,” an overview of two empirical studies of couples participating in mediation in Pima County, Arizona.

The first study determined that classifying litigants into “latent classes” (i.e. gender of perpetrator and nature of violence) is predictive of calls to law enforcement, party agreements, and post-divorce court contact.⁴

The second study, “IPV and Custody Decisions: A Randomized Controlled Trial of Outcomes from Family Court, Shuttle Mediation, or Videoconferencing Mediation” (which is in progress), seeks to enhance data on whether mediation can be conducted safely for families where intimate partner violence is present. Safety measures under evaluation include separate sessions, attendance by a supporter, representation by counsel, and the suspension and termination of sessions, as necessary. Procedural accommodations under evaluation include shuttle mediation and mediation via telephone or videoconferencing, as well as security measures.

In partnership with the D.C. Superior Court Multi-Door Dispute Resolution Division, participants in this study are separately administered MASIC (Mediator’s Assessment of Safety Issues and Concerns⁵) during intake in order to ascertain lethality and relationship dynamics. Furthermore, the mediators sampled represent a range of experience, training, understanding of intimate partner violence, and demographic diversity. To date, high levels of intimate partner

4 Connie J. A. Beck, Ph.D., Michele E. Walsh, Ph.D., Mindy B. Mechanic, Ph.D., Aurelio Jose Figueredo, Ph.D., Mei-Kuang Chen, M.A., M.S., *Intimate Partner Abuse in Divorce Mediation: Outcomes from a Long-Term Multi-cultural Study*, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/236868.pdf>

5 Holtzworth-Munroe, A., Beck, C. J. A. and Applegate, A. G., *The Mediator’s Assessment of safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain* in FAMILY COURT REVIEW (2010) 48: 646–662. doi:10.1111/j.1744-1617.2010.001339.x

violence have been present in cases mediated. Immediate and one-year outcome assessments as well as mediator and court records are currently being collected.

Mediation – Then and Now

Bea Hanson, Principal Deputy Director, OVW, presented a brief overview of OVW’s position on mediation.

Historically, many advocates considered mediation inappropriate and, for the most part, unsafe in cases where intimate partner violence exists.⁶ Accordingly, certain provisions in grant programs under the Violence Against Women Act (VAWA) require grantees to certify that their organizational policies do not require mediation or counseling involving offenders and victims being physically present in the same place.⁷ Whereas the statutory language in VAWA only prohibits OVW grantees from requiring certain kinds of mediation, the practice of using or requiring mediation has been included as “an activity that may compromise victim safety” in various different OVW grant program solicitations through the years. OVW recognizes that mediation does occur in a variety of forms and with different approaches in courts across the country and that, in certain cases, victims of domestic violence may prefer the alternative dispute

⁶ For an interesting discussion on the history of concern around domestic violence and mediation, see Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 YALE J. L. AND FEMINISM 97 (2010).

⁷ For example, pursuant to the statutory language in the Violence Against Women Act, under the Legal Assistance for Victims Program and other programs that support legal assistance, applicants must certify that “the grantee’s organizational policies do not require mediation or counseling involving offenders and victims physically together, in cases where sexual assault, domestic violence, dating violence, or child sexual abuse is an issue.” See 42 U.S.C. sec. 3796gg-6(d)(B)(4); See also 42 U.S.C. 10420(d)(5) for similar language in the Consolidation of Grants to Support Families in the Justice System grant program, requiring grantees to certify that “the organizational policies of the applicant do not require mediation or counseling involving offenders and victims being physically present in the same place, in cases where domestic violence, dating violence, sexual assault, or stalking is alleged.”

resolution process to litigation and other alternatives. It is for that reason that OVW was interested in convening this Roundtable to gather more input from stakeholders on this topic.

Professor Ver Steegh and Loretta Frederick, Senior Legal and Policy Advisor, Battered Women's Justice Project, presented a mini-lecture on the history of mediation in family law cases.

In the 1970s, the "best interests of the child" standard changed family law by heightening expectations of co-parenting and post-divorce contact. Meanwhile, mediation generally came to the fore in the 1980s, and – in more recent times – it has become increasingly difficult for litigants to gain access to a live appearance before a judge (even for interim orders). While some argue that mediation can effectively alleviate power imbalance within families and provide domestic violence victims an opportunity for self-determination, others are concerned that mediation will sacrifice victim needs and jeopardize victim safety in pursuit of superficial agreements that pander to abusive partners. These advocates argue that the court infrastructure, for the most part, fails to provide the safety mechanisms that would facilitate meaningful mediation for victims, and that victims fare better before a judicial officer.

Several realities in the family courts muddy the polarity between "unsafe" mediation and "safe" litigation. Increasingly, litigants do not have an opportunity to see a judge. Additionally, litigation is expensive and litigants are increasingly unable to retain attorneys, making those without legal counsel who have an opportunity to appear before a judge woefully ill-prepared, and facing a very unfair advantage if the other party does have legal representation. Represented or not, the outcomes for domestic violence survivors are often bleak in the family courts, and victims' voices go unheard. Jurisdictions that prohibit mediation in cases where domestic

violence allegations arise find that the inability of courts to differentiate cases of coercive and controlling violence from other cases effectively disenfranchises a host of litigants from utilizing the mediation process. Some argue that the “protectionist” motivation in prohibiting mediation in cases of domestic violence disempowers women and further controls their choices.

Professor Ver Steegh and Ms. Frederick proposed a court model supporting voluntary and informed participation in mediation:

1. Courts would provide publicly available information on the mediation process.
2. Interested parties would have the opportunity to attend an individual, confidential meeting with an attorney or advocate to learn the particulars of the process provided, assess safety, and discuss whether each party will/can engage meaningfully in the process and make decisions autonomously.
3. If the parties choose to proceed with mediation, the mediator would independently assess the safety of the participation, and whether both parties will deal fairly and make autonomous decisions. The mediator would also consider the utility of safeguards such as implementing ground rules and safety protocols, using a shuttle process, involving lawyers and/or advocates, or bringing in a co-mediator with expertise in domestic violence.

DISCUSSION: Can Mediation Meet the Needs of Victims?

Participants were asked to discuss the following questions in small groups:

- What does an empowering and safe family court process look like for families?
- What are the litigants’ and courts’ interests in mediation (not specific to DV)?

Small groups reported the following empowering and safe family court processes:

- Transparent, open, and welcoming;
- Child-centered and litigant-centered, instead of court-centered;
- Complete and neutral information provided, with litigants' time, convenience, and capacity in mind;
- No assumptions that computers are available to everyone and that weekday business hours are convenient for everyone;
- Clear definitions of terms;
- Referrals to appropriate resources;
- Procedural fairness; and
- Individualization for specific family needs.

Small groups then reported the following litigant and court interests in mediation:

Litigant Interests

- Cathartic aspects of having a voice;
- Education gained during the process; and
- More private process (not publishing all of the family's issues to the public).

Court Interests

- Docket control;
- Workable orders that don't need constant modification;
- Two-tiered system of justice: perceived as easier, faster, cheaper, less adversarial;
- Potential to narrow the issues even if unable to settle the whole case;

- More time to spend on issues that are more proper for the court;
- Parties more invested in outcome, less recidivism; and
- Efficiency.

Potentially Both Litigant and Court Interests

- Parties know a lot more about their family than a judge ever could;
- Possibility for improved intra-party communication; and
- Better for children, because parents worked it out.

Judge Breall and Judge Murray facilitated a process to assign values elicited from the responses to the two questions above, and develop a position statement on the following:

Where do the objectives of mediation and the needs of domestic violence victims diverge.
Where do they meet?

Points of divergence included:

- Unregulated mediation can facilitate coercion and limit self-determination;
- Compromise may not be in victim's best interest;
- An abuser's interests are often focused on coercive control;
- Since justice isn't the mediator's job, neutrality can empower an abuser; and
- Judges applying pressure to mediate is a concern, as well as judicial decision-making influenced by whether a party agrees to mediate and whether the litigants reach an agreement.

Points of convergence include:

- Actually reaching a resolution;
- The benefit of the presence of a trained mediator, especially for unrepresented victims/survivors, who otherwise would face litigation without assistance or support;
- Victims having a voice;
- Fair and safe processes;
- Power of self-determination;
- Child-centered (creating an environment where children thrive);
- Individualized; and
- Timely.

DAY 2: POINTS OF CONSENSUS

The facilitators commenced Day Two with a clarifying question to help frame the discussion. What features of mediation are assumed when we envision a process that meets the needs of litigants and the courts? Participants noted the following features as essential to a mediation process that could meet the needs of victims and assuage the concerns of the field:

- Mediators are neutral and impartial;
- Process is fair and confidential;
- Mediators are informed about domestic violence;
- Both the mediator and the parties can terminate the process at any time;
- Mediators create a “safe space” for parties to be heard;
- Process is voluntary and parties are informed about the what the process does and does not do;

- Potential to tailor the mediation process to individual needs; and
- Facilitates parties' self-determination.

After a discussion of the key elements of ethical and effective mediations, facilitators asked participants to choose a position on the utility of mediation in domestic violence cases. Specifically, participants were asked to discuss whether they agree with either the concept that “Mediation should not occur in domestic violence cases unless [certain enumerated protective elements are in place]...” or “Mediation may occur in domestic violence cases unless [certain enumerated factors exist] ...” Unable to reach consensus on these two positions alone, participants posited additional statements, including “Mediation should not occur in coercively controlling violent relationships;” “Mandatory mediation should not occur, even with opt –out provisions;” and “Mediation should occur if the victim wants it to occur and if service providers are trained and domestic violence-informed.” Participants noted a benefit to a change in OVW’s position is the potential support for new or enhanced domestic violence and mediation training of mediators, advocates, and judges.

TOOLS NEEDED FOR MEDIATORS AND THE COURTS

Facilitators asked participants to discuss in groups the types of tools needed for mediators and the courts to enhance the process and safety of mediation for domestic violence victims. Participants noted the need for clear and user friendly tools to inform participants about mediation, in particular to convey the purpose, process, and limits of mediation. They also noted the need for knowledgeable and well trained court staff. Participants recognized the importance of building community partnerships to enhance delivery of services. The necessity of a detailed

behavioral-specific screening instrument was widely mentioned, with training for the administrator of the tool.

Participants added that in order for the mediation process to work for victims of domestic violence, the process must include a complaint/grievance procedure. Education on domestic violence and mediation is essential for all professionals involved with the process. Participants generated the idea of an individualized “mediation orientation” for each party, either after screening or as part of screening. Victims must have access to legal or advocate support throughout the mediation. Finally, participants suggested that mediators should routinely avail themselves of information on local resources and community based services to which they could refer parties for additional assistance.

POLICY SUGGESTIONS FOR OVW

Participants met in groups to discuss any suggested policy changes to OVW’s position on mediation that might contribute to safer and more meaningful alternatives for victims of domestic violence. The groups articulated the idea that mediation should remain as one option for victims if the process is truly voluntary and parties are fully informed, including a self-assessment of each parties’ capacity to mediate. The process should allow for some degree of individualization, with an emphasis on fairness and freedom from coercion. Education for all parties on the mediation process is a universally recognized and agreed upon condition.

One group noted that the safety of the family, and of victims, throughout the mediation process is the system’s responsibility, not that of the victim. Groups suggested that OVW allocate funding for the creation of guiding principles, similar to the “Burgundy Book,” for providing mediation in domestic violence cases.

Participants conveyed the following preliminary guiding principles on the use of mediation in domestic violence cases:

- Victims can decide whether or not to participate after being fully informed of the mediation process
- Mediators are trained on mediating in domestic violence cases
- Victims can opt out at any time in process
- Victims have access to advocates and/or attorneys before, during and after the process
- Mediation process includes a safe environment (e.g. additional rooms for shuttle mediation, cameras, security, etc.)
- Pre-session assessment of nature and extent of domestic violence, risk, capacity to mediate and safeguards for mediation
- Pre-session training
- Meaningful language access for individuals with limited English proficiency

DISCUSSION: Additional Points for OVW Consideration

In closing, five proposed policy positions were presented and participants were asked to rank their first and second preferences among the following proposed positions:

1. Mediation is a facilitated negotiation that may be dangerous for victims and should be voluntary, informed, and have the following features (specific features to be determined).
Ranked first by 14 participants, and ranked second by 1 participant.
2. Mediation should not occur in [domestic violence or coercive control domestic violence] cases.

No ranking by any participant.

3. Mediation can occur in domestic violence cases if a victim chooses and mediators are trained in domestic violence.

Ranked first by 4 participants, and second by 1 participant.

4. Mandatory mediation is not appropriate for domestic violence cases.

Ranked second by 13 participants.

5. Mediation is appropriate for domestic violence if there is an opt-in and opt-out procedure.

Ranked second by 2 participants.

ANALYSIS

The Judicial Roundtable on Mediation illustrated the complexity of the issues around mediation in domestic violence cases. Participants conveyed concerns about victim safety but also recognized the challenges victims currently face when accessing the court system universally, irrespective of the potential risks associated with mediation. OVW's position on mediation, in large part a response to the concerns of the advocacy community, may warrant reconsideration in light of the prevalence of the practice across the nation. Courts are indeed utilizing mediation in cases where domestic violence exists and, in many respects, a prohibition on the practice by VAWA grantees forecloses the opportunity to engage in meaningful dialogue about its strengths and weaknesses. Accordingly, it is not possible to attempt to develop appropriate guidelines and resources to improve a practice that is prohibited altogether. On the other hand, the safety and fairness concerns associated with the practice of mediation in domestic violence cases are substantial and stakeholders fear that the use of mediation, without

consideration and oversight, will result in increased pressure on victims to forego litigation to their own detriment.

An analysis of the discussions over the course of the 1.5 days at the Roundtable, and the participants' overwhelming support of one policy position, suggest the following proposition:

Mediation is a facilitated negotiation that may pose a risk for victims of domestic violence due to the possible imbalance of power between the parties in a coercively controlling violent relationship. Mediation can potentially meet the needs of domestic violence victims, however, if it is voluntary, informed, and includes the following additional safeguards:

- Mediators are sufficiently educated on domestic violence and cultural competency;
- Screening for coercively controlling violence must occur before mediation so that parties may opt-out and/or to ensure a fully informed and safe decision-making process for all parties;
- Screening should be administered by a party other than the mediator; and
- The process should include the flexibility of individualization the victim needs (such as use of shuttle mediation, which is the tactic of separating parties during mediation).

It should be noted that participants unanimously chose not to support the proposition that mediation should never be used in domestic violence cases. Participants universally agreed that screening and education on the mediation process are essential.

Further, the Roundtable discussion clearly conveyed that OVW should not support *mandatory* mediation and that all mediators should avail themselves of community resources and provide referrals to advocates and other professionals to support families where domestic violence exists.

AFTERWORD

Since this Roundtable was conducted, OVW reviewed and reconsidered its policy on mediation in cases of domestic violence in light of what was learned at the Roundtable. As a result, OVW updated its language under “activities that may compromise victim safety⁸” to the following:

“Mediation in cases of domestic violence, dating violence, sexual assault, or stalking **except** where the mediation is voluntary for the victim and there is screening for such issues prior to the start of mediation, there is informed consent on the part of the victim, the mediators have appropriate training on such victimization issues, and the process includes ongoing safety planning for victims and flexibilities such as having the victim and offender physically separated.”

⁸ See, e.g., 42 U.S. Code § 3796gg–6 - Legal Assistance for Victims.

APPENDIX 1: Agenda



NATIONAL JUDICIAL INSTITUTE
ON DOMESTIC VIOLENCE

*A partnership of Futures Without Violence, the National Council of Juvenile and Family Court Judges, and the
Department of Justice, Office on Violence Against Women*

JUDICIAL ROUNDTABLE DISCUSSION: MEDIATION

Office on Violence Against Women Conference Room
August 17-18, 2016
Washington, DC

AGENDA

Wednesday, August 17, 2016

- 9:00 – 9:15 a.m. **Welcome, Roundtable Overview, and Objectives**
Hon. Marshall Murray, Milwaukee Family Court Division
Hon. Susan Breall, San Francisco Youth Guidance Center
- 9:15 – 9:40 a.m. **Introductions and Ice-Breaker**
- 9:40 – 10:10 a.m. **Large Group Discussion: What Do We Mean by Mediation?**
Hon. Marshall Murray
Hon. Susan Breall,
Nancy Ver Steegh, Professor of Law, Mitchell Hamline School of Law

10:10 – 10:25 a.m.	Break
10:25 a.m. – 12:00 p.m.	Scenarios
12:00 – 1:30 p.m.	Lunch on your own
1:30 – 2:15 p.m.	Points of Consensus from Scenarios
2:15-2:45 p.m.	National Institute of Justice Study on Mediation <i>Connie Beck, Ph. D., University of Arizona, Department of Psychology</i>
2:45 – 3:00 p.m.	Break
3:00 – 3:30 p.m.	Mini-Lecture on Mediation: Then and Now <i>Bea Hanson, Principal Deputy Director, OVW</i> <i>Loretta Frederick, Senior Legal and Policy Advisor, BWJP</i> <i>Nancy Ver Steegh</i>
3:30-4:55 p.m.	Can Mediation Meet the Needs of Victims?
4:55 – 5:00 p.m.	Wrap-up and Adjourn for the Day

Thursday, August 18, 2016

9:00 – 9:30 a.m.	Review of Previous Day and Points of Consensus
9:30 – 10:15 a.m.	Visioning and Futuring
10:15 – 10:30 a.m.	Break
10:30 – 11:00 a.m.	Report Back and Consensus Building
11:00 - 11:45 a.m.	Additional Points for OVW Consideration
11:45 a.m.– 12:00 p.m.	Wrap-up, Next Steps, and Adjourn

APPENDIX 2: Participants



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JUDICIAL ROUNDTABLE DISCUSSION: MEDIATION

Office on Violence Against Women Conference Room
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