

12 QUESTIONS ABOUT MEDIATION AND DOMESTIC VIOLENCE

Zena D. Zumeta

1. Is Domestic Violence an issue for Mediation?

There are a number of victims who would not be able to mediate because they are intimidated by their spouses. Any agreements reached under these circumstances are likely to be coerced, not voluntary agreements. In addition, there are a number of victims who would be endangered by the process, of mediation: discussing issues of divorce could give rise to an incident of violence, or their becoming empowered could give rise to an incident of violence.

2. Are we only worrying about physical violence?

No. Emotional, psychological, financial and other forms of violence can be as incapacitating as physical violence. They may render a victim unable to speak for her/himself, negotiate on her/his own behalf, and unwilling to protect her/his interests. (See Power and Control Wheel)

3. Does the fact that a victim is leaving a marriage make her/him safe(r)?

The fact that a victim has decided to end the marriage and get out may be evidence s/he is ready to escape a cycle of violence. Yet s/he may be particularly vulnerable at this time, precisely because s/he is leaving. One report indicated that 3/4 of reported arrests for domestic violence occurred with people already separated. A battered spouse may face the most physical danger when s/he attempts to leave the relationship.

4. How can I find out if domestic violence is an issue in any particular case?

Because most victims of domestic violence do not let mediators know, the mediator or intake person must do active screening to find out if there is a history of domestic violence. Even with careful screening, the mediator may not find out about the violence; however, if screening is not attempted, many cases may be mediated where the violence could have been ascertained.

5. How should screening be done?

Screening must be done separately with each client, so that a batterer does not directly influence the answers given by the victim. If screening is done in person, appointments should be on different days so that a batterer is not watching as the victim goes in or out of the office. If the screening is done over the telephone, the clients should be asked if they are alone before the questioning is begun. If the screening is done in writing, the clients should not fill out a form while they are sitting in the same waiting room and can watch each other. There should also be a verbal follow-up. All screening instruments should avoid faultfinding and interrogation.

6. What are we trying to find out by screening?

We are not investigating truth or determining fault or guilt by screening. We are trying to determine a) whether a victim safe, and b) whether this case should be mediated. Therefore, questions aimed at finding out if there is a perceived history of violence, coercion or intimidation, and if there is continuing fear are the appropriate questions. It has been determined that questions about "violence" often do not elicit positive answers. Questions about "concerns" or very detailed questions about actions and attitudes have been found to be more effective. (See screening instruments.)

7. What if I don't find out about the violence or intimidation until mediation has commenced?

Screening should continue throughout the mediation, in the sense that mediators should always be looking for signs of intimidation and fear. If the mediator believes that is occurring, it is appropriate to separate the parties and find out whether there is fear and/or intimidation.

8. If there is domestic violence or intimidation, should the case be mediated?

Most of the time, where there is a perceived history of domestic violence, mediation should not take place. A victim may not speak up out of fear or intimidation; a victim may fear or experience retaliation if s/he does speak up; or s/he may not feel safe negotiating with the batterer.

There are some cases where mediation may be appropriate. These are cases where the victim is not afraid, where there has not been recent violence, and where there are resources available to support the victim, such as domestic violence advocates or lawyers who understand domestic violence. In addition, some mediators are better equipped to handle cases where there is domestic violence. Those mediators who have worked in this area may have enough understanding and experience to be able to judge when mediation is dangerous, or when a client is being intimidated.

9. If mediation is determined to be inappropriate, how should the mediation be terminated or denied?

Mediation should be terminated or denied in a way that does not increase the risk for the victim. Thus, a batterer should not be told that his spouse "ratted" about the violence, since that may enrage a batterer and lead to retaliation.

10. What if screening reveals that a victim is in immediate or present danger?

A person in danger of battering should be put in touch with the police or a domestic violence shelter. It is helpful to follow up and see if they are safe. A mediator should not be "neutral" about safety.

11. If mediation is appropriate, should the process be changed where there is a history of domestic violence?

There are changes in the process that should be made where there is a history of or even an allegation of domestic violence. The mediation environment needs to be safe for the victim, including such strategies as:

- Suggesting the victim come 10 minutes after the abuser and leave 10 minutes earlier than the abuser to avoid stalking, and assisting her/him to do so.
- Asking the victim if s/he would like to be seated closer to the door or further from the door, depending on her/his wishes.
- Taking all discussions of fear and safety seriously.
- Setting ground rules for the mediation and conversation between the couple to reduce fear and intimidation, starting with the ground rule of no violence.
- Allowing for an advocate to come to the mediation with the victim, or perhaps waiting for her/him in the waiting room.
- Not allowing the couple to sit in the waiting room or mediation room alone together.
- Requiring that the violence be talked about in the mediation, or not mediating.
- Stating unequivocally that violence and intimidation are unacceptable behavior, no matter what the "reason" for it.
- Co-mediating with a male-female team (if the couple is male and female)
- Using caucus as a safety valve and a check on the process.
- Talking to (at least) the victim between sessions to assess the level of fear and to check on retaliation.
- Insisting that parties be represented by attorneys.

12. Even if mediation is appropriate at times when there is a history of domestic violence, what about mandatory mediation? How can battered women be protected in jurisdictions with mandatory mediation (or mandatory conciliation)?

Many jurisdictions with mandatory mediation laws specifically exempt cases of domestic violence, and mandate screening of cases and training of mediators in this area.