

STATEMENT BEFORE HOUSE JUDICIARY COMMITTEE

SENATE BILL 432

PATRICIA R. MARCUS, J.D. , MEDIATOR (Chairperson, York County Court Mandated Custody Mediation Program)

AUGUST 29, 1995

I. York County Court Mandated Custody Mediation Program.

A. Started January 1, 1994.

B. Currently have 26 trained members.

1. Attorneys, psychologists and social workers (Master's degree level).

2. 30 hours of training by approved Academy of Family Mediators trainers.

a. Includes two hours of domestic violence training.

b. Tolman Screening Model.

c. Many mediators have numerous additional hours of training.

d. The mediators are required to screen for domestic violence prior to scheduling the orientation session.

C. Court process to schedule mediation.

1. Custody Complaint filed.

2. Conciliation Conference scheduled within two (2) weeks thereafter.

3. No agreement at conciliation conference, mediation is ordered.

a. One, two-hour orientation session is mandated.

b. Mediator explains process and attempts to have parties voluntarily participate in future sessions, if necessary.

c. Parties split \$150.00 fee.

d. If parties reach agreement in mediation, a Memorandum of Understanding is prepared and sent to attorneys. The attorneys then prepare a stipulated order for the Judge to sign.

- e. If no agreement is reached, then the parties go through the litigation process.
- 4. Termination of mediation.
 - a. The mediator files report with Judge.
 - b. The mediator files report with committee.
- D. Confidentiality and Standards of Ethics.
 - 1. All mediations are confidential.
 - a. Except allegations of child molestation/abuse.
 - 2. Parties sign agreement to keep confidentiality and not to subpoena the mediator (also, court order has confidentiality provision).
 - 3. All mediators must agree to abide by AFM standards of ethical conduct.
- E. Evaluation of Program.
 - 1. SJI grant
 - 2. Committee statistics

ACADEMY OF FAMILY MEDIATORS

STANDARDS OF PRACTICE

FOR FAMILY AND DIVORCE MEDIATION

Preamble

Mediation is a family-centered conflict resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement. In mediation, whether private or public, decision-making authority rests with the parties. The role of the mediator includes reducing the obstacles to communication, maximizing the exploration of alternatives, and addressing the needs of those it is agreed are involved or affected.

Mediation is based on principles of problem solving that focus on the needs and interests of the participants; fairness; privacy; self determination; and the best interest of all family members.

These standards are intended to assist and guide public, private, voluntary, and mandatory mediation. It is understood that the manner of implementation and mediator adherence to these standards may be influenced by local law or court rule.

Initiating the Process

Definition and Description of Mediation

The mediator shall define mediation and describe the differences and similarities between mediation and other procedures for dispute resolution. In defining the process, the mediator shall delineate it from therapy, counseling, custody evaluation, arbitration, and advocacy.

Identification of Issues

The mediation shall elicit sufficient information from the participants so that they can mutually define and agree on the issues to be resolved in mediation.

Appropriateness of Mediation

The mediator shall help the participants evaluate the benefits, risks, and costs of mediation and the alternatives available to them.

Mediator's Duty of Disclosure

Biases. The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated.

Training and Experience. The mediator's education, training, and experience to mediate the issues should be accurately described to the participants.

Procedures

The mediator shall reach an understanding with the participants regarding the procedures to be followed in mediation. This includes but is not limited to the practice as to separate meetings between a participant and the mediator, confidentiality, use of legal services, the involvement of additional parties, and conditions under which mediation may be terminated.

Mutual Duties and Responsibilities

The mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. This may be a written or verbal agreement.

Limits of Confidentiality

The mediator shall inform the parties at the initial meeting of limitations on confidentiality, such as statutory or judicially mandated reporting.

Appearing in Court. The mediator shall inform the parties of circumstances under which mediators may be compelled to testify in court.

Consequences of Disclosure of Facts Between Parties. The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.

Release of Information

The mediator shall obtain the consent of the participants prior to releasing information to others. The mediator shall maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.

Caucus

The mediator shall discuss policy regarding confidentiality for individual caucuses. In the event that a mediator, on consent of the participants, speaks privately with any person not represented in mediation, including children, the mediator shall define how information received will be used.

Storage and Disposal of Records

The mediator shall maintain confidentiality in the storage and disposal of records.

Full Disclosure

The mediator shall require disclosure of all relevant information in the mediation process, as would reasonably occur in the judicial discovery process.

Self-Determination

Responsibilities of the Participants and the Mediator

The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time shall a mediator coerce a participant into agreement or make a substantive decision for any participant.

Responsibility to Third Parties

The mediator has a responsibility to promote the participants' consideration of the interests of children and other persons affected by the agreement. The mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people. The participants shall be encouraged to seek outside professional consultation when appropriate or when they are otherwise unable to agree on the needs of any individual affected by the agreement.

Professional Advice

Independent Advice and Information

The mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement or to protect the rights of a participant.

Providing Information

A mediator shall give information only in those areas where qualified by training or experience.

Independent Legal Counsel

When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement.

Relationship with Other Professionals

The Responsibility of the Mediator Toward Other Mediators

Relationship with Other Mediators

A mediator should not mediate any dispute that is being mediated by another mediator without first endeavoring to consult with the person or persons conducting the mediation.

Co-Mediation

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort.

Relationships with Other Professionals

A mediator should respect the complementary relationship between mediation and legal, mental health, and other social services and should promote cooperation with other professionals.

Advancement of Mediation

Mediation Service

A mediator is encouraged to provide some mediation service in the community for nominal or no fee.

Promotion of Mediation

A mediator shall promote the advancement of mediation by encouraging and participating in research, publishing, or other forms of professional and public education.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

PLAINTIFF : No.
VS. :
DEFENDANT :

ORDER FOR MEDIATION

AND NOW, to wit, this ____ day of _____, 1995, it is hereby ORDERED and DECREED as follows:

1. **Mediator.** Both parties in the above-captioned matter shall attend one (1) orientation mediation session with the following mediator:

(Name)

(Telephone Number)

2. **Contact.** The parties are advised that they should anticipate that the initial session with the mediator may last up to two (2) hours. Each party is hereby directed to contact the mediator within ten (10) days of the date this Order is filed to schedule the orientation session. The parties must cooperate with the mediator in scheduling the initial session so that a date can be arrived at for the initial session within 30 days of the date of the conciliation conference. The Court shall be notified by the mediator if either party does not cooperate with scheduling the initial appointment. The attorneys may petition the Court for a finding of Contempt of this Order if the scheduling does not take place as directed.

3. **Payment.** The cost of the orientation session only (up to two (2) hours) is one hundred and fifty (\$150.00) dollars. The parties are directed to share equally (on a fifty-fifty basis) the cost of the orientation session. The fee for future sessions will be at the discretion of the individual mediator. Payment for future sessions shall be made in proportion to the parties' income unless the parties agree otherwise. At the request of the mediator, a deposit may be required three (3) days prior to the initial session. Thereafter, the parties shall comply with the individual mediator's payment policy.

4. **Third party participants.** The Court strongly encourages both parties to cooperate with the mediator. If the mediator recommends that other individuals attend the mediation sessions, the parties shall cooperate in obtaining their participation.

5. **Attendance.** Only parties to the action shall attend the orientation session.

6. **Privacy of Mediation.** Neither of the parties shall call the mediator or any employees or agents of the mediator to testify as a witness nor shall either party subpoena any records of the Mediator in any matter related to the mediation or related to the issues which were discussed in mediation. All records, documents, notes, or any other information kept by the Mediator shall not be admissible in a court of law or available for legal discovery in any pending or subsequent litigation that relates to or involves an issue addressed in mediation, whether directly or indirectly. Furthermore, the parties shall not attempt to force the Mediator to divulge any information that he or she may acquire regarding the case. The parties shall not seek to require or request the Mediator or anyone else employed by the Mediator to testify in any legal proceeding relating to his or her dispute.

7. **Confidentiality.** The Mediator shall treat all information provided during mediation sessions as confidential. No information obtained during mediation sessions will be given to any outside person or organization unless both parties agree or unless there are allegations of child abuse. Disclosure shall only be permitted to the extent necessary to document the terms of any agreement reached as a final resolution of the dispute. The parties shall execute a Confidentiality Agreement upon request of the Mediator.

8. The Court requests that the Mediators promptly comply with the reporting requirements upon termination of the mediation (regardless of the reason(s) for termination).

BY THE COURT,

Judge

Attorneys:

Plaintiff _____

Defendant _____

February 20, 1995

TOLMAN SCREENING MODEL

SCREENING QUESTIONS

1. **Mediation often occurs with both spouses in the same room together. Do you have any concerns about mediating in the same room together with your spouse?**

The rationale for this question is that it may tap reluctance to participate in mediation because of physical abuse without directly asking for it. Thus, it may be effective as a broad screening question, even if abuse victims are reluctant to directly disclose abuse. On the other hand, reasons other than abuse may result in concerns about mediation, and these would have to be sorted out in further screening.

2. **Are you fearful of your spouse for any reason?**

This question taps the subjective perspective of the respondent. It does not assume fear is a result of physical abuse, nor is it limited to fear of physical harm. It may identify fears of various types (taking children away, fear of humiliation, fear of spouse harming himself, etc.)

3. **Has your spouse ever threatened to hurt you in any way?**

This question is similar to question #2 in that it asks about threats in a broad manner, not limited to physical abuse. It adds information about the spouse's behavior, rather than focusing on the subjective perspective of the respondent.

4. **Has your spouse ever hit you or used any other type of physical force towards you?**

This question directly asks about physical abuse, though it does not use the term abuse. Many women who experience physical abuse may not label it with that term. This question is more neutral in its terminology and may elicit more positive responses. On the other hand, further screening may clarify the physical force used as non-abusive. For example, a spouse's use of physical force may be legitimately self-defensive.

5. **Have you ever called the police, requested a protection from abuse order, or sought help for yourself as a result of abuse by your spouse?**

An affirmative answer to this question would demonstrate that abuse is a significant problem. However, serious abuse might have occurred even if it answered negatively.

6. **Are you currently afraid that your spouse will physically harm you?**

This repeats #2, except that it more pointedly asks about physical abuse. An affirmative answer to #2 and a negative answer to #6 would point the screening towards a clarification of the nature of the respondent's fears. It also may clarify that while the respondent experienced abuse in the past, she is not currently fearful. This also would indicate a direction for further screening.

7. **Mediation is a process in which divorcing spouses work together with a neutral third person to negotiate details of their divorce. Do you believe you would be able to communicate with your spouse on an equal basis in mediation sessions?**

This question indicates the respondent's subjective perspective about ability to mediate. A negative response would lead to further screening about the reasons for the inequality. If previous questions about abuse were answered negatively, but this question is answered positively, it may indicate that the reason for inequality is not physical abuse, but some other factors, including psychological maltreatment. This could then be clarified further. On the other hand, if abuse questions are answered positively, but this question is answered negatively, it might reflect the respondent's belief that the abuse has not hampered her ability to use mediation effectively.

(if couple has children, also ask the following questions.)

8. **Has your partner ever threatened to deny you access to your children?**
9. **Do you have any concerns about the children's emotional or physical safety with you or the other parent?**
10. **Has the department of children or family services ever been involved with your family?**

USING THE RESULTS

The hope is that this questionnaire quickly would add important triage information. The pattern of response would indicate next steps.

If all the answers indicated no abuse, no fear, and an endorsement of equal communication, the case would be referred on for regular mediation.

If the pattern of response indicates abuse has occurred in the past, but the respondent is not fearful and feels able to communicate equally, then she may be an appropriate candidate for face to face mediation. This would be explored further in screening, and would be carefully regulated by the mediator if mediation went forward. Either regular or specialized mediation might be the disposition.

If the pattern of responses indicates abuse has occurred, and the respondent is fearful, and/or does not feel able to communicate equally, then mediation would not go forward. Further screening would clarify concerns, and add information about whether specialized mediation might be possible.

TOLMAN SCREENING MODEL

Richard M. Tolman, Ph.D.
Jane Addams College of Social Work
University of Illinois
Chicago, Illinois

from:

Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risk, The Final Report of the [State of Maine] Domestic Abuse and Mediation Project, [Court Mediation Service, PO Box 328, Portland, Maine 04101 (207)822-4274].

THE BENEFITS OF CUSTODY MEDIATION

Many reasons are cited to support the growth of mediation as a voluntary option for divorcing or separated parents seeking a resolution of their custody issues. A mediated custody agreement protects family relationships: While helping a couple end their relationship as Husband and Wife, mediation establishes a foundation for co-parenting; focuses on the present and future, not the past; mediation helps individuals let go of their past and direct their energies toward independent futures; avoids polarizing tendencies of the adversary system: Mediation results in agreements to which people are committed, and therefore reduces the amount of custody litigation; is time limited: Mediation helps reduce uncertainty for the family and minimizes confusion and delay for children; offers an informal context for reaching agreement: such a setting is both confidential and convenient; allows for more control over the costs of the process: for many people the costs of obtaining a settlement through the adversary system is high, both financially and emotionally; is empowering: Mediation recognizes that both parents have legitimate needs and helps develop options to meet those needs; it is committed to self-determination.

WHAT IS CUSTODY MEDIATION?

Mediation is a voluntary problem solving process, available to assist divorcing or separated parents, work out a mutual agreement on the parenting issues which must be resolved; who will make decisions concerning the children and what will the children's schedule look like.

WHO MAY USE MEDIATION?

Mediation is for parents who have made a decision to divorce; parents who are unsure whether to divorce, but who want a separation; parents in post-decree disputes. Mediation is not only for parents who agree; it is a process designed to help any set of parents regardless of existing differences.

HOW DOES MEDIATION WORK?

With the assistance of a trained neutral third party, the parents work to identify, negotiate and resolve in a fair way the issues raised by the decision to divorce or separate. When those issues have been resolved, the mediator will draft the memorandum of agreement. This is reviewed by the parents and given to their attorneys for legal implementation. An attorney will then draw up a formal parenting agreement, which becomes a binding contract.

HOW LONG DOES IT TAKE?

Mediation varies in length depending upon the agenda, the complexities of the issues involved and the readiness of the couple. In York County, when the mediation is court ordered, the parties must attend an orientation session.

WILL EACH PARENT NEED AN ATTORNEY?

Each parent is urged to seek legal counsel throughout the mediation process. While the decisions reached in mediation are made by the divorcing or separated parents, we believe they should be informed decisions.

WHAT DOES IT COST?

Fees for mediation are billed at an hourly rate. The couple is encouraged to share the costs. Although this process involves the services of both mediators and attorneys, the cost of mediated custody agreements are often less than the usual adversarial alternative.

RESEARCH

"The research indicates that mediation is the more desirable way for couples to resolve contested child custody disputes." They also report much satisfaction with the process... successful mediation clients are less likely to report problems with their court orders and, are more likely to report that their spouses are in total compliance. The benefits of mediation clearly outweigh the costs." Pearson & Thoennes, Family Advocate (1982)

YORK COUNTY COURT OF COMMON PLEAS

Date: _____

Custody Mediation Statistical Report

Instruction: This report is forwarded to the Mediation Subcommittee at the Family Law Committee for statistical purposes. It is not to be sent to the Court.

Mediator #1 _____ Your File No.(optional) _____

Mediator #2 _____ Your File No.(optional) _____

1. Was case rejected during screening? Yes No

Reason(s) _____

2. Number of sessions parties attended: _____

3. Total number of hours in mediation: _____

4. Total number of hours by all mediators outside of sessions (phone calls, document preparation, etc.): _____

5. Time span in weeks from first session to last: _____

6. Check one:

- (a) [] Mediation successful (all issues resolved).
- (b) [] Mediation partially successful.
- (c) [] Mediation complete failure (no issues resolved).
- (d) [] Issues resolved outside of mediation.
- (e) [] Party/ies did not contact mediator.

7. Check one:

- (a) [] Case referred by Court Order.
- (b) [] Case referred privately.

8. Did you receive information that the agreement broke down after the Memorandum of Understanding was sent to counsel?

Yes No

9. Comments to be brought to committee during quarterly meetings:

please send completed form to Daniel M. Fennick,
1423 East Market Street, York PA 17403

JAN 29 1995

Mediation Statistical Report

Records reported through: 27-Jan-95

Statistics compiled by:
Daniel M. Fennick

Statistics Regarding Results of Mediation

Total no. of reports	133		
Cases rejected in screening	9	Percent:	6.8%
Of cases which were mediated,			
complete success	58	Percent:	53.2%
partial success	19	Percent:	17.4%
complete failure	37	Percent:	33.9%
Cases resolved outside mediation after being referred:	15	Percent:	11.3%
Number of Cases completely resolved in one session	22	Percent:	20.2%

Statistics Regarding Conduct of Sessions:

	Average	population Standard Deviation	Maximum
Number of Sessions	1.6	1.3	8.0
Total hours in mediation	2.8	2.3	13.6
weeks from first session to last	2.9	4.3	28.0

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Plaintiff : No.
: :
: :
vs. : Action in Custody
: :
: :
Defendant :

MEDIATION REPORT

1. Date mediation order entered:
2. Mediators:
3. Disposition:

- a. Screening determined that mediation not appropriate.
- b. The following party/parties did not contact the mediator/s within the time required by the Order:
- c. Mediation resolved all issues and a memorandum of understanding was sent to counsel on _____

- d. Mediation did not resolve all issues and a memorandum outlining issues to be resolved was sent to counsel on _____.
- e. Mediation did not resolve any issues.
- f. Issues resolved outside of mediation.

Comments: _____

Respectfully submitted,

Patricia R. Marcus, Esquire

Date: _____

February 10, 1995