



## **MEDIATION AND DOMESTIC VIOLENCE**

### **A Guide for Local Planning**

The Illinois Supreme Court has mandated mediation in custody and visitation cases in Rule 905 of the Custody Supreme Court Rules. By January 1, 2007, each circuit is required to have a plan for mediation in effect. After long debate about mediation and study of those circuits that had it, the Supreme Court adopted the rule and the philosophy of the Special Supreme Court Child Custody Committee noted in the Committee Comments. The committee believes “mediation can be useful in nearly all contested custody proceedings. Mediation can resolve a significant portion of custody disputes and often has a positive impact even when custody issues are not resolved. The process of mediation focuses the parties’ attention on the needs of the child and helps parties to be realistic in their expectations regarding custody.” One issue for each local circuit is how to address mediation in cases with domestic violence. To be helpful, circuits and local councils will need to understand what the Supreme Court Rule requires and where each local circuit and council can affect its application.

### **THE RULE**

#### **Rule 905. Mediation**

- (a) Each judicial circuit shall establish a program to provide mediation for cases involving the custody of a child or visitation issues (whether or not the parties have been married). In addition to the minimum requirements set forth in subparagraph (b)(2) of Rule 99, local circuit court rules for mediation in child custody and visitation cases shall address: (i) mandatory training for mediators; (ii) limitation of the mediation program to child custody and visitation issues; (iii) (unless otherwise provided for in this article) standards to determine which child custody and visitation issues should be referred to mediation and the time for referral, and (iv) excuse from referral to mediation if the court determines an impediment to mediation exists. The immunity and approval requirements of subparagraph (b)(1) of Rule 99 shall apply to mediation programs for child custody and visitation matters.

- (b) Each judicial circuit shall establish a program to provide mediation for dissolution of marriage and paternity cases involving the custody of a child or visitation issues (whether or not the parties have been married). In addition to the minimum requirements set forth in subparagraph (b)(2) of Rule 99, local circuit court rules for mediation in dissolution of marriage and paternity cases shall address: (i) mandatory expertise requirements of a mediator; (ii) mandatory training for mediators; (iii) limitation of the mediation program to child custody and visitation issues; and (iv) referral of child custody and visitation issues to mediation, pursuant to Rule 923(a)(3), unless the court determines an impediment to mediation exists. The immunity and approval requirements of subparagraph (b)(1) of Rule 99 shall apply to mediation programs for child custody and visitation matters.
- (c) In addition to meeting the requirements of Rule 905(a) and (b), local circuit rules may also impose other requirements as deemed necessary by the individual circuits.

### **Rule 923: Case Management Conferences**

**(a) Initial Conference.** In a child custody proceeding under this part, an initial case management conference pursuant to Rule 218 shall be held not later than 90 days after service of the petition or complaint is obtained. In addition to other matters the court may choose to address, the initial conference shall cover the following issues: ....

**(3) Mediation.** If there is no agreement regarding custody or a parenting plan or both, the court shall schedule the matter for mediation in accordance with Rule 905(b) and shall advise each parent of the responsibilities imposed upon them by the pertinent local court rules.

### **THE MEANING**

Supreme Court rules come with committee comments that help illuminate how they are to be applied. While mandating mediation in all cases dealing with custody and visitation issues, including probate guardianships and juvenile cases along with dissolution of marriage and parentage actions, the rule does not require each circuit to have an identical mediation program. According to the committee comments to Rule 905, it “requires each judicial circuit to establish a mediation program for child custody proceedings. Local circuit court rules will address the specifics of the mediation programs....” The cost of various programs is one reason that each circuit must create its own mediation program plan. Each circuit must determine how to pay for mediation, especially for the indigent, along with the other aspects of each program.

## IMPEDIMENTS TO MEDIATION

The Committee Comments provide guidance on what cases may avoid the mandatory mediation rule. They state:

“Parties may be excused from referral under both paragraphs (a) and (b) if the court determines an impediment to mediation exists. Such impediments may include family violence, mental or cognitive impairment, alcohol abuse or chemical dependency, or other circumstances which may render mediation inappropriate or would unreasonably interfere with the mediation process.”

The Illinois Marriage and Dissolution of Marriage Act also contains two important provisions on mediation which should also be remembered: Section 404 (b). “Conciliation-Mediation: The court may prohibit mediation upon good cause shown.” And Section 607.1(c) 4: “Enforcement of visitation orders – visitation abuse: The court shall not order mediation in visitation cases if there is domestic violence between the parties.” (emphasis added)

A stated goal of the Illinois Family Violence Coordinating Councils (IFVCC) is to contribute to the improvement of the legal system and the administration of justice. The IFVCC has developed, with a multi-disciplinary committee, this document to give guidance and suggestions for local councils and circuits to assist in shaping the administration of mediation where domestic violence is a concern. Circuits and councils are faced with the issue of mediation in cases involving domestic or family violence, and identified the need for advice and recommendations.

Mandatory mediation exists and is widespread, but there has been little meaningful research on issues of long-term safety, success, delay, and cost. The IFVCC and this protocol have not evaluated the efficacy of mediation itself as a tool, but are instead concerned with protecting the members of families affected by family violence in a legal culture that has mandatory mediation in custody and visitation cases.

Many local councils, counties and court systems are now struggling with developing mediation programs. The circuit and council should ensure that the local rules address: the training of mediators to be familiar with domestic and family violence issues; safeguards or limits on the types of mediation; and the location and circumstance under which mediation occurs. Standards for termination of mediation need to be delineated. Finally, councils will want to make sure that the program for their circuit defines when an impediment to mediation exists and enforces the exceptions.

The following concerns should be addressed by the IFVCC local coordinating councils with their Chief Judge or resident judge since each circuit adopts its own program and submits it to the Supreme Court for approval.

## **1. Domestic violence should be recognized as a potential impediment to mediation and steps taken to identify domestic violence in custody and visitation cases.**

- Criminal charges or an active order of protection indicate domestic violence and may identify an impediment.

The first issue in any case is to determine where there are domestic violence issues. Criminal charges or a plenary order of protection indicate domestic violence and identify an impediment. The local circuit may adopt a rule that the filing of criminal charges or granting of a plenary order of protection are automatically an impediment to any form of mediation.

- Screening protocols need to be in place to identify domestic violence cases.

Techniques have been developed to identify and divert cases inappropriate for mediation because of impediments, including domestic violence. Concern for safety and the protection of victims of domestic violence is a fundamental concern, particularly since evidence indicates that domestic violence escalates after the break-up of a marriage or relationship. Local councils need to address safety issues within each circuit with screening protocols.

Excellent screening protocols are essential. For example, screening protocols should address receipt of information from each individual separately. Screening protocols should ask specific behavioral-oriented questions rather than general conclusory questions like “are you a victim of domestic violence?” It is the responsibility of the court, the screening official, the attorneys, and the mediator to screen for impediments (including domestic violence) during the intake procedure and when an impediment is identified, terminate mediation. Mediators have an ethical and professional duty to screen for family violence (and to screen for substance and alcohol abuse) and to not begin or to stop or otherwise control the mediation when domestic violence has occurred. It is the absolute right of the party to be safe in mediation and to ask to terminate mediation because of the existence of domestic violence.

- Some victims of family violence will not identify themselves, and screening protocols may not successfully identify all domestic violence victims, so additional opt-outs are necessary.

Cases with criminal charges are obvious to the court, but not every case with domestic violence results in criminal charges. Both research and anecdotal evidence indicate that the victim of domestic violence may be unwilling to tell the screener, mediator or even his or her own attorney. Therefore, a series of opt-out opportunities are necessary.

Even if a particular circuit adopts a blanket rule excusing some categories of cases, additional safeguards may need to exist. For those circuits that do not adopt

a blanket rule and instead excuse parties from mediation on a case-by-case method upon finding an impediment, screening procedures are imperative. An opt-out from mediation should be able to be sought at any stage in the process by: a) the court; b) the screener (if any); c) the mediator; or d) a party.

Each circuit must also address various training, communication, confidentiality, and numerous other facets of a mediation program protocol to protect all parties.

Any family mediation process must be concerned from beginning to end with safety, with voluntary and confidential procedures to return to court, and with preparation and training of mediators. Every mandatory mediation program should develop a written local court rule detailing the court's policy on all rules, practices, and other policies governing mediation in that area.

## **2. Mediator training minimums should be established.**

Mediators who have not been trained in the dynamics of domestic violence may not be able to identify victims even with excellent screening protocols. Mediators who have not been trained to identify substance and alcohol abuse will be at a disadvantage. Mediators should be trained by local domestic violence experts in both the dynamics of domestic violence and safety planning, and be trained in identifying substance and alcohol abuse and mental illness. Mediators should meet minimum standards such as: a master's degree in a human services discipline or a law degree, or two years professional post-degree experience in dealing with family issues, and completion by all mediators of a recognized training program in mediation including training regarding pertinent parts of the Illinois Marriage and Dissolution Act, the Illinois Parentage Act, the Illinois Domestic Violence Act and any other acts that are subject to mediation.

## **3. When the mediator finds an impediment and excuses the parties from mediation, the reason should be kept confidential.**

Confidentiality in this framework means that the identity of the party who discloses the impediment should not be conveyed to the judge hearing the case, nor will the reason for opting out be identified. Similarly, the party who caused the mediation to terminate after it has begun may not be identified by the mediator unless mediator confidentiality rules mandate disclosure.

Identifying information should not be conveyed to the trial judge in a family court setting as the trial court is the finder of facts and makes the decision. As courts have accepted mediation with ever-increasing enthusiasm, the court must be sensitive that a victim of abuse may be reluctant to reject mediation if the judge hearing the case will immediately be told of the identity of the party or the reason(s) for termination.

**4. The existence of a mediation program must not delay the processing of a case.**

Supreme Court Rules require that all custody and visitation disputes must be resolved within 18 months.

When events or the facts lead to either a waiver of mediation or mediation terminates, the case should then be given timely access to the court. The 18 month deadline is the maximum time a custody and visitation dispute may pend; courts and lawyers must be sensitive to the need to resolve the cases that are not mediated on an expedited basis.

Since mediation programs require completion of mediation or a certain number of sessions before a court hearing may be scheduled, the court must be sensitive to concerns that an abuser may try to delay the mediation process as a tactic to control a victim. Cases that are sent to mediation should complete the mediation process within a three-month period (or some other reasonably short time period), so that the cases can then be referred back to the court in a timely manner. The court would then either receive a mediation agreement or set the case for hearing at that time. This would keep cases from remaining in mediation indefinitely precluding the parties from having access to the court. The expense and duration of mediation is especially important if the parties incur the cost of mediation.

**5. The existence of a mediation program requires the development of a comprehensive plan to respond to violence or the threat of violence among the parties in any cases subject to mediation.**

Personal safety protocols should take into account: the physical surroundings in which intake and mediation sessions will occur; access to prompt law enforcement assistance; the availability of community resources, such as victim advocate services to help reduce the risk of harm; and other protective measures that are reasonably necessary to safeguard a party in mediation. Personal safety protocols should be implemented at the direction of the mediator, screening official or judge. Evidence of prior domestic violence should be sufficient to implement safety protocols by a judge. Where there are disputed allegations, the court should err on the side of safety. Personal safety protocols should provide that during mediation or at the termination of mediation, an order of protection could be issued if needed to protect a party (and children) through all judicial proceedings. When a mediator decides there is a need to operate safety protocols for the mediation to safeguard any person, the mediator should not be required to disclose to the judge or to the parties the basis of a decision to implement safety protocols.

**6. Mediators are not counselors nor are they evaluators. Mediators cannot be called upon or expected to testify or make any recommendation to the court, regardless of whether they are qualified to testify or make recommendations, because it is not their role.**

The training of mediators and the standards for many societies of mediators make it clear that a mediator may not testify. The program adopted by each circuit should specifically state that mediators do not testify or make recommendations.

**7. Court communication is vital to protect victims of family violence.**

For example, if a circuit concludes that prior or concurrent domestic violence arrests, prior orders of protection and existing orders of protection absolutely preclude mediation (or is prima facie evidence of an impediment to mediation), it is important that each judge (courtroom) in the jurisdiction be aware of the existence of orders of protection. A purported victim who wants to be excused from mediation services because of an existing Order of Protection may be disadvantaged unless that judge, court clerk or scheduling entity is officially notified the Order of Protection was entered.

**8. Costs of mandatory mediation are a series concern for domestic violence victims.**

The court should consider a financial hardship waiver or reduction of fees for any domestic violence victim who is subject to mandatory mediation and is not financially able to pay the costs. . Since mediation is specifically listed as a required service that should be provided at no cost to the indigent, the program adopted by each circuit must clearly ask individuals who cannot pay to identify themselves and it is imperative that persons who may be indigent and may be victims of abuse are identified to avoid additional hardship and stress (See 735 ILCS 5/5-105, Leave to Sue or Defend as an Indigent Person and Supreme Court Rule 298, Application to Sue or Defend as an Indigent Person).

**9. Each circuit should develop an Oversight Committee as it begins its mediation program.**

Finally, each circuit should realize that mediation in family law cases as one method of alternative dispute resolution. It should be thoroughly studied and evaluated as to the issues of safety, cost, delay, outcomes, and degree of satisfaction (including the impact on children).

Circuits and local councils are urged to create an oversight committee on the consequences of mandatory referral to mediation that would provide periodic feedback to the Chief Judge regarding how local practice is affecting victims of domestic violence. Local domestic violence providers, judges, law enforcement and health care personnel could be members.

The Illinois Family Violence Coordinating Councils recognizes that there are other issues that could be addressed, but it is convinced that the above items are the most important safety considerations of family violence survivors for circuits and local councils developing mediation programs under the new Supreme Court rule.

Each circuit must locally define its impediments to mediation, but each circuit should be aware that existing Supreme Court Rules and domestic violence experts recognize that there are cases where mediation is not appropriate because of family violence. Thus, each circuit's rules must define how cases with domestic violence will be addressed.