

Mediation and Mental Health Best Practices Handbook



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Table of Contents

I. Introduction: About this Handbook and Best Practice Guide	3
Background.....	3
Handbook Objectives	4
States of Well Being.....	5
Dealing with the Justice System	8
The Trauma of Divorce	8
Promoting Mental Wellness in Justice	9
II. Mediator Best Practices	11
Awareness of Mental Health Issues	11
Preparing for the Mediation Session	12
Practices During the Mediation Session	13
De-Escalation and Engagement Techniques and Practices.....	14
Mediation as a Service within Caseload Processes.....	16
III. Court Specific Issues.....	18
Pandemic Impacts	18
Remote Access to Court Services	19
Event Participation Via Remote Video or Telephonic Platforms	19
IV. Systemic Responses.....	20
Sequential Intercept Model	20
System Handoffs	21
Collaboration with Mental Health Providers and Professionals	22
V. National Efforts	23
VI. Resources	25
Terms and Terminology.....	25
Suggested Resources	25
Checklists.....	26
Scenarios.....	31

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I. Introduction: About this Handbook and Best Practice Guide

Background

This handbook is the result of the emerging and increasing recognition of the need to appreciate, comprehend, and employ best (and improved) practices in the delivery of mediation services. It also acknowledges that mediators are expected to interact with parties who may come into mediation with different states of being, physical condition, mental condition, and wellness. Coupled with that is the desire to enhance mediator awareness of mental health triggers that may interfere with the mediation process, equip them with practices and techniques to resolve disputes while being sensitive to mental health needs of parties during mediation sessions.

The Office of Dispute Resolution for Lubbock County, Texas (TX ODR or ODR)¹ recognized the need for practice improvement for mediation interactions with parties experiencing mental health issues.

- Party engagements with the justice system have proved to be stressful, with parties potentially engaging in harmful behaviors.
- Mediators and other settlement or dispute resolution providers have been called upon to interact with parties having undiagnosed and untreated conditions.
- In recent years, Lubbock County had worked to address mental health issues, primarily with respect to criminal proceedings.
- One in five persons have experienced issues with mental health and have had issues ranging from anxiety to mental illness.
- Almost half of the adults in the United States will experience a mental health challenge at some point during their lives; challenges include depression, anxiety, post-traumatic stress, substance abuse, bipolar disorder, or psychotic episodes.
- Many individuals with common mental health problems do not seek professional help.
- In family court cases, high incidences of mental health issues influence the way that mediators do their work.
- Party mental, behavioral, or emotional disorders create the possibility of functional impairment and interference with one or more life activities.
- Mediators may also take for granted that mediation can seem mysterious and that can impact parties' ability to mediate meaningfully.²

In conjunction with the National Center for State Courts (NCSC), the TX ODR requested funding from the State Justice Institute (SJI). The grant³ was established to: engage consulting

¹ In this handbook, the Texas Office of Dispute Resolution program will be referred to as TX ODR or ODR. In recent years, many courts have implemented processes for settlement and dispute resolution using online platforms – commonly called online dispute resolution, or ODR. For purposes of this handbook, court online programs will be called Court ODR.

² Hon. Drue Farmer, J.D., Lubbock County Court at Law, comments from TX ODR training provided in July 2021.

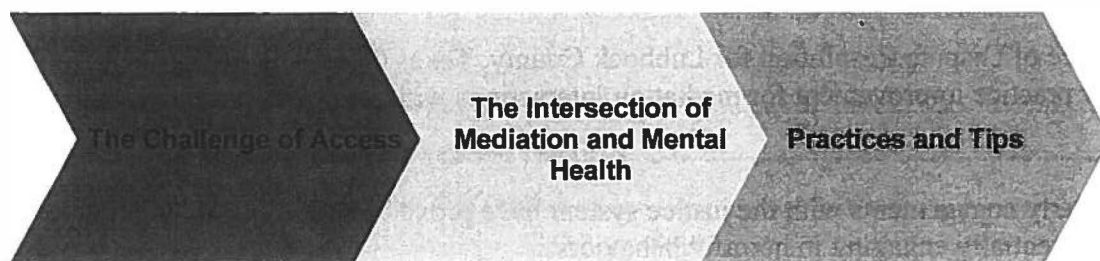
³ SJI grant number 21E017.

and professional services to prepare and provide workshops for the Texas Courts TX ODR and mediation practitioners; learn about issues, techniques, and best practices; teach mediators how to recognize signs and symptoms of mental illness that may impact mediation sessions; become aware and utilize protocols with increased efficacy; and publish a best practice guide or handbook.

Handbook Objectives

This document is intended to describe: the *challenge* of accessing the justice system; illustrate the *intersection* of mediation services and parties experiencing mental health challenges; and provide *practice* techniques and tips that were provided during workshop presentations to the TX ODR.

Figure 1- The Challenge, The Intersection of Mediation and Mental Health and Practices and Tips



This handbook may serve as a quick reference guide for mediators working with parties who may be experiencing different mental health related challenges. Further, this handbook is intended to prepare mediators and professionals (with practices and techniques) for productive engagements with parties. It will link mediation and Court ODR or alternative dispute resolution (ADR) practices with pertinent practices employed for those encountering mental health issues. Lastly the handbook will hopefully be the impetus for further development and refinement of mediation and mental health services in family court cases, with resulting growth in awareness and practice.

What It Is and What It Is Not

This handbook is intended to document and provide tips on and descriptions of best practices for mediators when dealing with those parties who may be experiencing mental health issues, and to enhance mediator awareness of mental health issues to be encountered when providing mediation services in family court cases. This handbook is not intended to be a full treatise or training manual on either mediation techniques or mental health services, functions, or instruction. Content in this guide is expected to grow and develop as courts and professionals continue refinement of protocols and practices. Hopefully, other courts will provide additional content and practice details in the future.

Summary of Contents

This handbook summarizes challenges involving clients with mental health concerns, recommends practices to mediators to work with those challenges, considers court processes, and includes system and national responses and resources.

Figure 2- Handbook Contents

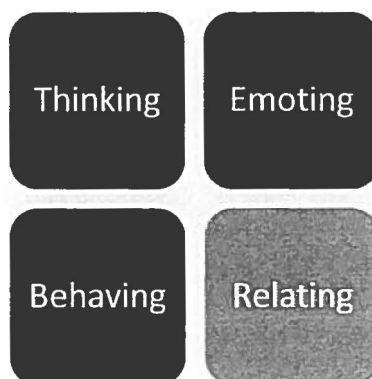


States of Well Being

Well-being and mental health are issues that courts and court programs may not necessarily recognize. Court processes are not necessarily created or practiced to adequately address well-being and mental health. The World Health Organization defines mental wellness as “a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.”⁴

In fact, symptoms of a person’s mental illness, particularly if untreated, may influence a person’s thinking, emotional state, individual behavior, and the ability to relate with others.⁵ These four quadrants may likewise impact engagements for court events and with mediation sessions.

Figure 3 - Areas Affected by Mental Illness



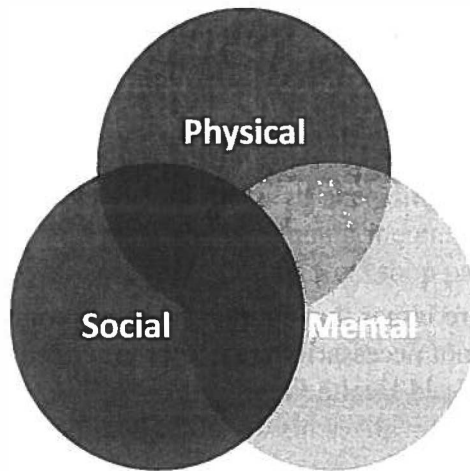
Mental wellness, therefore, consists of the complete package of physical, social, and mental health. However, having physical, social, and mental health may not indicate the absence of illness or infirmity. The Texas Health and Safety Code defines mental illness as an illness, disease, or condition, other than epilepsy, dementia, substance abuse or intellectual disability, that: A) substantially impairs a person’s thought, perception of reality, emotional process, or judgement; or

⁴ Content presented during workshop by Hon. Amy L. McFarland, Associate Circuit Judge, 11th Judicial Circuit, McLean County, Illinois, July 2021.

⁵ <https://carrierclinic.org/2018/06/20/how-to-recognize-a-mental-health-crisis-and-intervene/>

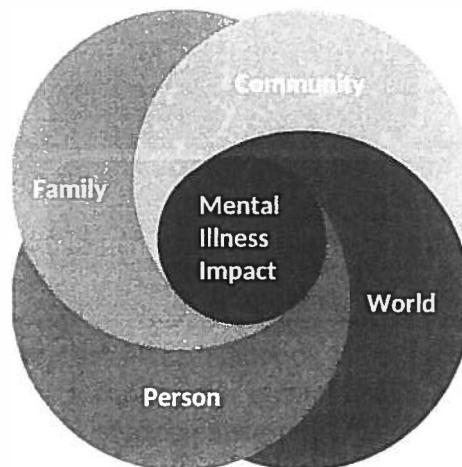
B) grossly impairs behavior as demonstrated by recent disturbed behavior.⁶

Figure 4- States of Well Being



In cases involving criminal law, parties with mental illness are overrepresented, that is, the prevalence of those with some form of mental illness is great.⁷ Two million times a year, people with mental illness are booked into jails. Seventy percent of youth in juvenile court have a diagnosable mental health condition. Sixty-six percent of women in prison have a history of mental illness. Mental health has a ripple effect. It can impact the person, the family, the community, and the world.

Figure 5- Impacts of Mental Illness



Underlying mental conditions may be heightened by the stress of legal processes. This extends to services provided by mediators. Increased awareness of party mental conditions can improve

⁶ Texas Health and Safety Code; Title 7; Subtitle C; Chapter 571 Section 571.003.14.

⁷ According to the Texas Health and Human Services Commission, of the 27 million people who live in Texas, approximately 1 million adults experience mental illness (Texas Health and Human Services Commission, Texas Statewide Behavioral Health Strategic Plan 10, (2016)).

interactions. There are some obstacles to consider. Common obstacles include:

- Lack of knowledge about mental health or intellectual or developmental disabilities.
- Stigma about mental illness creating unnecessary barriers for interaction or services.
- Presence of co-occurring disorders.
- Lack of resources contribute toward criminalization of people with mental health needs.
- Additional stressors due to the influence of the COVID19 pandemic, impacting anxiety, depression, and isolation.
- Legal system changes resulting from the COVID19 pandemic that modify how proceedings are held and accomplished.
- Parties that may not be represented in the legal system and may have limited resources to navigate legal processes.

Education and increased awareness are needed to overcome the obstacles and avoid further stigmatization and criminalization of mental health issues. Areas for education and focus should include:

- Understanding the difference between competency, insanity, capacity, and mental illness.
- Knowing that mental illness and intellectual developmental disabilities are not the same.
- Ensuring that parties have access to treatment especially for low level criminal misdemeanors.
- Providing zealous representation for clients absent provider biases or prejudices.
- Avoiding provider positioning of clients in “revolving door” processes.

Points for Consideration: Differences Between Competency, Insanity, Capacity and Mental Illness⁸

- *Competence* to stand trial is the legally determined capacity of a criminal defendant to proceed with criminal adjudication.
- *Insanity* relates to a criminal defendant’s mental state at the time the alleged crime was committed and is an affirmative defense to prosecution.
- *Capacity* relates to the individual’s ability to understand the nature and consequences of decisions.
- *Mental illness* relates to impairment of thought, perception of reality, emotional process, judgment, or behavior; a person may have a mental illness, but still be competent to stand trial (though maybe not without counsel).

⁸ Texas Judicial Commission on Mental Health, Texas Mental Health and IDD law Bench Book, 3rd Ed., <http://texasjcmh.gov/media/2087/jcmh-adult-bench-book-3rd-ed-final-print.pdf>.

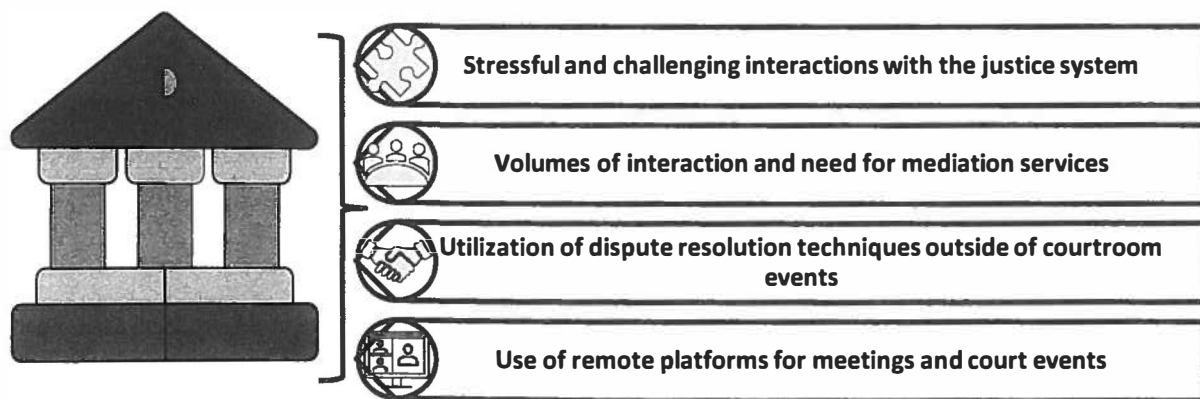
Dealing with the Justice System

Engagements with the justice system may be stressful for parties, even under the best of circumstances. Parties are put to the test to navigate the system without further stress and life disruption. They may feel vulnerable to unknown processes. Parties may not be represented by legal counsel and left to their own resources to navigate complex legal processes. Accessing court services and functions may involve challenges in getting to the court and accessing transportation, locating childcare, and fear about the process and environment. Concerns may also include worries about the court rigor or rigidity, handling of information gathered from interactions, and fears about how to conduct oneself when attending a court event, or even a mediation appointment. With the implementation of technology and expanded utilization of virtual platforms for access to court hearings and events (prevalent during the COVID-19 pandemic), some efficiencies in access and processes have occurred, but some stresses have been magnified. These stresses may create problems in dealing with parties that have mental health issues.

The volumes of parties in court ordered mediation and particularly those users with mental health issues may be of concern to court leaders and indicate the need to be better prepared, provide services in different ways, and strive to address party needs. Lack of awareness and understanding of parties with undiagnosed and untreated conditions that may contribute to dispute resolution or mediation problems.

Lastly, in recent years, courts have embraced an increased desire to use practices for cases to be resolved outside of formal court processes and without convening events within a courtroom. This reality has resulted in courts creating settlement and mediation programs, offering remote and online dispute resolution, and offering different methods to access and attend events to resolve cases.

Figure 6 - Dealing with the Justice System



The Trauma of Divorce

It may be traumatizing for parties to engage with the court system to obtain a divorce or dissolution of marriage. Family court parties may be destabilized and find themselves in a type of survival mode. In criminal courts, the court process may engage with bad actors attempting to be

on their best behavior. But in family proceedings, parties may be at the worst time of their lives and their behavior may reflect it. The nature of the legal system adds to the demise of a person's state of well-being. What might be otherwise good parents may find themselves "slinging mud" to gain or maintain parenting-time. The adversarial process creates an imbalance for families and can create a situation where children are negatively impacted. Secondary impacts include an imbalance of wellness and further interaction with the justice system. Mediators are positioned to be the first responders, identifying where parties are in their state of wellness as the mediators perform their dispute resolution process.

What happens if mental instability is introduced? The National Institute of Mental Health⁹ provides these definitions:

1. Any mental illness is a mental, behavioral, or emotional disorder. It can vary in impact, from no impairment to mild, moderate, or severe impairment.
2. Serious mental illness is a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.
3. Parties that suffer from a serious mental illness do not generally have access to services to assist them through a moment of instability, during the adversarial process. Historically, this has been an unwelcome or uncomfortable conversation in the justice process.
4. Those outside the mental health community will often talk about happiness as a choice. Often, we treat those with a physical illness very differently than how we treat those with a mental illness.

Promoting Mental Wellness in Justice

There are three main pillars that should be considered to promote and support mental wellness for parties in family cases. They include: access to justice; procedural fairness; and accommodation. These have also been memorialized and urged in a Resolution from the Conference of Chief Justices (CCJ).¹⁰

Figure 7- Three Pillars of Justice



Access to justice can include a variety of information and services to help parties in family court

⁹ <https://www.nimh.nih.gov/>

¹⁰ CCJ/Conference of State Court Administrators (COSCA) Resolution 4, 2020 available at https://ccj.ncsc.org/data/assets/pdf_file/0023/51197/Resolution-4-In-Support-of-a-Call-to-Action-to-Redesign-Justice-Processes-for-Families.pdf.

cases. Such access services may include self-help volunteers or navigators to assist parties in completing paperwork. It can include documents and case “maps” whereby details are provided about the steps involved in legal processes. It can even involve the use of online tutorials or instructional videos. When dealing with individuals that may have mental health challenges, these informational and support actions may or may not be effective. Trauma informed practices are essential.¹¹ These questions may arise: Are there gaps in justice related to mental health? Do we give parties the opportunity to step out and take a breath while they are experiencing anxiety? Do we explain the process before walking into the courtroom? Do we allow parties to see the courtroom or physical surroundings first? Do we explain mediation and the process?

Procedural justice or fairness includes the concept that parties a) sense a fairness in the processes used whereby they feel treated with dignity and respect, b) see neutrality and transparency in the actions of the court and decision maker, c) have opportunities to be heard and have a voice during processes, and d) feel that there is impartiality and a sense of trust in the decision making.¹² Courts may need to redouble attention to practices and protocols to impart fair processes, respectful treatment, provide time for litigants to speak, and demonstrate impartiality. These questions may arise: Are we ensuring that practices are understandable and communicated? Do court processes allow time for parties to tell their story and needs?

Accommodation refers to specific assistance and support protocols for those parties who may need supplemental assistance. Examples include accommodation for the deaf, blind, and language needs. Courts have been mandated to and have increased the provision of language services but may be challenged to ensure that assistance is included for those needing help other than with language. In these areas, courts may ask: Have we ensured that we have processes that can be shared in different forms and formats? Have we endeavored to understand and discern the needs of parties?

Points for Consideration

- How can mediators promote the well-being of families, use trauma informed practices, and make those practices part of the overall outcome goal?
- How can mediators recognize and identify the presence of mental conditions in parties?
- Are there other best practices that come to mind?
- What additional techniques might be used to assist parties experiencing mental illness?

¹¹ Trauma informed refers to the practice of recognizing that parties may have experienced prior traumatic events, including family dynamics and impacts from issues surrounding substance abuse. Trauma informed practices assert that engagements and services should avoid retraumatizing parties.

¹² <https://law.yale.edu/justice-collaboratory/procedural-justice>

II. Mediator Best Practices

Mediator practices can appropriately vary based upon the individual case and circumstances. This section suggests researched and proven practices and approaches to lay the foundation for effective delivery of mediation services and experiences. Included are practices for the following:

- Awareness of Mental Health Issues
- Preparation
- Session Practices
- De-escalation and Engagement Management
- Other Considerations
- Mediation as a Service within Caseflow Processes



Awareness of Mental Health Issues

While mediators and neutrals in family court cases are not experts on mental health issues (nor should they attempt to evaluate or diagnose), they should be aware that mental health issues may create additional challenges, and opportunities, for the conduct of any mediation sessions. As was mentioned earlier, mental health issues can be diagnosed or undiagnosed. Either way, the resulting vantage point and reference point of an individual can impact their thinking, emotions, relationships, and behavior. These can certainly appear during mediation activities.

**Find out more
regarding party
capacity for mediation:**
*On the Question of a Party's
Capacity to Use Mediation,*
by Jeanne Cleary

Not all are negative. In fact, some individuals who are challenged with mental health issues may be better equipped to engage in mediation with some positive aspects. Individuals:

May in fact be responsive to effective participation and having a “voice” in the mediation.

Can have a more realistic and less grandiose expectations for the process.

May truly be reassured that working toward the resolution of the dispute will ease their concerns.

How to Talk About Mental Health Without Offending Everyone

Mediator Dan Bernstein shares his journey to being open with his bipolar disorder, and how conflict resolution skills can help us overcome barriers to having conversations about mental health.



Preparing for the Mediation Session

- Recognize that mental illness and intellectual and developmental disabilities (IDD) are not the same.
- Seek to avoid, mitigate, or overcome assumptions about stigma, biases, and prejudices.
- Initiate and conduct a pre-session meeting.
- Consider using motivational interviewing techniques.¹³
- Interview and interact with the client as early as possible prior to the mediation session.
- Recognize preparation needed for remote and virtual sessions.¹⁴
- Ask about the facts of the case and obtain the client input and information.
- Ask the client about any concerns regarding illness.
- Inform the client of his or her rights to information.
- Obtain information about the client attorney or legal representation.
- Familiarize yourself with community services and options available in the community.
- Ascertain and communicate with the client about their needs and concerns, using open-ended questions.
- Ask parties about support needs in advance of the mediation. “Is there anything about your medical care that would be helpful for me as the mediator to know?” “Here is how I run the process... are there any adjustments that would be helpful to enable your full participation?”
- Confirm the nature of the conflict, disagreement, or differences in opinion regarding the divorce.
- Seek to know and understand the nature of the disagreement and conflict that is the subject of the mediation.
- Consider setting multiple sessions and/or spreading out sessions, perhaps by a week or two.
- Identify to the degree possible if there has been a diagnosed condition pre mediation
- Consider whether remote access will assist or hinder

¹³ <https://www.homelesshub.ca/resource/motivational-interviewing-open-questions-affirmation-reflective-listening-and-summary>.

¹⁴ Lessons learned from the TX ODR indicate that remote and virtual sessions have become the norm and are expected to remain viable and effective methods to conduct client interactions.

Find out more about mediation readiness:

Disabilities And Mediation Readiness In Court-Referred Cases: Developing Screening Criteria And Service Networks, by Patrick G. Coy and Tim Hedeon

Attend to special needs for virtual and remote mediation sessions:

- Ensure use of quiet, private setting for session
- Ascertain if safety needs are addressed or in place
- Strive for confidentiality of discussions
- Confirm if session will be via audio and/or video
- Identify if others are present for the session off camera
- Avoid prompts and coaching by others off camera
- Overcome limitations of remote interactions

Find out more about online mediation: Online Mediation:

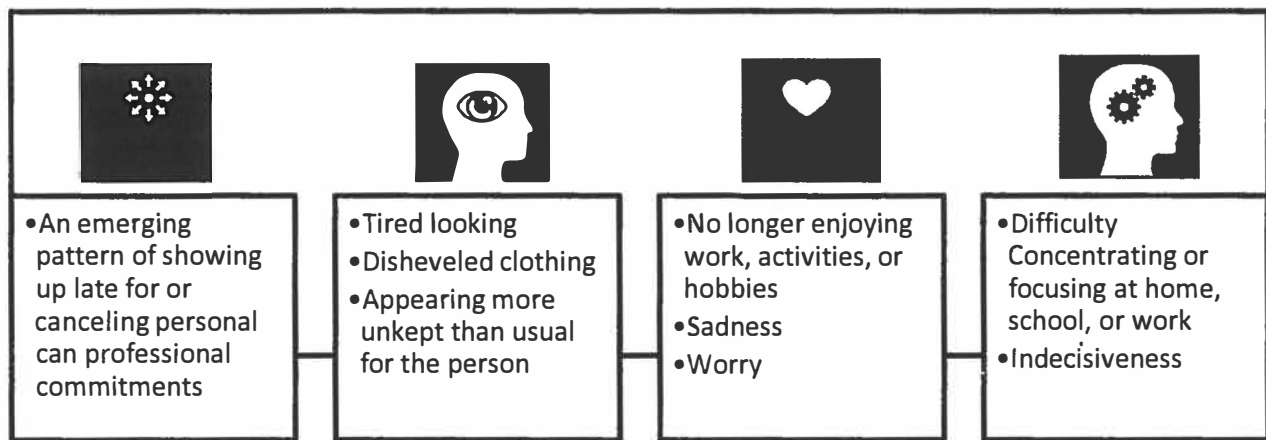
Using Zoom to Conduct Online Mediation: Considerations and Resources for Community Dispute Resolution Program Centers, by the Michigan Supreme Court Office of Dispute Resolution

5 Tips for Successful Mediation, by Metro Law and Mediation

the mediation.

- Remember that the client may not understand legal language, acronyms, or jargon. Work to avoid or explain them.
- Recognize if the client is unable to focus on tasks or interaction pre-mediation
- Talk to the party prior to the mediation and identify possible accommodations that the party may seek.
- Consider accessing any additional resources or support persons that may assist.
- Consider appropriate ADA accommodations.
- Consider whether the person wants a support person or support animal present.
- Consider communicating with the individual in advance, to have them communicate to their legal counsel to communicate to the mediator.
- Honor confidentiality.

Figure 8 - Examples of Early Signs and Symptoms of Mental Illness



Practices During the Mediation Session

- Create a calm and nurturing environment.
- Communicate with quiet and unrushed voice and tone.
- Use open-ended questions and check understanding, using the “OARS” technique.¹⁵
- Set boundaries.
- Summarize key points during the mediation.
- Be concise in comments and questions.
- Invite questions about what was stated (“did I miss anything?” “is this accurate?”).
- Conclude the session with a summary of the next steps (“let me summarize where we are at this point.” “let’s confirm...”).
- Consider physical layout, seating positions and use space in a way comfortable for the client. Avoid restricting the client’s movements.

¹⁵ OARS signifies the use of open questions, affirmations and repetition, reflexive listening, and summarizing what was stated.

- Be strategic in seating arrangements.
- Be aware of the parties becoming aggravated or agitated and give them the opportunity to take a break.
- Recognize if the client is indicating withdrawal and social isolation.
- Establish the rule that parties will not talk over each other. Be careful with your own tendency to speak over parties to “move things along.”
- Establish a speech about respecting everyone’s views.
- Communicate to the other side if the person’s condition has been made known. (Example, if someone has requested a support person).
- Work with support personnel to identify conditions that may be difficult. Example, anti-depressant timing that may make a morning mediation unworkable.
- Use individual caucusing or shuttle mediation with the parties seated in different locations with the mediator visiting each location separately.
- Remember the client may be experiencing confusion, disorientation, impairment in thought, perception of reality, emotions, or judgement, and may exhibit disturbed behavior or anxiety.
- Be cautious regarding sensitive behavioral health related content.
- Honor confidentiality. Identify any exceptions to confidentiality requirements.



**Find out more about
the role of mental
health professionals**

*The Varying Roles of
the Mental Health
Professional in
Divorce*, by Rachel
Virk

De-Escalation and Engagement Techniques and Practices

- Speak slowly, confidently but gently and with caring tone.
- Avoid arguing and raising voice.
- Use positive words.
- Pause if necessary.
- Take breaks if needed.
- Recognize when emotions get heightened.
- Use open communication techniques.
- Seek a non-adversarial interaction.
- Seek other services and support systems if needed.
- Work with the attorney or support person present.
- Facilitate seeking help or support for the individual, if concerns exist about the person being a danger to self or others.
- Consider taking a break, or offer to return another day, if someone is not understanding, or is unwilling to engage further.
- Work with a carefully selected, and agreed upon, support person present.

Figure 9 - Examples of Worsening Signs and Symptoms

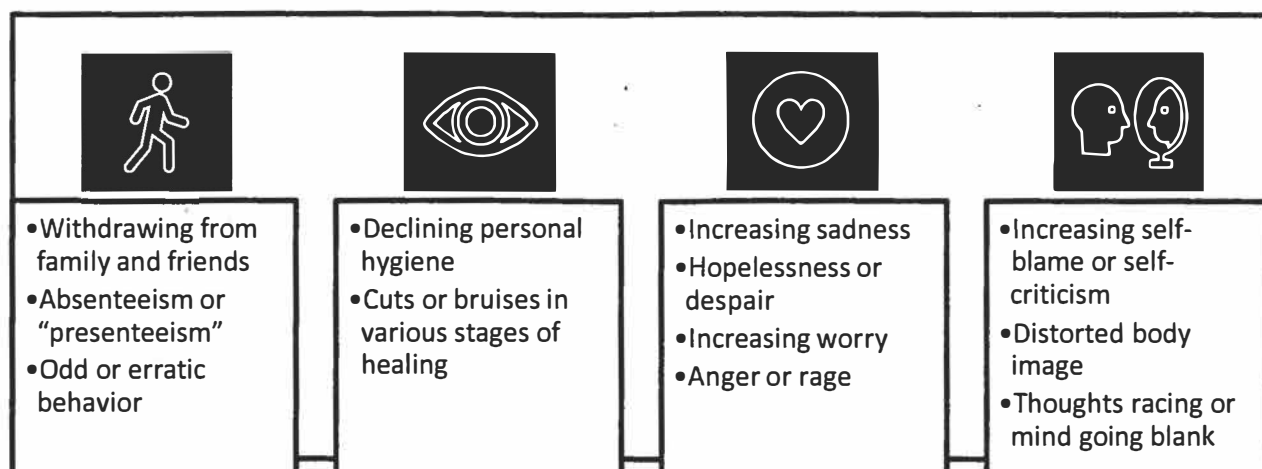
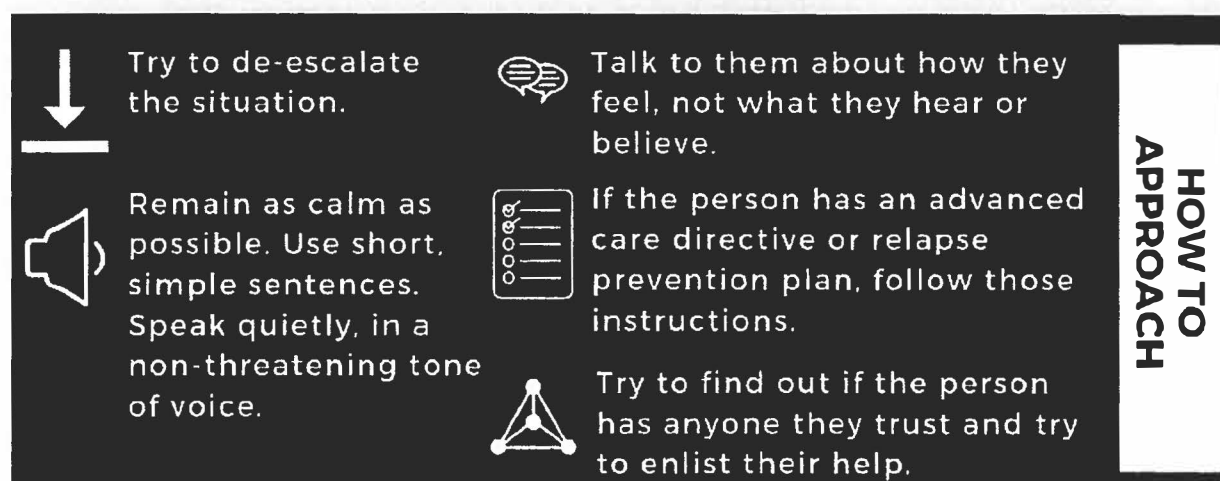


Figure 10 - Example Techniques to Respond to De-Escalate



Other Considerations

- Learn to recognize and identify signs and symptoms of a potential mental health disorder.
- Recognize that "high functioning" individuals may be able to or attempt to mask symptoms.
- Pay attention to client ability or inability to focus on the discussion or on tasks, remember things, and pay attention.
- Be attentive to levels of anxiety that may appear.
- Consider cultural differences and preferences and tailor interactions (including language and physical space) based upon the need.
- Remember to practice mediator "self management" practices.

Figure 11 - Summary Do's and Don'ts for Mediators

Do's	Don'ts
<ul style="list-style-type: none">✓ Create a calm, dedicated, and nurturing environment.✓ Speak in a quieter tone✓ Use inclusive and respectful language.✓ Set a calm and consistent tone in the room.✓ Understand that parties may not understand legal language or jargon.✓ Gather information from support systems associated with the needs of the client.✓ Consider peer specialists to assist with engagement.✓ Be aware of sensitive behavioral health related information.✓ Access support systems to gain better understanding of the person's issues and abilities.	<ul style="list-style-type: none">✗ Use language that could be perceived as threatening, confrontational, or disrespectful.✗ Use legal jargon that may not be understood.✗ Give the sense of rushing the process or court events.✗ Add to the stress of the event.✗ Forget that the legal process may be foreign.✗ Adopt a one size fits all approach to communication and decision making.✗ Neglect to use caution in sharing sensitive evaluation or assessment documents

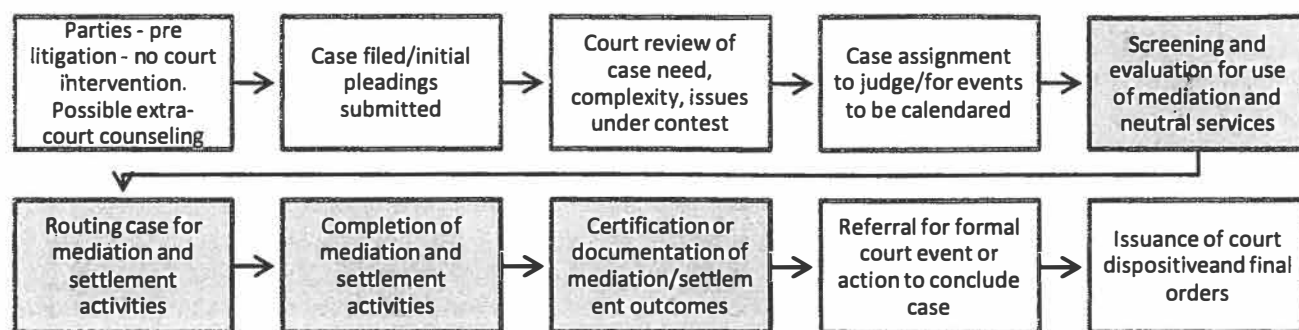
Mediation as a Service within Caseflow Processes

Some jurisdictions have criminal diversion programs, offered as a service or tool to assist in the case conclusion.¹⁶ Some courts use mediation, settlement conferences, or arbitration in civil cases likewise with the end goal of narrowing or resolving issues in dispute so that the case can move closer to the final court order. In family court cases, mediation has provided a tool to support settlement or narrowing of contested or disputed topics, and assist in moving the case to final adjudication.

Mediation processes occur within the overall continuum of caseflow processes or caseflow management. A simplified illustration of a mediation-based process is charted below. It illustrates where the mediation process occurs within the case processing flow.

¹⁶ In fact, the TX ODR offers mediation services for criminal cases, reinforcing the breadth of mediation services available to assist in case resolution.

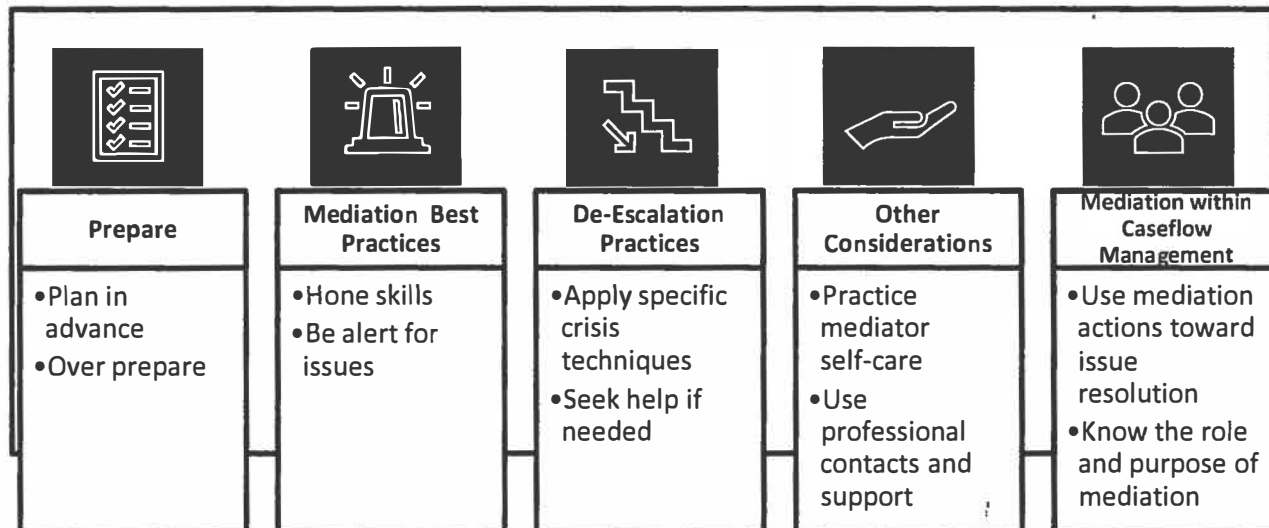
Figure 12 - Mediation as a Service within Caseflow Processes



Mediators can effectively leverage their function if they know and see their role as a discreet technique authorized by the Court. In that regard, mediators and mediation services:

- Provide specialized services at Court order, request, or in compliance with court policies,
- Activities represent a caseflow management technique offered for family court cases,
- Provide an important form of alternative dispute resolution, and
- Processes are specifically deployed to facilitate the case moving from issues in dispute or contest to final conclusion, thus helping the Court serve its purpose of providing access and case resolution.

Figure 13 - Mediator Best Practices



Points for Consideration

- How should a mediator become informed, in advance, if one or both of the parties has a mental illness?
- Is it feasible to evaluate in advance if the client is able to make rational decisions about their case?
- How can a mediator prepare if there is no information available in advance?
- What is the role of court screening prior to referral to mediation?
- What are the implications and influences with the client with mental illness if virtual proceedings are to be used, and what protocols are appropriate to manage virtual interactions?

III. Court Specific Issues

A few court specific issues or practices are worth mentioning. They include: the pandemic impacts on court operations; remote access to court services and dispute resolution steps; and use of new platforms such as Zoom, Microsoft Teams, GoToMeeting, or Cisco WebEx for official court events. Each of these have potential ramifications for mediation interactions and services. While remote platforms may allow parties to participate from known surroundings, contributing to a sense of comfort, they may not allow the mediator or decision-maker to perceive possible risk, such as a party being coached or coerced by another party.

Pandemic Impacts

The presence of COVID19 has created after-effects that may play out in party interactions with the court. Among the after-effects – increased stress, worry, and general anxiety about life.

- COVID19 effects may be amplified for parties experiencing mental health issues.
- Service access during the pandemic may have been moved from in person to reduced or eliminated contact, either of which may create frustration or concern, and a desire to have or avoid having interpersonal contact.
- Mediators may want to ensure their use of techniques do not further exacerbate concerns and challenges for parties.

Key Section Contents

- Pandemic Impacts
- Remote Access to Court Services
- Event Participation via Remote Telephonic or Video Platforms

Remote Access to Court Services

Implementation of remote access to court services via such practices as Court ODR have provided increased access for parties. Court ODR uses an online medium to resolve disputes via artificial intelligence algorithms and the use of tools and techniques without the presence of a judge or typical courtroom set up.¹⁷ It has been validated to be an effective methodology for cases to be routed toward final resolution, and efficiently concluded. The process, however, may prove to be impersonal for some parties. A resulting premium may be placed on understanding what is expected and how to navigate the processes.

- Information, documents, and advisements are provided digitally.
- Different audio and video processes are used for interactions.
- Considerations should occur to determine party abilities to use technologies.
- Benefits include increased access, reduced costs, efficiency, safety, and user satisfaction.
- Ethical practices should be in place for accountability, confidentiality, impartiality, transparency, informing parties about their participation and the process, and proper security protocols.

Event Participation Via Remote Video or Telephonic Platforms

The pandemic has spurred courts to implement very different protocols to conduct formal court events. Those protocols have included different remote technologies such as Zoom, Microsoft Teams, or WebEx. Courts have utilized these to conduct hearings and even trials. These can be effective platforms to conduct mediation events. Remote attendance can increase access and reduce costs for parties. But much like the remote access for generic court services, these platforms may impart an impersonal feeling for parties who are already finding it difficult to engage for court events and expectations.

- Assume that return to the “old ways” will not be realistic.
- Consider how to manage challenges such as documentation access and review.
- Privacy considerations should be considered.
- Ensure and confirm party ability to use technology and choice of and access to the platform and mobile technologies.
- Determine party lack of or limited internet access and stability, including possible economic limitations of parties.
- Consider in person access for those having insufficient access or means for technology platforms.
- Consider in person access for complex cases or those cases with multiple parties, like grandparents or intervenors.
- Hybrid processes may be worth considering using in-person, telephonic, or virtual access depending on case complexity, numbers of parties and actual access available to the different technologies.

¹⁷ National Center for State Courts, COSCA, and National Association for Court Management, Joint Technology Committee (JTC), Resource Bulletin, November 30, 2016.

Points for Consideration

- Has the mediator recognized the potential impact of the pandemic on the client?
- If any remote interactions, including introductory meetings, will occur using virtual platforms, has the mediator evaluated its use and impact?
- To what degree has the mediation participant previously used remote and digital exchange of information and documents, and how effective was it?

IV. Systemic Responses

Interaction with and between systems can have beneficial results and responses. Three systems will be noted here: the concept of sequential intercept; handoffs between different areas of the justice system; and the importance of collaboration across groups and professionals.

Sequential Intercept Model

The concept of a sequential intercept model (SIM) details how individuals with mental and substance use disorders make contact and move through the criminal justice system.¹⁸ Within the model, resources, stages, services, and gaps are identified. The intent is to identify where systems, resources, services, and professionals can anticipate, establish, and provide support or services early on (sometimes referred to as “upstream”), and work together to serve the litigant need.

When applying the SIM concept to individuals encountering mediation services, information about areas of collaboration and communication may be revealed and mapping phases in the court process can appear. These will facilitate options for diversion, alternatives, and services, and resources can be identified. An example of SIM in the criminal area is noted below. The SIM also has been applied in child and family contexts. Here, it illustrates a system mapping, and how the mapping can be used to identify points where courts can provide services for families before court intervention intensifies. As identified above, it is the exception, not the rule, that courts are equipped to respond to parties experiencing mental health issues. The SIM approach can be used to help address system deficiencies.

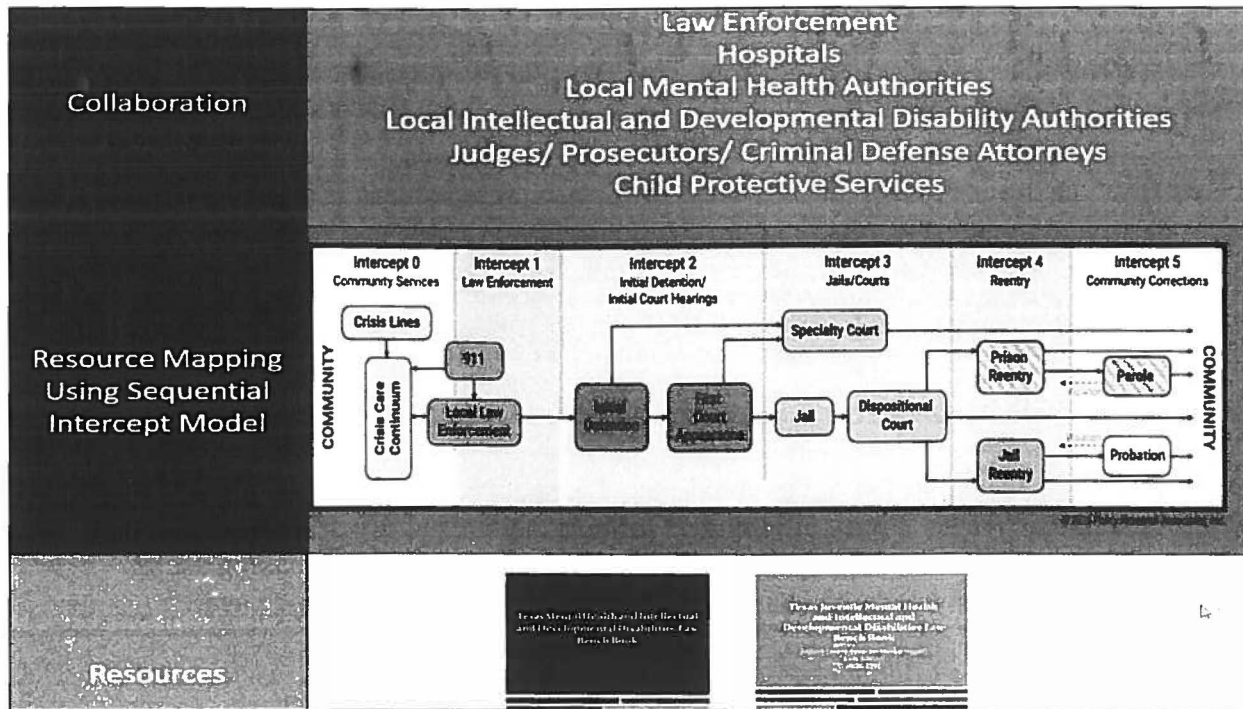
Key Section Contents



- Sequential Intercept Model
- System Handoffs
- Collaboration with Mental Health Providers and Professionals

¹⁸ See <https://www.samhsa.gov/criminal-juvenile-justice/sim-overview>.

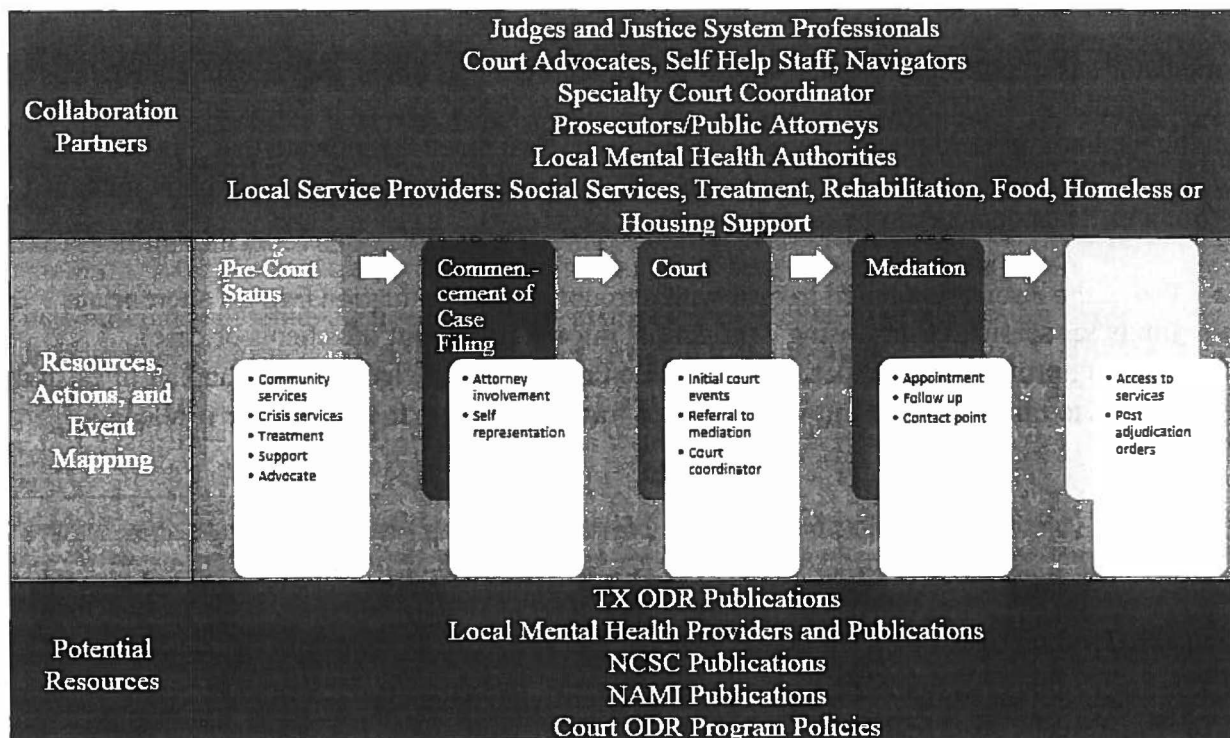
Figure 14 - Criminal Example of Sequential Intercept



System Handoffs

In considering family court cases and mediation with parties experiencing mental wellness concerns, a modified sequential intercept model might appear as noted below. It includes targeted collaboration partners or stakeholders, case mapping from pre-court filing through final order, and notes possible resources that can be considered.

Figure 15 - Family Court Intercept Example



Points for Consideration

- What restrictions of confidentiality come into play as a mediator for providing unequal assistance to both parties?
- If mental illness is identified, confidentiality may be breached.
- What can the justice system do to address the over-representation?
- Is there need for a true restorative justice system to divert cases from the courts altogether?
- Are addiction/substance use disorders included in the definition of mental illness and intellectual developmental disabilities?

Collaboration with Mental Health Providers and Professionals

Collaboration with mental health professionals may take a variety of forms. Important ones to note include: being proactive and aware of providers for information and expertise sharing; having relationships in place prior to seeking or needing assistance in a crisis; and making use of mediation experts and service providers for program improvement and enhancement.

Proactive and Interactive Collaboration

Court ordered mediators may want to create their list of local providers, professionals, organizations, associations, and services with whom to create and maintain contact. These contacts can come in handy for:

- Sharing insights on effective processes within the court environment and protocols,
- Exchanging information about other services and providers in the area, and
- Confirming those individuals and organizations with which to maintain communication.

Collaboration and Assistance During a Crisis

If a mediator has established communication and collaboration as noted above, in circumstances when the mediator may need help or support, the communication channels can come in handy when the mediator is seeking new insights or feedback. Best practices indicate that it is better to have contact established prior to the challenge, to avoid introducing the collaboration in the midst of a problem. The contacts can be useful for:

- Providing a sounding board to deal with a troubling client situation (within appropriate limits for sharing or disclosing confidential information about the clients or case),
- Offering professional support or feedback on mediator knowledge, skills, and abilities, and
- Access to other services and viewpoints to frame or address the concern or challenge.

Collaboration to Support Ongoing Program Improvement

Additional collaboration targets should be to engage with local and regional professionals and organizations with the specific purpose of seeking input on program improvements. These targets can and should include:

- Interactions with other courts and court-sponsored mediation programs to share information about best practices, lessons learned, and resources to the degree possible,
- Seeking input and contributions from these colleagues about program use, effectiveness, and areas for further attention.

Points for Consideration

- In what areas can a mediator make outreach and contact for professional interactions?
- Are there any areas in which the mediator should make specific focus to engage with others?
- Which topics and areas are good ones on which to share information, practices and seek improvement suggestions?

V. National Efforts

The NCSC has identified the importance of promoting well-being in family court cases, so much so that a task force has been created to address the “intersection” of domestic relations, domestic violence, and behavioral health.¹⁹ Desired outcomes of the task force include:

- Promotion of and support for the well-being of families;
- Utilization of trauma informed practices with recognition of the presence of trauma for individuals and resulting impacts on actions and behavior; and
- Establishment of these elements (well-being and trauma informed) as part of the case outcome.

These same objectives should be present when mediation and mental health concerns intersect, to seek family well-being, use sensitive and trauma responsive actions, and ensure that the ultimate case resolution includes attention to well-being.

The Conference of Chief Justices (CCJ) has affirmed the practice of principles for the administration of justice in family court cases. Among the guiding principles:²⁰

- Principle 1 – Direct an Approach that Focuses on Problem Solving

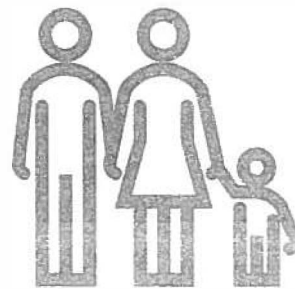
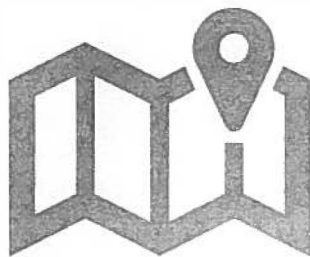
¹⁹ <https://www.ncsc.org/services-and-experts/areas-of-expertise/children-and-families/fji-update/well-being> and https://www.ncsc.org/data/assets/pdf_file/0034/66976/Well-Being-Charter-Statement-Revised-July-2021.pdf

²⁰ https://www.ncsc.org/data/assets/pdf_file/0021/19362/resolution-3-fji-resolution-final-resolution-02-11-19.pdf

- Principle 2 – Involve and Empower Parties
- Principle 3 – Courts are Safety and Trauma-Responsive
- Principle 10 – Identify and Strengthen Community Partnerships

In addition to these court-based initiatives, other organizations promote the attention to mental well-being:

- Local Mental Health Authorities
- The National Alliance on Mental Illness, which may also offer local chapter activities.²¹



Well-Being in Domestic Relations Court

"Promote the well-being of families, including implementation of trauma-responsive practices for families and staff, throughout the life of their case and as the primary desired case outcome." - CCJ/COSCA Resolution 4 (2020)

²¹ <https://nami.org/Home> .

VI. Resources

Terms and Terminology

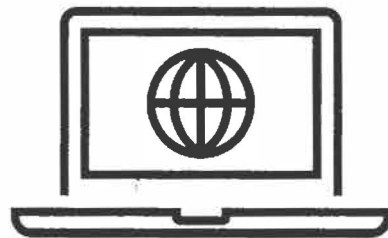
Specialty Court Coordinator – a court or government position with express responsibility for managing certain types of court cases, typically assigned to a specific court calendar, based upon case type, case status, or case need.

- NAMI – National Alliance on Mental Illness: <https://nami.org/Home>
- NAMI Texas: <https://namitexas.org/>
- JCMH – Texas Judicial Commission on Mental Health: <http://texasjcmh.gov/>
- AOT – Assisted Outpatient Treatment
- StarCare Specialty Health System: <https://www.starcarelubbock.org/>
- IDD – Intellectual and developmental disabilities



Suggested Resources

- National Center for State Courts: [Promoting Well Being in Domestic Relations Court](#)
- NAMI Texas Guide by Brian Shannon: [Shannon NAMI Texas Guide 6th ed Fall 2019](#)
- [https://www.texasappleseed.org/sites/default/files/Mental Health Handbook Printed2015.pdf](https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf)
- <https://www.mediate.com/articles/RutterMbl20140603.cfm>
- <https://www.mediate.com/articles/BersteinDhead.cfm>
- <https://www.mediate.com/articles/ClearyJ2.cfm>
- <https://www.mediate.com/articles/cohed1.cfm>
- <https://www.mediate.com/articles/VirkR5.cfm>
- Texas Juvenile Mental Health and Intellectual and Developmental Disabilities Law Bench Book: <http://texasjcmh.gov/media/2088/2021-juvenile-bench-book-final.pdf>
- Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book: <http://texasjcmh.gov/media/2087/jcmh-adult-bench-book-3rd-ed-final-print.pdf>



Preparing for the Mediation Session

- ☐ Recognize that mental illness and intellectual and developmental disabilities (IDD) are not the same.
- ☐ Seek to avoid, mitigate, or overcome assumptions about stigma, biases, and prejudices.
- ☐ Initiate and conduct a pre-session meeting.
- ☐ Consider using motivational interviewing techniques.²²
- ☐ Interview and interact with the client as early as possible prior to the mediation session.
- ☐ Ask about the facts of the case and obtain the client input and information.
- ☐ Ask the client about any concerns regarding illness.
- ☐ Inform the client of his or her rights to information.
- ☐ Obtain information about the client attorney or legal representation.
- ☐ Familiarize yourself with community services and options available in the community.
- ☐ Ascertain and communicate with the client about their needs and concerns, using open-ended questions.
- ☐ Ask parties about support needs in advance of the mediation (“is there anything about your medical care that would be helpful for me as the mediator to know?” “here is how I run the process... are there any adjustments that would be helpful to enable your full participation?”).
- ☐ Confirm the nature of the conflict, disagreement, or differences in opinion regarding the divorce.
- ☐ Seek to know and understand the nature of the disagreement and conflict that is the subject of the mediation.
- ☐ Consider setting multiple sessions and/or spreading out sessions, perhaps by a week or two.
- ☐ Identify to the degree possible if there has been a diagnosed condition pre mediation
- ☐ Consider whether remote access will assist or hinder the mediation.
- ☐ Remember that the client may not understand legal language, acronyms, or jargon. Work to avoid or explain them.
- ☐ Recognize if the client is unable to focus on tasks or interaction pre-mediation
- ☐ Talk to the party prior to the mediation and identify possible accommodations that the party may seek.
- ☐ Consider accessing any additional resources or support persons that may assist.
- ☐ Consider appropriate ADA accommodations.
- ☐ Consider whether the person wants a support person or support animal present.
- ☐ Consider communicating with the individual in advance, to have them communicate to their legal counsel to communicate to the mediator.
- ☐ Honor confidentiality.



²² <https://www.homelesshub.ca/resource/motivational-interviewing-open-questions-affirmation-reflective-listening-and-summary>.

Practices During the Mediation Session

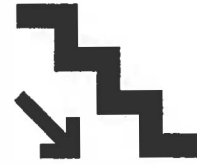


- ☐ Create a calm and nurturing environment.
- ☐ Communicate with quiet and unrushed voice and tone.
- ☐ Use open-ended questions and check understanding, using the “OARS” technique.²³
- ☐ Set boundaries.
- ☐ Summarize key points during the mediation.
- ☐ Be concise in comments and questions.
- ☐ Invite questions about what was stated (“did I miss anything?” “is this accurate?”).
- ☐ Conclude the session with a summary of the next steps (“let me summarize where we are at this point.” “let’s confirm...”).
- ☐ Consider physical layout, seating positions and use space in a way comfortable for the client. Avoid restricting the client’s movements.
- ☐ Be strategic in seating arrangements.
- ☐ Be aware of the parties becoming aggravated or agitated and give them the opportunity to take a break.
- ☐ Recognize if the client is indicating withdrawal and social isolation.
- ☐ Establish the rule that parties will not talk over each other. Be careful with your own tendency to speak over parties to “move things along.”
- ☐ Establish a speech about respecting everyone’s views.
- ☐ Communicate to the other side if the person’s condition has been made known. (For example, if someone has requested a support person).
- ☐ Work with support personnel to identify conditions that may be difficult. (For example, anti-depressant timing that may make a morning mediation unworkable).
- ☐ Use individual caucusing or shuttle mediation with the parties seated in different locations with the mediator visiting each location separately.
- ☐ Remember the client may be experiencing confusion, disorientation, impairment in thought, perception of reality, emotions, or judgement, and may exhibit disturbed behavior or anxiety.
- ☐ Be cautious regarding sensitive behavioral health related content.
- ☐ Honor confidentiality. Identify any exceptions to confidentiality requirements.

²³ OARS signifies the use of open questions, affirmations and repetition, reflexive listening, and summarizing what was stated.

De-Escalation Techniques and Practices

- ☐ Speak slowly, confidently but gently and with caring tone.
- ☐ Avoid arguing and raising voice.
- ☐ Use positive words.
- ☐ Pause if necessary.
- ☐ Take breaks if needed.
- ☐ Recognize when emotions get heightened.
- ☐ Use open communication techniques.
- ☐ Seek a non-adversarial interaction.
- ☐ Seek other services and support systems if needed.
- ☐ Work with the attorney or support person present.
- ☐ Facilitate seeking help or support for the individual, if concerns exist about the person being a danger to self or others.
- ☐ Consider taking a break, or offer to return another day, if someone is not understanding, or is unwilling to engage further.
- ☐ Work with a carefully selected, and agreed upon, support person present.



Other Considerations

- ☐ Learn to recognize and identify signs and symptoms of a potential mental health disorder.
- ☐ Recognize that “high functioning” individuals may be able to or attempt to mask symptoms.
- ☐ Pay attention to client ability or inability to focus on the discussion or on tasks, remember things, and pay attention.
- ☐ Be attentive to levels of anxiety that may appear.
- ☐ Consider cultural differences and preferences and tailor interactions (including language and physical space) based upon the need.
- ☐ Remember to practice mediator “self management” practices.



Sample Pre-Appointment Screening Interview

SAMPLE PRE-APPOINTMENT SCREENING INTERVIEW ²⁴

Case Number: _____ DV Reported? Yes/ No Parent: Mother/Father Terminated due to DV? Yes/No

Parent Education Completed: Mother _____ Father _____ Clinician Initial(s): _____ Date _____

1. Confidentiality/Recording Devices/Weapons:

2. Medical and Mental Health Needs of Parents and/or Children:

- _____ Any Physical or Mental Health Concerns?
- _____ Medications?
- _____ Recent Hospitalizations for Physical or Mental Health?
- _____ Substance Abuse or Concerns?
- _____ Counseling/Therapy?

3. Safety Concerns (If Applicable): In all the time that you have known each other, has there been any:

_____ Destruction of property (Things thrown at each other, broken furniture, dishes, holes punched in walls or doors, etc.)?

_____ Physical Violence (Hitting, pushing, shoving, punching, choking, hair pulling, kicking, slapping, restraining) or other violent behaviors such as use of weapons or abuse of pets?

_____ Sexual intimidation or assault?

_____ Ever consider going or actually go to doctor or hospital for injuries?

_____ Police involvement? Arrests for DV?

_____ Orders of protection/restraining orders? Any violations/arrests for violations?

_____ Ever prevented each other from having contact with family or friends? Ever used shelter services or left to preserve the peace?

_____ Department of Child Services Involvement?

4. Ability to Mediate:

_____ Do you currently feel like there are any threats, intimidation, coercion, or harassment happening between the two of you?

_____ Do you have any fears or concerns about being in the same room?

_____ Do you feel like you can advocate for yourself?

_____ Would you like to leave separately at the end of the appointment today? Do you need security to accompany you?

²⁴ Form adapted from the Family Center of the Conciliation Court, Arizona Superior Court in Pima County, Tucson, Arizona.

SAMPLE PRE-APPOINTMENT SCREENING INTERVIEW – SPANISH ²⁵

Número de Caso: _____ ¿Ha reportado un acto de VD? Sí No
Padres: Madre Padre ¿Se ha cancelado la mediación a causa de VD? Sí No
¿Ha completado el Curso Educativo para Padres? Madre _____ Padre _____
Iniciales del Clínico: _____ Fecha _____

ENTREVISTA DE EVALUACIÓN PREVIA A LA CITA

Confidencialidad/Aparatos de Grabación/Armas

Necesidades Médicas y de la Salud Mental del Padre(s) y/o los Hijos:

- _____ ¿Alguna preocupación médica o de la salud mental?
- _____ ¿Medicamentos?
- _____ ¿Hospitalización reciente por cuestiones médicas o de la salud mental?
- _____ ¿Alguna preocupación sobre abuso de sustancias?
- _____ ¿Asesoramiento/Terapia?

Preocupaciones de la Seguridad (si corresponde): Durante el tiempo que tienen de conocerse, alguna vez:

_____ ¿Ha habido destrucción de propiedad? (¿Se han tirado objetos, destruido artículos de muebles, quebrado platos, hecho hoyos en las paredes o las puertas por impactos de golpes, etc.?)

_____ ¿Ha habido actos de violencia física (Por ejemplo: golpes, empujones, strangulamientos, jaladas del pelo, patadas, bofetadas, restringir) u otra conducta violenta como el uso de armas o el abuso de mascotas?

_____ ¿Ha habido alguna intimidación de índole sexual o algún acto de agresión sexual?

_____ ¿Alguna vez ha ido o pensado en ir con el médico o al hospital por lesiones que haya sufrido?

_____ ¿Ha habido algún involucramiento reciente con la policía o algún arresto por VD?

_____ ¿Se han emitido órdenes de restricción u órdenes de protección? ¿Ha habido algún arresto a causa de una violación de esta orden?

_____ ¿La otra parte alguna vez le ha impedido tener contacto con su familia o amistades? ¿Alguna vez ha acudido a un albergue o se ha alejado para conservar la paz?

_____ ¿Ha habido alguna intervención por parte de la Agencia para la Protección de Menores? (*Child Protective Services o CPS*)

Habilidad de Negociar y Mediar:

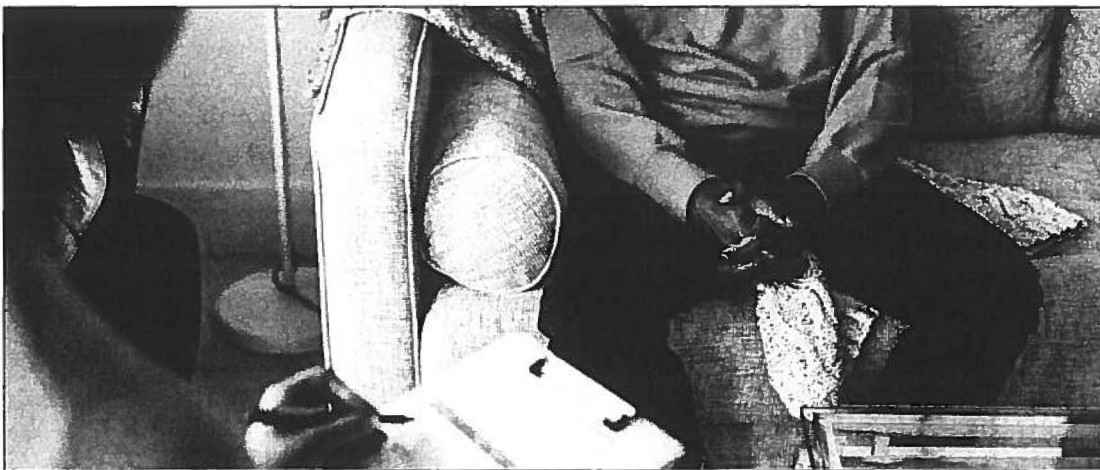
- _____ ¿Siente que actualmente existen actos de amenazas, intimidaciones, coacciones o acosos entre ustedes?
- _____ ¿Siente miedo o inquietud al estar en el mismo cuarto?
- _____ ¿Siente que puede defenderse o abogar por sí mismo?
- _____ ¿Prefiere salir de la entrevista por separado? ¿Le gustaría que lo acompañe un agente de seguridad al salir de la entrevista?

²⁵ Form adapted from the Family Center of the Conciliation Court, Arizona Superior Court in Pima County, Tucson, Arizona.

Scenarios

Confidentiality and Ethics

- | |
|---|
| <p>Q. What about concerns regarding "undue inquiry" into a person's disability or the nature of any disability. How do you balance/handle interests in "screening" for mental-health concerns with risks of undue inquiry (both during screening and the mediation)?</p> <p>A. The screening is best treated as confidential. Consider using open ended questions and encourage client self-disclosure. You may also want to obtain any self-disclosed concerns about the other party, including views on the degree to which the other party has the ability to participate in the mediation. These inquiries can become means by which to determine if the mediation can proceed.</p> |
| <p>Q. Would it be prudent to "remind" participants about confidentiality throughout the mediation or is that too condescending?</p> <p>A. Yes, that is a good practice. People forget.</p> |
| <p>Q. In what percentage of cases are mental health issues present?</p> <p>A. We don't always know. Parties often don't disclose because they think it will work against them.</p> |
| <p>Q. Regarding the involvement of a support system, would restrictions of confidentiality come into play as a mediator or providing unequal assistance to both parties?</p> <p>A. If mental illness is identified, confidentiality may be breached.</p> |



Crisis Management and Avoidance

Q. Are there any situations or option for the police department to contact a mental health professional instead of sending law enforcement? Or to access the services of a mental health professional employed by law enforcement? Maybe a mental health team?

A. Yes, some courts can use this method.

Q. What about suspecting a mental illness?

A. A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

Q. Trauma often impacts control of emotion - dysregulation. This might affect the mediators process options (choices) - how the mediation is conducted - maybe?

A. The ability for a person to regulate can be affected. Try to meet with parties prior.

Q. How do you deal with someone whose illness includes manipulation and that appears to be happening in mediation?

A. Yes, address in the environment: this is what I'm hearing, this is what it sounds like.

Q. During a mediation, if I observe that a person seems to have a mental illness should I stop and ask for a mental health professional be present? Will the decision reached be binding?

A. State laws and rules require consent to talk to someone about their mental health issues. In a collaborative setting, you may be able to approach the issue. A mental health trained co-mediator might be a support, might make people uncomfortable.

Interpreter and Other Specialist Use

Q. When doing a mediation virtually, could a third party such as an interpreter perform their duties in a separate location, or would they need to be present with client?

A. You could do it virtually, telephonically or some combination thereof.

Preparation for Mediation Session

- Q.** Are there appropriate screening questions we can ask of individuals that will help identify potential challenges before a mediation session with multiple participants?
- A.** HQ9 helps to screen people for depressive issues. Regarding psychotic disorders/bipolar – there are no quick screens without directly asking the parties. Of note, attorneys may tell clients not to complete the forms/screening. The mediator should ensure that people understand. But without official documentation, use your best communication skills.
- Q.** How can we find out the mental health crisis team in our area?
- A.** Recent national legislation to create a 3-digit number to direct to the mobile crisis team. One method is to Google Crisis Management Team for the local area. In Lubbock, it is: <https://ci.lubbock.tx.us/departments/police-department/links/crisis-intervention>
- Q.** In handling appointments on CPS cases over the past year or so, I have received training and have observed a significant amount of mental health concerns, organic and environmental, with parents and children. Parents often seem resistant to engaging in services through the adversarial system, lack of trust. Is there any discussion of perhaps rather than litigating those cases, they are brought into the mediation process to manage? It seems that mediation would promote healing and change in a much more efficient manner.
- A.** Use dispute resolution to resolve problems. Refer to the use of mediation as a peaceful resolution of disputes. It's not just about settlements, or resolving a case per se, but minimizing or resolving the issues in dispute. There are a lot of disabilities that may be associated with the dispute, for example, service dogs. The participants with challenges from mental health disabilities, do not always disclose it.
- Q.** Is severe Dementia/Alzheimer's considered a type of Mental Illness? Should interactions with the subject be guided thru the lens of the de-escalation suggestions you've shared with us?
- A.** It is similar to SMI, you can use similar de-escalation techniques.
- Q.** Is there any overlap between mental illness and unprocessed trauma? If so, is it important or relevant to mediation?
- A.** Yes, if you haven't processed trauma, there is an overlap. Unaddressed trauma is a risk factor. It is important to know if trauma is present so that you don't trigger it.
- Q.** Are there any of these conditions that would contra-indicate mediation?
- A.** Psychotic disorders are not suitable. Bipolar can have psychotic features but it depends on the state that people are in. If in a manic state, they may not make the best decisions.
- Q.** Any suggestions for preparing a party for mediation when that party has experienced a trauma inducing incident from the other party (such as a spouse, former employer, or business representative)?
- A.** Prepare parties for the mediation itself and make sure they have the opportunity to take breaks.
- Q.** Might it be discriminatory to rule out mediation as a dispute resolution process based only on the fact that a person has a particular diagnosis?
- A.** Yes, unless you have evidence to show that the person is not a candidate for mediation.

<p>Q. Is this an appropriate line to include on the Mediation Notice? "We are happy to provide accommodation if you notify us of any special needs."</p> <p>A. Accommodation is the language of Title 1, Employment. Title 2 is Program Access. Title 1 is obligation to provide without need to disclose, burden to provide. Title 2, people have to have access. Lewis would say "how can we help ensure access to this program?"</p>
<p>Q. I have always had the support persons and interpreters - basically anyone participating, or attending the mediations sign a confidential agreement. They all get advised of the mediation confidentiality. Is this a good practice?</p> <p>A. As a mediator, announce that all present will be subject to ADR confidentiality. Have an Agreement to Mediate that everyone signs.</p>
<p>Q. I do high conflict mediations and I have had situations where the "support" person is meant to trigger the other party. In that case I separate the parties in different rooms and use "shuttle mediation" - easy with Zoom now. Do you have experiences like this and how do you handle them?</p> <p>A. Do what you need to do.</p>
<p>Q. A and B are married. A has an affair with C and the affair becomes public. B has self-disclosed, pre-existing mental-health issues/conditions that have spiraled (to B's and their children's detriment). A's support person and confidante is C and A refuses to mediate without C present. B refuses to mediate if you, the mediator, allow C to be present. oops. Do you allow C as the support person? How, if at all, do you address B's mental health concerns and issues?</p> <p>A. They don't get in. Partly because it precipitates other discussions. On the other hand, there may be a real need to have the support person there. Consider if another support person is available.</p>
<p>Q. Can the panel recommend techniques for mediators to overcome objections to the presence of non-parties in mediation? Examples: caregivers or foster parents of a teen parent in a child welfare case; non-party caregivers of a subject child. 12-Step sponsors or counselors for party in recovery. Assume for the purpose of the question that the party who desires the presence of a support system has legal representation and/or a guardian ad litem.</p> <p>A. Work with the other side. Sometimes complainants are intimidated when the other side has counsel. Look, if the other side has a good attorney who knows the requirements of the law, they can be supportive in getting a good resolution. The principle of self-determination is fundamental, and mediation centers on problem solving collaboratively. Anything that can help that happen is in the interest of the other party. This seems to be helpful when dealing with CPS mediations. Quite often, when dealing with parents who are addicts or have other mental health issues, I've noticed it can be helpful to allow someone in the room that can help the process move in a productive manner.</p>

Remote and/or Virtual Sessions

<p>Q. I am trying to understand how online dispute resolution increases access to justice.</p> <p>A. In some courts, mediation is not seen as a part of the justice system, rather an alternative. In some areas, mediation may be seen by many as an impediment to access to justice. Mediation services, whether alternative dispute resolution, can be considered as a protocol for access to justice.</p>
<p>Q. What's the difference between online and virtual?</p> <p>A. Virtual is any form: Zooms, Team. ODR is asynchronous.</p>
<p>Q. What adjustments have you made to your practice in the virtual environment?</p> <p>A. It's been difficult to work virtually. People may not know how to navigate technology or may not have access to technology.</p>
<p>Q. When doing a mediation virtual could a third party such as an interpreter perform their duties in a separate location, or would they need to be present with client?</p> <p>A. You could do it virtually, telephonically or some combination thereof.</p>
<p>Q. What about incorporating more technological infrastructure. If mediations are conducted telephonically because many parties don't have access otherwise, it is challenging to discern visual cues between the parties telephonically.</p> <p>A. Mediators should seek several ways to determine cues and perceptions from the client. This can be done by checking assumptions, summarizing discussions, and asking open ended questions.</p>
<p>Q. With many mediations via zoom in my jurisdiction, it has worked very well, but a persistent issue is having no practical way to safeguard confidentiality. Participants mediate from all settings and have others in the same room with them, but the third parties are off camera. I understand that in-person also pose confidentiality issues through the use of cell phones and other technology. As to virtual mediation do either panelist have suggestions about how to address these issues. I am not interested in policing the parties but take my responsibility to ensure a fair and transparent process seriously. Ideas?</p> <p>A. If they determine there is someone is not in a private space, if so, we need to terminate and return at a later date. There was no bright line, but the mediator should be vigilant.</p>
<p>Q. How are virtual sessions affecting overall mediation agreement rates?</p> <p>A. Experience has shown that mediation rates have stayed constant.</p>
<p>Q. How do you do DV and Mental Health Screening in virtual mediations?</p> <p>A. A DV screening is conducted individually and privately with each client or each individual. Attorneys are not attending those proceedings/counsel is not to be present unless directed by the assigned judge. The exception is in child-represented cases. Each jurisdiction does its own screening.</p>