

# ADR: Domestic Violence Screening Made "SIMP[LE]" (Simplified Initial Mediation Prescreen)

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1

## Professional Background

Related to developing this new model

- Teaches two 40-hour Family Mediation courses each year plus other ADR courses.
- More than 15 years experience practicing Family Law in private practice.
- Has significant experience representing parents in child protection matters. These cases have a high incidence of domestic violence.
- More than 50% of his practice is Family Law ADR including mediation (represented and self-represented), SENE/FENE and Custody Evaluations.
- Approaches the topic of DV screening as both an ADR teacher and practitioner.

2

## What is meant by Domestic Violence (DV)?

- Domestic Violence (DV) in this model is meant to broadly include:
- Violence/coercive control/threatening behavior

3

## SIMP[LE] Prescreen

Background and Purpose

- Many mediators **do not have a system to determine if a case is appropriate or inappropriate for mediation** due to a restraining order or whether both parties perceive that they can fully participate (self-determination) and whether any safety/self-determination accommodations might be appropriate.
- Many screening guides are overwhelmingly lengthy and **difficult to apply in practice**.
- Many screening guides focus on **what** to look for rather than **how and when to ask**.
- **In this presentation, attorney and ADR teacher and practitioner Carl Arnold proposes a new model that he is calling "SIMP[LE]" (Simplified Initial Mediation Prescreen).**

4

## What is meant by Domestic Violence (DV)?

- Domestic Violence (DV) in this model is meant to broadly include:
- Violence/coercive control/threatening behavior

But more importantly...

- In the SIMP[LE] prescreen model, we ask questions about DV **only** to the extent that we are trying to figure out if:
  - the case is suitable for mediation; and
  - whether any safety/self-determination accommodations would be helpful or appropriate.

5

## What is meant by Domestic Violence (DV)?

- We have arguably been using inaccurate language to describe mediation screening for DV.
- We **aren't trying to figure out everything** about the nature and context of DV in this family.
- We ultimately **aren't determining whether there has or hasn't been DV.**

6

## What is meant by Domestic Violence (DV)?

- We are really only **trying to determine if this case is appropriate for mediation and what safety/self-determination accommodations might be appropriate.**

7

## What is meant by Self-Determination?

- Self-determination in this model is meant to broadly include the **“ability of the parties to reach a voluntary, uncoerced agreement.”**
- This language is from **“Mediation Rule I. Self-Determination”** in the Appendix to Rule 114.

8

## Can There Be DV AND Self-Determination?

- In my experience people are **not easily categorized** into the following two binary categories:
  - those who **have** experienced DV and do not believe they can speak their mind and make voluntary decisions (self-determination) in mediation; or
  - those who **have not** experienced DV and believe they can speak their mind and make voluntary decisions (self-determination) in mediation.

9

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  - those who **have not** experienced DV and believe they can speak their mind and make voluntary decisions (self-determination) in mediation.
- Life is more complicated and nuanced than that. We often find people who are just the opposite from the circumstances above and **everywhere in between**.

10

## Can There Be DV AND Self-Determination?

- This is an important point and draws a distinction between traditional approaches to “screening” for DV and using the more limited SIMP[LE] prescreen. When mediators are asking about DV before mediation, let me suggest that **we are not really trying to figure out whether there has been DV**. Instead, we are trying to figure out if the person can speak their mind and make voluntary decisions (self-determination).

11

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- Whether or not there has been DV, the bottom line is that mediators are not truly interested in whether there was or wasn't DV, just as we are not using screening to obtain substantive information about income or work history or other factual information. No, we are really just trying to **figure out if this case is suitable for mediation and whether any safety/self-determination accommodations would be helpful or appropriate**.

12

## SIMP[LE] Prescreen

### Background and Purpose

- The SIMP[LE] Prescreen is a short, accessible prescreening tool that is tailored to use for mediation and other ADR processes.
- In this new model, he proposes that **every mediator should develop 2-5 limited, non-leading questions that they ask every mediation client before the day of mediation** in order to improve the effectiveness and appropriateness of their screening for ADR.

13

## Why Are We Here?

### Why do we need a new model for mediation screening?

- ADR providers need a simple and effective model for screening.
- ADR providers don't currently have a simple and effective model that contains a limited number of non-leading, non-aligning, narrowly focused, ADR-appropriate questions.
- ADR providers don't appear to regularly and effectively screen.
- **Screening for DV for ADR is different in purpose and scope** than screening for DV for aligned roles such as an attorney or advocate and therefore DV screening for ADR requires a different approach and different set of screening questions.

14

## Let's Take a Step Back

### What is the purpose of DV screening for **attorneys and advocates**?

- Support client.
- Categorize DV for legal strategy.
- Align with client.
- Evaluate strengths of evidence.
- Educate client about legal system and their available options/strategies.
- Help safety plan for client's home, work, attorney visits, court hearings.
- Help safety plan for children/parenting.
- ARE ANY OF THESE GOALS APPROPRIATE FOR MEDIATION SCREENING?

15

## What is the purpose of "prescreening" FOR ADR PROVIDERS?

### The SIMP[LE] model uses the term "prescreen" rather than screen...what does that include?

- Determine if client can attend mediation due to restraining orders.
- Determine if client believes that they will be able to speak their mind in mediation and make voluntary decisions (self-determination).
- Safety/Self-determination accommodation planning (before/during/after mediation).
- Determine whether the specific ADR provider is trained and experienced enough to ethically provide mediation in circumstances of this particular case.

16

## Why use term “prescreen” rather than “screen”?

- “Prescreen” in the SIMP[LE] Prescreen model is intended to mean the few questions asked by a mediator to see if the case is appropriate for ADR.
- Other, more involved, detailed and exhaustive questions are not good questions for mediators to ask before a mediation. Those are “screening” questions (rather than “prescreening”) to determine that nature and scope of DV that an attorney or advocate might ask.
- The SIMP[LE] Prescreen model has a more narrow focus on “prescreening” to simply see if the case is appropriate for ADR.
- Any further questions beyond “prescreening” are:
  - risky because of potential alignment (bad news when you are a neutral)
  - Time-consuming and unnecessary (bad news when you have limited time/resources)

17

## What does SIMP[LE] Prescreening look like in practice?

### First, orient them

- Explain your background/experience related to being a mediator
- Explain your role
- Explain what they can expect in the mediation process

18

## What does SIMP[LE] Prescreening look like in practice?

### Second, try to figure out if the client perceives they will have self-determination.

- Suggested first question (self-determination):
  - Do you think you will be able to speak your mind in mediation?
- Suggested alternative first questions (self-determination):
  - Do you expect that you will be able to openly discuss your ideas, preferences and concerns during mediation?
  - With a neutral mediator such as myself managing the meeting, do you think you will feel comfortable speaking your mind in mediation?

19

## What does SIMP[LE] Prescreening look like in practice?

### Third, would safety/self-determination accommodations be helpful/appropriate?

- If, after the first question, the mediation client expresses safety concerns or concerns about being able to speak their mind, ask open ended follow-up questions such as “tell me more about what you meant when you said ‘I’m not sure’”. This will allow for a more in-depth discussion about available safety/self-determination accommodations such as staggered arrival/departure, separate rooms, etc.

20

## What does SIMP[LE] Prescreening look like in practice?

Trying to figure out if there are any restraining orders and if so whether they allow for mediation

- Suggested second question (restraining order):
  - Have there ever been any restraining orders?

Suggested alternative second questions (restraining order):

- Have either of you ever had a restraining order preventing contact such as an HRO, OFP or DANCO?
- Have either of you ever had a restraining order against the other person?

21

## What does SIMP[LE] Prescreening look like in practice?

Trying to figure out if there are any restraining orders and if so whether they allow for mediation

- If they say no (to the restraining order question), and you believe they can have self-determination with some accommodations, if any, then your SIMP[LE] Prescreen is complete.
- If they say yes, then you should ask:
  - What was it for;
  - When was it put into effect;
  - When will it expire;
  - Does the restraining order specifically say you can attend mediation together?; and
  - Ask them to send you a copy of the restraining order or have their attorney send you a copy (to determine if it specifically allows mediation).

22

## SIMP[LE] Prescreening tips and tricks

- I've been practicing the SIMP[LE] Prescreen method since early in 2020 and I've come up with some tips and tricks.
- I would recommend starting out with providing information about the mediation process and your role as mediator, rather than jumping right into questions. This provides a nice transition and helps them feel comfortable answering your questions in the context of your role.
- Although logically it may make sense to first ask if there are any restraining orders, that question seems abrupt and out of place in practice. It is better to first ask if the person thinks they will feel comfortable speaking their mind in the mediation. That will naturally lead to a question about whether there are any restraining orders.

23

## SIMP[LE] Prescreening tips and tricks

- For the mediator using the SIMP[LE] Prescreen model, asking mediation participants to respond to DV questions by email or in writing might seem to be the most **efficient**, BUT it is not the best way to get the answers you want. **The best way to ask about DV is to talk directly with the person before the day of the mediation.** There is no substitute for the human voice to notice the client's concern, uncertainty and other emotions that come through over the phone about such a sensitive and nuanced topic. I have been doing mediation intake phone calls with each client before the day of mediation, in order to explain mediation and to use the SIMP[LE] Prescreen method, and I highly recommend it.
- Many clients who have experienced DV are looking forward to mediation because it is a way they can see moving forward and being done with this chapter in their lives without waiting for court hearings and giving away their decision-making authority to a judge.

24

## SIMP[LE] Prescreening tips and tricks

- Many clients who have experienced DV are not aware of options to provide staggered arrival/departure times at a mediation and separate rooms or other safety/self-determination accommodations. Talking with a client about these mediation options before the day of mediation often builds the client's confidence in their own ability to participate safely and effectively.
- I like to ask whether either of them have **ever** had a restraining order like an HRO, OFP or DANCO. I ask "have ever" (rather than "is there currently") because it is common to have one that was only in effect for a short time and then dropped/dismissed or one that expired before the mediation. The mediator will likely want to know about this because it helps the mediator explore whether the client perceives themselves to be able to speak their mind in mediation.

25

## Don't We "Have to" Ask About DV?

- To be on the Rule 114 Family Roster, Qualified Neutrals must complete six hours of training on Domestic Abuse, including:
  - 2 hours about domestic abuse in general, including definition of battery and types of power imbalance;
  - 3 hours of domestic abuse screening, including simulations or role-playing; and,
  - 1 hour of legal issues relative to domestic abuse cases.
- Although the SIMP[LE] Prescreen model recommends a **limited number of questions, the importance of understanding DV is perhaps even more important.**

26

## Don't We "Have to" Ask About DV?

- There appears to be no statute or rule preventing a person who has experienced DV from voluntarily participating in mediation.
- A court order restraining direct or indirect contact would prohibit mediation unless it contains a provisions specifically allowing mediation.

27

## Don't We "Have to" Ask About DV?

- DV is a complex subject that directly relates to self-determination.
- The SIMP[LE] Prescreen model is not intended to imply that DV is simple or easy.
- Instead the intent of the SIMP[LE] Prescreen model is:
  - An increase in the percentage of mediators who prescreen for appropriateness for mediation and to make appropriate accommodations; and
  - A focus on the appropriate, limited questions directly related to the purpose of prescreening and avoiding questions that:
    - lead to alignment; and
    - Are time-consuming and unnecessary.

28

## SIMP[LE] Prescreen (Simplified Initial Mediation Prescreen)

One-page Overview of the Process

### First, Orient them.

- Explain your background/experience related to being a mediator
- Explain your role
- Explain what they can expect in the mediation process

**First question (self-determination):** Do you think you will be able to speak your mind in mediation?

If they say “yes” (they will be able to speak their mind), then move on to the second question (restraining order).

If they say “no” or express concerns, then you should ask open ended questions such as “tell me more about your concern”. This should lead to a discussion of potential safety/self-determination accommodations such as staggered arrival/departure, separate rooms, etc. The goal is to determine if they believe they can speak their mind and make voluntary decisions and any accommodations that may make them comfortable participating.

**Second question (restraining order):** Have there ever been any restraining orders?

If they say no, then you have completed the SIMP[LE] Prescreen.

If they say yes, then you should ask: What was it for?; When was it put into effect?; When will it expire?; Does the restraining order specifically say you can attend mediation together?; Ask them to send you a copy of the restraining order or have their attorney send you a copy (to determine if it specifically allows mediation).

29

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## Opportunities to screen for DV as ADR provider

- First contact
- Intake (forms, call, or other method of doing intake)
- Arrival at mediation (or other ADR, actively check in separately with participants)
- During mediation, possible flags for DV come up

30

## Opportunities to screen for DV as ADR provider

- **When** will you screen for DV?
- **Who** will screen for DV?
- **How** will you screen for DV?

31

## Are we “deciding” whether there is Domestic Violence?

- No, **we are not deciding** whether there is or is not Domestic Violence (broadly defined).
- **It isn’t our role** to decide whether there has been Domestic Violence.
- It is our role to evaluate **whether a restraining order prevents mediation**.
- It is our role to explore with **each participant whether they have self-determination (before and during mediation)**.
- It is our role to explore with each participant whether any **accommodations** that you can provide in the process will help them have self-determination in ADR.

32

## What is our role in DV screening for ADR?

- **It is our role** to always be thinking is this case appropriate for ADR based on:
  - A **factual question** about whether ADR can happen in relation to a current restraining order; and
  - A subjective question about **whether each participant feels** that they can have self-determination
  - A subjective question about **whether you believe that the participants** can have self-determination
  - A subjective question about **whether you believe that you have** the skills to mediate this matter

33

## Questions?

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34