

Screening for Power Imbalances in Family Law Cases

(this is a draft paper that was prepared for a 10-hour program on domestic violence and family arbitration law in January 2012)

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Summary

Since the Ontario's Attorney General introduced Regulation 134/07 under *Arbitration Act*,¹ requiring family arbitrators to take specified training, the term "screening" has firmly entered family law's lexicon. But the concept and its application to the arbitration process remains less clear.

Screening is a well-established practice used by mental health professionals, accredited family mediators, doctors, the police, and, now, family arbitrators. In all family law processes its purpose is to provide enough information to answer the question: *is the proposed dispute resolution process likely to be effective, fair and safe for both parties and their children?*

Drawing on research into the dynamics of power and control in intimate partner relationships, tools have been created and tested to help family law professionals better understand the relationship between the parties and how they, the professionals, can best help their clients.

This short paper captures the author's understanding of best practices in Ontario based on the author's experience as a family lawyer, mediator, arbitrator and educator, and a review of current research and literature.² It will explain the purpose of family law screening, and identify some screening tools and the research supporting their use. The author suggests that, in most cases, the goals of the screening process in family arbitration will be best met if the screening is conducted by either the mediator-arbitrator or an independent third party. Having the process provider or a qualified independent professional screen both parties can help lawyers identify the dispute resolution process best suited to the needs of their clients. It can also help clients better understand and be more comfortable and effective in the process chosen.

¹ Arbitration Act, 1991, SO 1991, c. 17.

² This updates a paper that the author presented at a conference in April 2010. It is a draft of a longer paper in progress, and is not intended to be a thorough review of the research. Comments are welcomed on the ideas presented in this paper. Please do not reproduce the paper without the author's written permission.

Family lawyers will continue to be in the best position to choose the most appropriate screening process for their clients.³

What is screening in the family law context?

Screening is the term used for the means by which a family law professional determines if a proposed conflict resolution process is likely to be effective, fair and physically and emotionally safe for both parties and their children.

Over the past 20 years, mental health and legal professionals have researched, developed and field-tested various “screening tools” -- guides to assist those who conduct screening interviews with parties who are separating.

The purpose of such tools is to enable the family law professional to predict the chances of physical, emotional or other harm coming to a party or child as a result of the party interactions required by the proposed dispute resolution process.⁴

What does training in screening entail?

Screening training is specialized and specific. It is generally privately provided.⁵ The available programs typically have five components:⁶

1—analysis of the factors that influence power dynamics between separating couples;

³ Increasing numbers of family lawyers are becoming accredited family mediators in order to join court-connected mediation projects. As a result more family lawyers have been exposed to the use of screening tools. Family arbitrators are required to take similar training.

⁴ According to the website of the Ontario Attorney General, “The screener determines whether there is anything standing in the way of a person’s full participation in family arbitration or whether the arbitrator should impose certain safeguards (such as that the parties should not be alone together) before the arbitration can proceed.”

<http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/screening.asp>

⁵ Most workshops are between two and four days long.

⁶ The OAFM (Ontario Association of Family Mediation) and ADRIO (ADR Institute of Ontario) currently do not stipulate the content of required screening training. The OAFM is in the process of providing guidelines for standardized requirements. The available outlines of the various courses that are offered privately have these features in common.

2—analysis of the different types of violence that can occur in intimate partner relationships, the indicators of each type, and the differentiated responses that lawyers, mediators and arbitrators should consider depending on the type of violence assessed.

3—review of the various screening tools that have been developed and the research supporting them;

4—role playing with various fact situations to help practitioners know how to conduct a screening interview and how to use the screening tools; and

5—discussion of the options available for structuring the dispute resolution process based on information obtained during the screening process, how to decline or terminate the process and how to refer the parties to a more suitable one in a way that will not risk harm to either party or a child.

What are “screening tools”?

Screening tools are sets of questions to be asked by the interviewer of the client. They are based on research about the most significant indicators of power imbalances, including coercion and control, in intimate partner relationships.⁷ Some are designed to predict the chances of violence occurring during the dispute resolution process, such as DOVE, which was created by York University sociology professors and is internationally recognized as the most reliable screening tool for predicting violence during the mediation process.⁸ Others are designed for the police to predict the chances of violence re-occurring between a man convicted of spousal assault and his spouse.⁹ The most recent screening tool in circulation is the MASIC, created by three American professors (in psychology and law), now being tested in various court locations.¹⁰

⁷ One of the earliest of such protocols was proposed in an article by L.K. Girdner, “Mediation triage: Screening for spouse abuse in divorce mediation” (1990) 7 *Mediation Quarterly* 365.

⁸ “Domestic Violence, DOVE and Divorce Mediation”, D. Ellis and N. Stuckless, (Oct. 2006) 44-4 *Family Court Review* 658.

⁹ “A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment”, Z. Hilton, G. Harris, M. Rice, C. Lang, C. Cormier, K. Lines, (Sept. 2004) 16(3) *Psychological Assessment* 256.

¹⁰ “The Mediator’s Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain”, A. Holtzworth-Monroe, C. Beck and A. Applegate, (October 2010) 48-4 *Family Court Review* 646. (The MASIC is currently being tested in off-site mediations at the Ontario Superior Court of Justice in Toronto.)

In the family law context, screening tools are designed on the assumption that the person asking the questions will meet privately with each party. Research and experience supports that process as leading to the most accurate assessment of the power dynamic as it allows a single trained person to assess the relationship from each party's perspective.¹¹

Who conducts the screening interview?

Historically, family mediators have met with each client separately, before starting mediation, to assess whether the case is appropriate for mediation and, if so, how to best structure the process. If the parties are not suited to the process, the mediator will refer them to a more appropriate/safer alternative.

Mediators in Ontario's court-connected family mediation programs are required to conduct separate screening interviews prior to commencing on-site or off-site mediations.¹² Accredited family mediators in Ontario also have such a requirement based on their governing code of conduct.¹³

With the introduction of the screening requirement and mandated arbitrator training in family arbitration, three options for screening were created. In mediation-arbitration, screening may be done either by the

¹¹ For instance, the excellent paper "Safety Screening in Family Mediation: A Discussion Paper", (2008) B.C. Mediator Roster Society notes, at p. 6, "it cannot be assumed that the referring lawyer has necessarily undertaken a screening process or, in any case, that the same kind of assessment regarding self-determination and mediation readiness will have occurred. Although there have been some strides in recent years, studies suggest that there is a lack of awareness within the legal system generally of the dynamics and implications of partner violence and abuse. Even if satisfied that the referring lawyer has screened for violence, the mediator may ask different questions or have a different appreciation of how previous violent episodes between the parties may play out or impact self-determination in mediation. It is generally recommended therefore that mediators conduct their own safety screen." Such findings support the recommendation that, in mediation-arbitration, the screening be conducted by the mediator-arbitrator, and that in arbitration-only processes, the screening be done by a qualified third party screener who meets with each of the parties separately. This process has the additional benefit of allowing both parties to meet with a "process expert" who can help them feel more comfortable with the process and professional they are choosing.

¹² Pre-mediation screening is a mandatory requirement of the Attorney General as set out in its Request for Proposals # OSS_00166368, for service providers of court connected information and mediation services.

¹³ For example, the OAFM Policy on Abuse requires separate screening interviews with each client before commencing mediation. <http://www.oafm.on.ca/mediators/abusepolicy.html>. See also the excellent paper by Lene Madsen, *A Fine Balance: Domestic Violence, Screening and Family Mediation*, soon to be published.

mediator-arbitrator, by a third party screener, or by each party's counsel. For arbitration only, the screening is to be done either by a third party screener or by each party's counsel.¹⁴

What are the key principles and elements of a screening interview?

1-- **Screening is confidential.** It is universally accepted that the person doing the screening should not, without written consent from the clients, disclose to anyone—not the other party, not a judge, not counsel for the parties—what he or she was told by either party during the process, subject to the limited information that a third party screener may provide to the arbitrator. Disclosure of confidential screening information could put a party or child at risk of harm in certain cases.¹⁵

2—**Screening is subjective and non-judging.** It is based on the theory that “power” is a matter of perception. It is intended to give the interviewer necessary information about how the client feels about participating in the proposed dispute resolution process, and what the client needs to fully participate, without requiring the screener to determine who is telling the truth. Is the client afraid of his or her partner? Does the client feel vulnerable in a negotiation? In mediation? In a four-way meeting? Giving evidence in arbitration? Is the client comfortable being in the same room as the other party? What are the client's procedural options and how does the client feel about each of them?

The subjective screening function can be contrasted with the fact-finding and judging role of a lawyer, whose role is to elicit the relevant facts and judge the reliability of the information provided in order to assess its legal merit.

3-- **Screening is comprehensive.** Interviews are generally conducted as part of a broader intake process, enabling the interviewer to understand the issues in dispute, the concerns each party has about them, and the outcomes each party seeks. This information enables the screener to better assess whether the process under consideration is a suitable one for each party and what each needs to fully participate.

¹⁴ The options are set out in the sections of the regulation that state the mandated content of the Arbitrator's Certificate, which must be signed by the arbitrator or mediator-arbitrator before the parties commence the process.

¹⁵ Statistics confirm the high risk of violence or death faced by women leaving relationships of coercion and control. (See for example the *Domestic Violence Death Review Committee* reports published by Ontario's Coroner: http://www.crvawc.ca/section-research/domestic_death_review_committee.html.)

4—**Screening is intended to support the party being screened.** Clients are never asked questions about what they have done to the other person during the relationship; they are asked only what they have experienced.

The key stages of the screening process are as follows:

1—ensuring that the client feels comfortable and free to discuss his or her fears and concerns;

2—assessing the degree to which the client feels prepared to commence the process, and what the client may need to feel prepared;

3—assessing the degree to which the client feels able to engage fully in the process, including whether there is any history of abuse, control, violence, mental illness, drug or alcohol abuse, etc., and what the client may need to feel fully able to engage fully;

4—assessing whether the proposed process is likely to be effective, fair and safe, and how best to structure it, power-sensitive options include arranging staggered arrival and departure times, providing for shuttle mediation, arranging for lawyers to be present, and so on.

5—assessing whether another process might better meet the needs of the parties and safely terminating the existing process.

Is there any case law about screening?

1—A 2006 California case suggests that if there is any evidence of prior violence, a mediator may have some duty to take proper procedural steps to protect clients from harm: According to R. Badgely:

“In California, a family mediator was sued for the death of a wife stabbed by her husband in the building in which the mediation session occurred. The divorcing couple had met a week earlier at the mediator’s office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator’s office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors. The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the

murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defence costs exceeded \$100,000.”¹⁶

2— A recent Ontario case illustrates the willingness of the courts to set aside agreements that are negotiated in the context of undetected power imbalance. In *Morgan-Thompson v. Thompson*,¹⁷ Healey J. set aside a separation agreement that was entered into in circumstances of horrific physical and emotional abuse that was not disclosed by the wife at the time and not detected by the lawyer who gave her legal advice on the agreement.

What are the similarities and differences between screening for mediation and for arbitration?

Purpose: In all family law dispute resolution processes, the purpose of the screening is to assess the ability of the parties to fully, fairly and safely participate in the process.

Screener: Screening for mediation is typically done by the mediator. Screening for other processes can be done by the mediator-arbitrator, a third party screener or the lawyers for the parties themselves, noting the limitations inherent in the latter process, notwithstanding the skill and training of the lawyer.

Confidential Process and Results: Screening in all processes—the intake forms, screener notes, all communications with respect thereto—is confidential between each party and the screener. Mediation and mediation-arbitration agreements will set out the terms on which parties are screened by the mediator or mediator-arbitrator, and the confidential nature of those meetings along with notes, intake forms and communications in connection with the screening.

If the screening for arbitration is done by a third party, the screener should be retained by the arbitrator. Arbitrators may wish to stipulate the form of report they require. The report from the screening should be limited to the amount of information necessary for the arbitrator to decide whether to accept the case and, if so, on what procedural terms. (Some arbitrators have “Standard Safety and Civility Procedures” that they incorporate into their Arbitration Agreements as a means of addressing potential power imbalances in all arbitration processes.) The report should not, for safety reasons, provide any

¹⁶ “Mediator Liability: A Survey of Recent Developments”, Robert A. Badgely, New York Dispute Resolution Lawyer, Fall 2011, Vol. 4 No. 3, p. 54.

¹⁷ Newmarket Court File. FC-07-27827-00, Canlii. 2011 ONSC 2787.

explanation for recommending against arbitration nor indicate which party felt vulnerable. The parties should each sign some form of agreement with the third party screener, so that the purpose of the process and its confidential nature is clearly established.

Conclusion:

Family law dispute resolution is an evolving field. Lawyers are experimenting with new and hybrid processes that are increasingly interdisciplinary. Family law clients are socially and culturally diverse reflecting Canada's changing demographics. More clients are self-represented. Lawyers and clients are increasingly willing to try difference processes at different stages of their continuum.

Family mediation, mediation-arbitration, arbitration, and collaborative practice all have their costs and benefits. Given the increasing complexity of family law dispute resolution processes, the lawyers responsibility to help clients select the most appropriate process becomes more challenging and sophisticated. Knowledge of current screening processes and resources will undoubtedly assist lawyers in meeting that challenge.

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