

## **Best Practices for Addressing Power Imbalances and Safety in Family Dispute Resolution Processes: Research, Protocols and the Law**

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### **Introduction**

With courts, for now, restricting services to all but emergency matters due to COVID-19, the demand for alternative dispute resolution services is growing exponentially. The need is greater than ever to ensure that those processes put issues of power imbalance and safety of clients and children first.

Private mediation or adjudication is not appropriate in all cases. Professionals should assess suitability for diversion away from court through the practice of ‘screening’ for power imbalances, including those arising from family violence.

The purpose of screening — to determine if a case is appropriate for diversion out of court, and, if so, how any power imbalances can be effectively managed — and the protocols to be followed are the same regardless of the dispute resolution process under consideration.

The overall utility and effectiveness of family arbitration has been enhanced by Regulation 134/07 under the Arbitration Act; it adds a specific screening requirement as well as other enhancements.<sup>1</sup> Because of the harm that can be caused by private adjudication, screening for arbitration is even more important than for mediation in a practical sense. Legally, it is likewise more important given that the only legal professionals in Ontario who have a statutory duty to ensure screening is done and to take it into account in all they do, are family arbitrators (and parenting coordinators.) The meaning of ‘due process’ in the context of private, for profit-dispute resolution must evolve accordingly.

As many of the senior family law professionals who offer private adjudication services were trained in an era before these concepts were embedded in our practices, it is important that we develop a common understanding of screening, its purpose and its value to clients and professionals alike.

### **The risk of violence to parties in family law cases**

We know that separation is the most dangerous time for many victims of intimate partner violence. And that family law professionals, along with those in the broader community, often do not know what to look for when assessing risk.

Although leaving a violent relationship may be a rational choice, it is in leaving without a safety plan that can lead to the murder of victims and their children.

Family violence, as defined in Bill C-78,<sup>2</sup> is pervasive in our culture and will be present in a great many of our family law mediations, arbitrations and court matters. We also know that many intimate partner murders and murder-suicides are both predictable and preventable.

There is vast research from Ontario and other jurisdictions establishing consistent predictors. According to the most recent Ontario Domestic Violence Death Review Committee Report,<sup>3</sup> the most common predictors are (in order):

- history of domestic violence
- actual or pending separation
- the perpetrator was depressed
- obsessive behaviour by the perpetrator
- suicide threats or attempts by perpetrator
- victim had an intuitive sense of fear that perpetrator would kill them
- perpetrator demonstrated sexual jealousy
- prior threats to kill the victim
- excessive drug/alcohol use
- unemployed perpetrator
- history of violence outside the family
- escalation of violence

One of the most chilling statements I have read in that report is this, from the 2011 report:

This case represents one of the many that have been reviewed where abuse victims have sought advice from family law lawyers shortly before being killed by their partner, usually as part of the separation process.

Most family lawyers have not taken training in how to identify and assess risk. This is one reason why the Department of Justice has convened a group of professionals from across the country to design and pilot a family violence screening tool for family lawyers,<sup>4</sup> to support the implementation of the expanded definition of family violence and other new provisions in the *Divorce Act* taking effect this June. I am privileged to be a member of this Advisory Committee and can report that a very comprehensive and well-explained screening tool for family lawyers is in progress. I believe this will advance understanding of this subject enormously.

In the meantime, we can look to the great body of helpful research, including two outstanding Canadian websites:

- Centre for Research and Education on Violence Against Women and Children<sup>5</sup>
- VEGA (Violence, Education, Guidance and Action) Project<sup>6</sup>

In the training that I do, I often reference an excellent 2013 paper written by Linda Neilson<sup>7</sup> for the Department of Justice, which lists the main indicators of continuing violence:

- a pattern of past emotional, financial, physical or sexual violence and abuse against family members
- sexual abuse
- financial control with abuse
- emotional and psychological abuse associated with coercion and control
- prior criminal conviction for violence
- the degree to which the violence is recent or is escalating in severity or frequency
- failure to comply with restraining orders, support orders or other court orders
- victim fear of the perpetrator
- unstable lifestyle
- substance abuse
- separation<sup>8</sup>

Compare these with the predictors associated with lethal outcome:

- access to weapons
- unemployed perpetrator
- pending or actual separation
- prior domestic violence that is escalating in severity or frequency
- the presence of children in the home, particularly those who are not biologically related to the perpetrator
- death threats
- choking
- suicidal tendencies and attempts to commit suicide by perpetrator
- stalking, monitoring

- forced sex
- victim fear of being killed
- controlling, obsessive forms of psychological bond/possessive jealousy
- threats with weapons
- violence during pregnancy
- significant perpetrator life changes<sup>9</sup>

## **Signs that counsel should be alert to which might indicate a heightened risk of violence**

The research tells us that certain facts are more predictive of risk than others. This is where the screening tools come in. We also know that cases involving more than one indicator of danger predict greater risk.

Certainly, if a client expresses fear of the other person, whether that fear seems founded to the professional or not, that in itself should be taken seriously. We know from the research that having an intuitive sense of fear of one's partner is often a reliable predictor of risk.

One of the greatest challenges facing family law professionals is that those who are at risk can come across as unreliable, or as lacking credibility. They may not take seriously the risk to themselves or their children that seems apparent to the professional. We can be quick to judge such behaviours negatively or dismissively. Victims of severe violence and abuse can be suffering from PTSD and may not tell their stories in a consistent, linear fashion. They may come across as unstable, hysterical, unlikeable or unpredictable. They may change instructions, waver about what they want and seem 'difficult'. They may behave in ways that frustrate a rational professional, such as not wanting to follow advice or going back to an abusive partner.

It is therefore important for family lawyers to not only be well trained themselves, but also to pay attention to their own responses to clients, regardless of gender, and be curious rather than judgemental about that person's seeming unreasonable conduct. As a colleague once taught me, we must seek the reasonable reason for the unreasonable behaviour.

## **Can lawyers simply add check boxes to their client intake forms that reflect these risk factors, or should we be doing more?**

It is tempting to simply take a screening tool or checklist and add those questions to an intake form. Or to give the list to a clerk and have them take clients through it.

But without proper training in how to identify, assess and manage such risks, checklists are

not likely to be very helpful and could do more harm than good. That is because many of those at greatest risk may be disinclined to disclose any relevant information. If the interview process is not well designed and well delivered, and if it is not informed by the principles of safety planning and safe referrals to appropriate processes and resources, chances are people will not trust it sufficiently to disclose their true concerns.

I believe that all family lawyers should take specialized training that teaches them how to identify, assess and manage risk in their practices — including risk to themselves and their staff. They should be knowledgeable enough to use a screening tool, to be able to identify and assess risk, to understand the concept of “Safety Planning” and to know the resources in their community to assist spouses who need a safety plan to support their litigation or negotiation process.

The research is clear that we cannot determine risk on a superficial basis. It is not enough for lawyers to assume that ‘they will know’ when they have a high-risk case, or that their client will just disclose risk to them.

Screening tools are essential for family law professionals. The best one in use at this time, in my view, is the Holtzworth-Munroe, Beck, & Applegate, Mediator’s Assessment of Safety Issues and Concerns (MASIC), set out at the end of this article, which is now at version 4.<sup>10</sup> But there are other screening resources for lawyers, including the Women’s Experiences with Battering Scale<sup>11</sup> and the Danger Assessment.<sup>12</sup> And lawyers should watch for the Justice Canada screening tool, which will be piloted and tested over the coming year.

## **What exactly is meant by “screening for domestic violence and power imbalances”?**

Screening is the process by which family law professionals determine which dispute resolution process will best suit which family.

It is done by way of a non-judging and non-fact-finding confidential interview with a client during which the client is asked to identify their concerns about participating in the proposed dispute resolution process. It is intended to be a safe place for each client to disclose to a trusted professional what they need in order to be able to fully and safely participate in the proposed dispute resolution process.

It is the means by which family law professionals identify whether they feel they are the best professional for a particular family, which process will best meet the needs of that family and how that process should be designed. It is the means by which they gain the information they need to comply with their responsibility to continuously screen for power imbalances as the process evolves, and to know when and how to terminate a process that is no longer appropriate.

And in particular, insofar as it relates to domestic violence, screening is a process of

identifying possible risks, assessing what impact those risks might have on each client's ability to fully and safely participate in the proposed dispute resolution process and determining how those risks will be managed. It is the means by which family law professionals determine what safety planning and other resources might be needed to enable the intended process to proceed fairly and safely, and, if that cannot be done, what alternate processes should be put into place.

Safety is not defined simply as physical safety. In most cases we are more concerned about the impact on clients of a process that is not safe emotionally or legally. For example, an intimate partner violence survivor might be, or feel, too traumatized to participate in a four-way meeting, a mediation, a cross-examination or arbitration with their abuser. If they have not been properly screened their own lawyer, the mediator, arbitrator or judge might misinterpret their behaviour as non-compliance. Or they might go through a process that causes them to experience re-victimization; they may be or feel bullied, judged, minimized or coerced into a process or an outcome that is not actually voluntary.

Identifying these factors, before the client commits to any process, and before the process chosen is designed, is helpful to ensure that these mistakes are not made.

Screening therefore is a pre-process process. It must be done before a client commits to participate in any dispute resolution process. And it is done to identify and assess any form or source of power imbalance that could, if not managed properly, result in the conclusion that private dispute resolution is not suited to a particular situation.

There has been a historic sense that screening is for the purpose of either "screening in" or "screening out". Either idea is an over-simplification. Rather, screening is for the purpose of quality process design. It enables family law professionals to design the most appropriate, safest, most satisfying, most durable, most likely to be effective and most respectful dispute resolution process for each individual and each family.

There are many process design options that can accommodate clients in a safe and respectful way without jeopardizing the principle of due process as it should be interpreted in the context of private dispute resolution. Technology is a powerful resource to enable mediators, arbitrators and parenting coordinators if it is used correctly.<sup>13</sup> Other options where appropriate can include written arbitration proceedings without cross-examination; setting up arbitration room spaces to accommodate clients' spatial needs; agreements in advance about the process to be followed if, during an arbitration, a party's, counsel's or the arbitrator's assessment of safety or power balance shifts; the consensual use of creative processes including a more inquisitorial approach, or a more 'collaborative' approach, to an arbitration. Once the arbitrator has been provided with appropriate detail about power imbalance and domestic violence risks, they have very substantial latitude under the Regulation, it is suggested, to apply the principles of due process in a way that addresses power imbalance concerns.

The best brief definition of screening for domestic violence that I have seen came from British Columbia's Continuing Legal Education Society ("CLEBC") when its *Family Law Act* was amended in 2011 to impose a new duty on all family dispute resolution professionals, including lawyers, mediators and arbitrators. That Act provides, in s. 8, that such professionals "... **must assess ... whether family violence may be present... and the extent to which the family violence may adversely affect**

- (a) *the safety of the party or a family member and*
- (b) *the ability of the party to negotiate a fair agreement*".

The definition that was used in the CLEBC training materials was that screening is the process by which family law professionals:

1. Identify,
2. Assess and
3. Manage such risk.

British Columbia is not the only Canadian jurisdiction that has decided that family dispute resolution professionals including arbitrators have a personal duty to screen for such risks. Manitoba also recently required its family arbitrators to personally screen their clients:

Before a family arbitration begins, the arbitrator must consider whether proceeding with the arbitration could expose a party or child to a risk of domestic violence or stalking, and ask each of the parties:

- (i) Whether there is a history of domestic violence or stalking involving the other party or a child, or contact with a law enforcement agency about domestic violence or stalking involving the other party or a child of a party, and
- (ii) Whether a civil or criminal court has made an order prohibiting or restricting one of the parties from being in contact with or communicating with the other.

## **What does the Arbitration Act require by way of screening in family arbitration?**

Prior to the 2007 amendments to the *Arbitration Act*, including Regulation 134/07,<sup>14</sup> and to the *Family Law Act*, there was no requirement for family arbitrators to screen for power imbalances and domestic violence. Now family arbitrators have a positive duty to ensure that appropriate screening has taken place before clients sign an Arbitration Agreement.

This is a sea change in how family arbitration is practised, one that has been understandably challenging for counsel and arbitrators who have not been trained to incorporate screening principles into their practices.

The *Arbitration Act* was amended in 2007 after extensive public hearings and consultations

with various stakeholders, including those advocating for victims of domestic violence. I participated in those hearings on behalf of the Ontario Bar Association's ADR Section. At the time, there was considerable pressure being brought to bear on the government to entirely prohibit the use of private adjudication in family law as is the case in Quebec. The changes brought about by the Regulation and amendments to Part IV of the *Family Law Act* represented a compromise between those who wanted no family arbitration at all and those who wanted no changes at all. It is an unfortunate myth that these changes were mere tokens to assuage fears of faith-based arbitration. These were substantive changes intended to improve family arbitration in Ontario.

There are sound policy reasons for requiring rigorous screening in family arbitration, a process to which parties will be required to adhere once they and arbitrator have complied with the procedural requirements of the *Arbitration Act* and Regulation 134/07. Those reasons are enforced by the recognition in Bill C-78 of the relevance of identifying family violence, not only in relation to determining the best interests of a child but also in making appropriate dispute resolution process choices.

Those who offer private adjudication services are profiting from the diversion of people from the publicly funded, publicly accountable, transparent legal system. Private, for-profit adjudicators should have a positive duty to 'do no harm' to the appropriate degree.

This evolving duty is reflected in the Standards of Practice of the Family Dispute Resolution Institute of Ontario,<sup>15</sup> a voluntary professional organization for Ontario's family arbitrators. It is also reflected in the changes taking place in other jurisdictions, including British Columbia and Manitoba, requiring arbitrators to personally screen their clients.

To preserve its integrity, family arbitration must be, and be perceived to be, a voluntary and consensual process. Those who profit from the diversion of clients from the court system have a duty to take reasonable steps to ensure that their clients are able to fully and safely participate without power imbalances that could undermine their ability to do so. Failure to do so will undermine public confidence in the integrity of the process.

This duty is expressed in Regulation 134/07 through its screening requirements, which admittedly create a new understanding of the meaning of "due process" in family arbitration, one that recognizes that extra precautions are required to protect the principle of voluntary, consensual participation. Screening for power imbalance and safety is a statutory obligation.

Prior to Regulation 134/07, it might have been credibly argued that an arbitrator who obtains confidential information from just one party is violating the fundamental principle of natural justice.<sup>16</sup> But the Regulation mandates that family arbitrators obtain such information, either directly from the clients if they are acting as a mediator-arbitrator or parenting coordinator, or indirectly through a third party screener if they are acting as an

arbitrator alone.

The definition of 'natural justice' in family arbitration has thus been expanded. Due process in the private adjudication of family law matters not only tolerates the provision of such confidential information to the arbitrator, it requires it.

This is a fundamental change in the way family arbitration is practised relative to other forms of arbitration and relative to the way it used to be practised.

It is important to remember that screening is not a fact-finding exercise. It does not result in the gathering of evidence. It is merely a subjective, non-judging exploration of each party's procedural concerns, one that permits the arbitrator to obtain the information that will allow them to reliably determine if they can provide a fair, impartial and safe process of private adjudication.

Screening is arguably more important in family arbitration than in any other process because:

- Private adjudication is a private, profit- driven business.
- Arbitrations operate in private and are not accountable to the public unless there is an appeal.
- Appeal rights are more limited than in the courts.
- Arbitrations take place in intimate, informal settings.
- Arbitrators do not have all the powers of a judge, particularly in relation to *parens patriae* jurisdiction and contempt jurisdiction.
- Arbitrators cannot make orders for the Office of the Children's Lawyer.
- Arbitrators do not have the same access to interpreters, security, Legal Aid duty counsel, the family court (domestic violence) support workers, nor free mediators and information and referral resources.
- Arbitration is binding and expensive.

The duty imposed on Ontario's family arbitrators under Regulation 134/07 is consistent with the trend in other jurisdictions, which in turn reflects the public policy reason for screening in arbitration: such private processes can cause harm to the vulnerable and those providing them have a responsibility to ensure that the cases they accept are suitable for out of court adjudication.

Regulation 134/07 therefore requires family arbitrators to personally certify in their arbitration agreements that (these are my words):

- (a) They have met the training requirements set out on the website of the Ministry of the Attorney General, which include a basic 14- hour role-play based course that teaches

arbitrators how to use screening tools, which must be repeated every five years unless they have completed 10 arbitrations during those five years;

- (b) In the case of a mediation-arbitration or secondary arbitration such as parenting coordination, they themselves have screened the parties separately for power imbalances and domestic violence, that they have taken this information into consideration before deciding to accept the case and that they will continue to consider the results of their screening throughout the arbitration process, if they conduct one, for the purpose of determining whether private adjudication continues to be appropriate and, if so, what procedural accommodations are required to manage the power imbalances they have identified; and
- (c) In the case of a pure arbitration, they have relied on a third party to separately screen both clients for power imbalances and domestic violence, they have considered the report that they received from the third party prior to determining whether to accept the case and that they will continue to consider that report throughout the arbitration for the purpose of determining whether private adjudication continues to be appropriate and, if so, what procedural accommodations are required to manage the power imbalances they have identified.

Section 59.6(1) of the *Family Law Act* provides that a family arbitration award is enforceable only if the arbitrator has complied with the Regulation.

## **When, by whom, and how should screening be done?**

For years it was common to include a clause in separation agreements that committed parties to mediation-arbitration as their future dispute resolution method. That practice has led to many problems, and as a result, we are seeing fewer such clauses nowadays. Because private dispute resolution is a voluntary and consensual process, pre-mandating it in separation agreements, when the circumstances in which future disputes may arise could render it inappropriate, can be counter-productive. This was in essence the finding of Justice Nolan in *Wainwright v. Wainwright*.<sup>17</sup>

- (a) **When:** Given the very purpose of screening
  - to enable the arbitrator to identify, assess and determine whether they can appropriately manage power imbalances and domestic violence in a private adjudication process
  - screening should be done before the parties have committed to the process. Once an enforceable Arbitration Agreement is signed, parties will be bound by their process choice subject to limited exceptions. Effective screening (e.g., conducted in accordance with best practices) is therefore a crucial condition precedent to an enforceable Arbitration Agreement.

In the case of mediation-arbitration or parenting coordination, that means that the screening should take place before the Mediation-Arbitration Agreement is signed by the parties and before any mediation starts, because that is when the parties commit to the process. It may need to be updated before the arbitration starts.

In the case of arbitration, the screening should be done before the parties sign the Arbitration Agreement.

The case law on this subject has been progressing, with some decisions better than others along the way.

In *Horowitz v. Nightingale*,<sup>18</sup> Justice Nelson correctly found that Minutes of Settlement containing an agreement for future arbitration were not enforceable because the requirements of Regulation 134/07 had not been met, including that there had been no screening.

In *Michelon v. Ryder*,<sup>19</sup> Justice Kurz (then of the Ontario Court of Justice) followed a long line of authority confirming that “court orders, even on consent, do not contain a shortcut across the arbitration gateway” set out in Ontario’s statutory framework. Justice Kurz declined to compel the parties to participate in a parenting coordination process even though they had previously agreed to do so in a consent order.

Then, in *Lopatowski v. Lopatowski*,<sup>20</sup> Justice Gray, *in obiter*, found that the court *does have* jurisdiction to make an order incorporating a requirement, contained in Minutes of Settlement, that the parties arbitrate future disputes even though the formal requirements set out in Regulation 134/07, including the requirement of screening, had not been met.

In *Giddings v. Giddings*,<sup>21</sup> Justice Gray continued with this line of reasoning, giving life to an arbitral process contemplated by Minutes of Settlement in which no Arbitration Agreement had been signed, none of the formalities of Regulation 134/07 had been complied with, and no screening for power imbalances and domestic violence had been conducted. Even so, Justice Gray ordered the parties to sign an arbitration agreement.

In *Z.S. v. B.P.*,<sup>22</sup> the parties had signed Minutes of Settlement requiring future disputes to be resolved by way of mediation-arbitration, and they both signed an Arbitration Agreement. However, the arbitrator had not yet arranged for the parties to attend for screening. The arbitrator incorrectly signed the Arbitrator’s Certificate indicating however that she had done so. The husband then refused to pay his retainer and refused to attend for screening.

Justice MacEachern ordered him to attend the screening, finding that once he does so, the Arbitration Agreement will then come into effect. She wrote at para. 8:

This finding is consistent with the policy requirements behind the requirement for domestic violence and power imbalance screening. The purpose of this screening is not to exclude participants from the arbitration process, but to ensure that domestic violence and power imbalance factors are considered throughout the arbitration process.

Although the result is probably technically correct given the unique facts of this case, I would suggest that this is not an entirely correct summary of the purpose of arbitration screening.

Rather, the purpose of screening in family arbitration is to enable the arbitrator to decide whether the matter is an appropriate one for private adjudication, and, if it is, to provide the arbitrator with sufficient information about power imbalances and domestic violence to enable the arbitrator to comply with their duty to “consider the results of the screening throughout the arbitration”.

An outcome more consistent with the requirements and intent of Regulation 134/07 would have been to require the parties to be screened, for the arbitrator to receive the report from the person who conducted the screening and, if the arbitrator determines that the matter is appropriate for arbitration, then the Arbitration Agreement will come into effect. (This situation is a bit unique because the experienced arbitrator had incorrectly already signed the Arbitrator’s Certificate confirming that the parties had been screened.)

- (b) **By whom:** Screening should be done by the person who is providing the dispute resolution service unless there is a prohibition against them doing so. This is because the person managing the dispute resolution process has the responsibility to accept cases and design processes with safety and power balance in mind. They are the ones that need the information.

Safety planning is one of the most important responsibilities of family dispute resolution professionals. The person with carriage of the process is the procedural expert. In family law, that expertise includes the ability to recognize when a safety plan for one or both parties is required in order for them to fully and safely participate, knowledge of the available safety planning resources and capability to refer clients to them appropriately. In order to do this, the professional must have the best information available about power imbalances.

Mediators who are certified by one of the Ontario Association of Family Mediation, Family Mediation Canada, the Family Dispute Resolution Institute of Ontario, or the ADR Institute of Ontario, all recognized by the Ministry of the Attorney General, are required to screen their own clients, whether they are acting as a mediator, mediator-arbitrator or parenting coordinator.

For family arbitrators, Regulation 134/07 offers two options.

In mediation-arbitration and in secondary arbitration such as parenting coordination,

the mediator-arbitrator/parenting coordinator may do their own screening. As most mediator-arbitrators and parenting coordinators are also certified by one of the professional organizations that offer family mediation designations, they are required to do their own screening in all such cases. This is widely practiced in many Ontario jurisdictions.

In arbitration-only processes, the screening must be done by someone other than the arbitrator. The best practice is for the arbitrator to refer both parties to a trusted third party screener.

Arbitrators should not rely on counsel to each screen their own clients, as this will not provide the arbitrator with the information they need to comply with their responsibility to consider screening results during the arbitration.

- (c) **How?** The best practices for screening in family mediation apply. The person doing the screening meets with each party, separately and confidentially, and asks them questions about the dynamics in the relationship between the parties. The purpose is to learn the concerns that each party has about participating in a private dispute resolution process with the other person. Do they feel safe? Are they afraid? Can they fully participate without fear of reprisal or harm to them or to a child? Will they be able to fully give evidence? Do they feel they will be a good witness? Do they have PTSD or some other disability that may be better accommodated in another process? Can an arbitration be made safe and empowering for them, *etc.*?

Where the screening is being done by the mediator-arbitrator themselves, they will have the information they need if the matter progresses to an arbitration, though some mediator-arbitrators will send their clients to a third party screener for an independent report prior to the arbitration.

Where the screening is done by a third party screener, that professional will meet each party for a confidential screening interview. That third party screener will then send their report to the arbitrator (alone). This report will remain private and confidential in the hands of the arbitrator. If the report contains information of such a nature that the arbitrator feels they cannot proceed for any reason, then the matter should be deemed not appropriate for private adjudication.

## **Under what circumstances should clients be ‘screened out’ of family arbitration, and how would that happen?**

It has been suggested by some commentators, including the court in *Z.S. v. B.P.*,<sup>23</sup> that the purpose of screening in family arbitration is not to screen cases out of arbitration, but rather to empower the arbitrator to manage them. With respect, that is not correct. The purpose of screening in arbitration is the same as it is in all out-of-court processes.

There could be any number of reasons why an arbitrator may determine that a matter should be screened out, either before they accept the case or, in rare cases, during the arbitration. My own experience is that where fulsome screening is done prior to the arbitration, the chances of it being screened out or failing later are considerably diminished.

If one accepts that the purpose of screening is to enable the arbitrator to identify, assess and determine how to manage power imbalances including family violence, one can imagine any number of situations where the court may be a more appropriate process for a given family. Some examples might include:

- An obviously 'ungovernable' party who is not prepared to comply with the requirements of a voluntary, consensual dispute resolution process.
- One or both parties are not likely to be able to afford the full range of eventualities in private adjudication processes.
- A party is too afraid of the other to fully or freely participate in the process without fear of retribution.
- Parties or children may need the resources of the court, including security, a court order appointing the Office of the Children's Lawyer, *parens patriae* or contempt jurisdiction, interpreters, or immediately enforceable orders such as restraining orders.
- A party's mental health status may render them incapable of participating in an intimate, closed, private process.

A matter is more appropriately dealt with in the public courts for public policy reasons, e.g., should a child be vaccinated against diseases such as the measles.

### **Under what circumstances can or should information from the screening process be disclosed?**

Confidentiality is a foundational element of screening. Those in high risk cases are not going to disclose their fears if there is even the tiniest chance that their disclosures might be shared with the person of whom they are afraid. Screening information and results should not be disclosed to parties, counsel or to the court. The only exceptions would be the standard ones set out in Screening Agreements: if the information suggests that a child is at risk of harm then a report to a Children's Aid Society may be warranted; if there is a serious and imminent risk to any person then a report to the police or to the at-risk person may be warranted; or if a court orders disclosure, for example if required in a child protection matter or if a party made admissions of criminal activity which might be compellable in a criminal court.

Only one case that I am aware of has considered confidentiality of the screening process,

*Benson v. Kitt*.<sup>24</sup> In that case the parties had engaged in confidential mediation that led to Minutes of Settlement which made provision for incorporating their terms into an amending agreement. When the amending agreement was not executed by Benson, who instead sought a court order for specified relief, Kitt sought production of the mediator's file including their "screening report". Justice Monahan found that the wording of the parties' Agreement to Mediate made clear that all documents arising out of the mediation are subject to settlement privilege and are inadmissible in subsequent proceedings. Although the ruling is correct, it is my view that Justice Monahan could have gone further and acknowledged the specific protection of confidentiality that is afforded the screening process in contract and at common law.<sup>25</sup> This article explains this further.

## **What should judges hearing family law cases that involve domestic violence be aware of?**

- (1) Screening is a sophisticated and well-developed field of knowledge and expertise. The purpose of screening — assessing whether a proposed dispute resolution process can be provided safely and effectively — and the process by which it is provided — a confidential interview with each party that leads to a risk and suitability assessment — is the same regardless of the proposed process.
- (2) The courts' traditional deference to parties' agreements to arbitrate should be subject to the requirements of Regulation 134/07. Assessing safety and suitability of process is mandatory when parties are contemplating contracting out of their rights to be protected by our courts.
- (3) Rigid adherence to contractual agreements to arbitrate may not always be appropriate in family matters where dispute resolution professionals have an ongoing duty to screen. Parties can and should be 'screened out' of family dispute resolution processes, including arbitration, at any time that the process is no longer appropriate for a party or the family. Patterns of abuse and violence and power imbalances of all forms change and evolve in unpredictable ways. There is always a risk that clients will and should be 'screened out' of family arbitration and into court where their matter can be more appropriately managed.  
  
This is a risk that those providing private, for-profit adjudication services must accept and anticipate as best they can by incorporating rigorous screening protocols into all they do. It is also a risk about which screeners and providers of private adjudication services should inform their clients. Clients who are considering contracting out of their rights to use the courts should understand that the certainty they believe they are contracting for is not absolute.
- (4) Screening is not a tactical or strategic exercise. The courts must not allow parties or their counsel to turn it into such. All elements of the screening process must remain

confidential and should be understood in the context of their limited but critical role. To do otherwise is to risk involuntarily 'outing' a victim of domestic violence in a way that could lead to retribution, without a safety plan. If there is any risk of such outing, the purpose and utility of screening will be undermined by the reluctance of clients to provide the information needed for a credible risk and suitability assessment. The necessity of screening, and the confidentiality of all steps of the screening process must therefore be vigorously protected by the courts.

- (5) Safety planning is an important element of family law matters involving family violence. There are many online safety planning resources available to assist parties, counsel and the courts, including this one from Community Legal Education Ontario.<sup>26</sup> Court-connected family mediators offering on-site and off-site mediation are good resources as they are trained to carefully screen parties and are either free (if in court) or subsidized if not in court that day. Every Family Law Information Centre has an Information and Referral Coordinator who also has training in issues of family violence. And the government-funded family court support workers are invaluable safety planning resources.

## Conclusion

The introduction of a requirement for screening has presented arbitrators, lawyers and judges with a new tension between the way things have always been done and new thinking about how things could be done better. Traditional legal processes have not included a requirement for screening for power imbalances on the basis, among others, that judges do not screen. But private, for-profit, contractual mediation and adjudication services are entirely different from court processes.

Governments across Canada are taking steps to enhance not only the credibility and effectiveness of private dispute resolution processes, but also the safety of the parties, and their children, who opt to use them. These procedural requirements help protect the integrity of out-of-court mediation and arbitration and should be viewed as part of a progressive evolution in the field of family dispute resolution.

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Research or Case Number:

Name of interviewer:

Party being interviewed:  1<sup>st</sup> party: Male/Female/Nonbinary  2<sup>nd</sup> party: Male/Female/Nonbinary Date of interview:

**MEDIATOR’S ASSESSMENT OF SAFETY ISSUES AND CONCERNS VERSION 4 (MASIC-4)  
as of January 9, 2020<sup>27</sup>**

**ADMINISTERED VERBALLY IN FAMILY LAW CASES WITH OR WITHOUT CHILDREN<sup>28</sup>**

The authors of this instrument make the following recommendations: (a) if possible, obtain any court or police records that might address parties’ violent or abusive conduct before completing this Assessment; (b) complete this Assessment in intake session(s) on separate days from negotiation session(s); and (c) complete this Assessment with each party privately (i.e., separately from the other party), preferably with the female party first.<sup>29</sup>

The MASIC-4 may be completed by hand on a paper copies or by typing into the Yes/No boxes and text boxes throughout the document on a computer or tablet. It is generally preferable, when conducting the interview, to refer to the other party by his or her name (or Mom or Dad) in each of the questions below. The MASIC-4 has been set up to allow you to make a global change from NAME (which appear in brackets) to the other party’s first name (or Mom or Dad) throughout the document. Do not make other changes to the MASIC-4 without the permission of the authors. ***Bolded and italicized*** language in this document are instructions and not questions to be asked.

Before asking the questions in Section 1, first ask the party about what brings them to mediation and what they are hoping to accomplish through mediation: use this to get the party’s narrative and build rapport. Throughout the interview, remember to engage with the party you are interviewing and follow up on information that is unclear or may seem important (even if you are digressing at times from the outline). At the same time, be sure to obtain answers (if you can) to all the questions in the MASIC-4. They are there for a reason, which is to assess all types of violence, abuse, and controlling behaviors.

***[Read introduction and questions to each party:]*** In mediation, parties work together to try to make good decisions for themselves [and, if applicable, for their children] outside of court. Mediators do not take sides and do not decide for the parties how to settle their case. Rather, mediators assist both parties in exploring ways to resolve any disagreements in this confidential settlement process. Before the parties start negotiations, we do an intake where we explain the mediation process and ask the parties to give us some background information and complete a confidential intake form.<sup>30</sup> You may wonder about some of the questions I will be asking you now, but it is helpful to think of this like a visit to the doctor’s office. There, you are often asked questions that may not seem important to you or may not seem to apply to you, but are important to the doctor. The questions we ask are important to us in deciding what *process* would work best for you and [NAME]; we are not trying to make any decisions about your case. So please answer the following questions to the best of your ability, knowing that this will be helpful to us, and we will keep your answers to these questions private and confidential from the court and [NAME].<sup>31</sup>

**Section 1**

1a. Do you and [NAME] have any children together?  Yes OR  No

1b. If yes, please list them:

Boy or Girl?	Age?	Arrangements for this child to be discussed in Mediation
		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> Yes <input type="checkbox"/> No

2. Do you have any children from another marriage or relationship who live with you?  No (IF NO, SKIP TO QUESTION 4) OR  Yes

3. How does [NAME] get along with your other child or children?
- 4a. Which of the following describe your main daily activities and/or responsibilities? You can tell me more than one.
- Working:  Full-Time or  Part-Time
  - Retired
  - Unemployed or laid off or looking for work
  - Disabled or unable to work due to health issues
  - Full time home/family responsibilities (raising children, caring for family member, keeping house)
  - Student  Full-Time or  Part-Time
- 4b. Is [NAME] employed?  Yes OR  No
- 5a. Are you and [NAME] currently or were you ever married?  No (IF NO, SKIP TO QUESTION 5d) OR  Yes
- 5b. What is/was the length of the marriage between you and [NAME]? Answer should be in Years:      and/or months:
- 5c. Which of the following best describes your case?
- Original divorce from [NAME]
  - Legal separation from [NAME]
  - Modification to a prior divorce from [NAME]
- 5d. ***If the parties were never married, ask:*** What kind of case is this? Stop me when I get to the correct answer.
- Paternity
  - Guardianship/third party custody
  - Abuse or neglect
  - Termination of parental rights
  - Other (please explain)
- 6a. Has the relationship between you and [NAME] ended?
- No (IF NO, SKIP TO QUESTION 7) OR
  - There never was a relationship (IF THERE NEVER WAS A RELATIONSHIP, SKIP TO QUESTION 9) OR
  - Yes, how long ago did it end? Answer should be in Years      or Months
- 6b. Which of you ended the relationship?
- You OR  [NAME] (IF [NAME] ENDED THE RELATIONSHIP, SKIP TO QUESTION 7) OR  Both of us decided to end relationship
- 6c. Why did you / [NAME] end the relationship [or if both parties decided to end the relationship, why did the relationship end?]
- If the party already answered that they ended the relationship for another relationship, just mark Yes in 6d and go to 6e. Otherwise, ask both 6d and 6e:***
- 6d. Did you end the relationship for another relationship?  Yes OR  No
- 6e. Does [NAME] believe you ended the relationship for another relationship?  Yes OR  No
- 7a. ***If the parties were married, say:*** I assume you lived together and check Yes if the party agrees. Otherwise, ask: Have you and [NAME] ever lived together?  No (IF NO, SKIP TO QUESTION 9) OR  Yes
- 7b. What is the total amount of time that you and [NAME] lived or have lived together? Answer should be in:
- Years      or Months

7c. Are you and [NAME] still living together?  Yes (IF YES, SKIP TO QUESTION 9) OR  No

7d. How long ago did you and [NAME] stop living together? Answer should be in:

Years or Months

8a. Since you stopped living with [NAME], have you and [NAME] spent any time together as a couple? I am not asking about time you spent exchanging the child(ren) or co-parenting the child(ren).

No (IF NO, SKIP TO QUESTION 9) OR  Yes

8b. How long ago was it when you and [NAME] spent any time together as a couple? Answer should be a number measured in one of the following: Days or Weeks or Months or Years

8c. What did you do together?

9. Everyone fights or argues with family members and friends now and then. What happened when you fought or argued with [NAME]?

10. Do you have any of the following concerns about [NAME]? If you have any of these concerns, I will be asking you for some details about your concerns.

- Overuse of alcohol or prescription medications
- Illegal drug use
- Mental health problems
- Child abuse and/or neglect concerns
- Any criminal history

If party reports having any of the concerns listed above: Please tell me more about your concerns:

11. Do you think [NAME] will say that he/she/they has/have any of the following concerns about you?

- Overuse of alcohol or prescription medications
- Illegal drug use
- Mental health problems
- Child abuse and/or neglect concerns
- Any criminal history

If party reports that the other party will have any of the concerns listed above: Please tell me what [NAME] will say about each of those concerns?

12. Have you ever been involved with the Department of Child Services (Child Protective Services)?

Yes OR  No

13. If yes, please explain (be sure to ask any appropriate follow up here):

14. Has [NAME] ever been involved with the Department of Child Services (Child Protective Services)?

Yes OR  No

15. If Yes, please explain (be sure to ask any appropriate follow up here):

16. Are there any current or past protective orders, restraining orders, or orders of protection issued against [NAME]?

Yes OR  No

17. If Yes, please explain (be sure to ask any appropriate follow up here):

18. Are there any current or past protective orders, restraining orders, or orders of protection issued against you?

Yes OR  No

19. If Yes, please explain (be sure to ask any appropriate follow up here):
20. Does [NAME] own or have access to any weapons, for example, guns or knives?  Yes  No
21. If Yes, what kind(s) of weapons?
22. Do you own or have access to any weapons, for example, guns or knives?  Yes  No
23. If Yes, what kind(s) of weapons?
- 24a. Are you in mediation because:
- you and [NAME] decided on your own to mediate, or
  - the Court referred you and [NAME] to mediation?
- 24b. Is this mediation:
- the first time you and [NAME] are mediating or
  - a return to mediation?

### Section 2

Now, I am going to ask you a series of questions about your relationship with [NAME]. I am interested in things that [NAME] may have done **during a conflict, disagreement, fight, or in anger, or to scare you or hurt you, but NOT while joking around.** If any of these questions make you feel uncomfortable or upset, we can take a break. Just let me know.

First, I will ask if something ever happened, and you should answer Yes or No. If you answer Yes, then I will ask if it happened within the past 12 months; again answer Yes or No.

A. Did [NAME] ever (whether living together or not)		B. Did that happen in the past 12 months?	
1.	Call you names?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
2.	Insult you or make you feel bad in front of others?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
3.	Forbid you to go out without him/her/them?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
4.	Try to control how much money you had or spent?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
5.	Been secretive or kept you in the dark about financial matters?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
6.	Try to control your activities, including work?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
7.	Try to control your contact with family and friends?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
8.	Act extremely jealous, or frequently check up on where you've been or who you've been with?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
9.	Demand that you obey him/her/them?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

10.	Physically abuse or threaten to abuse pets to scare or hurt you, or when angry at you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
11.	Punish or deprive the children because he/she/they were angry at you? [If no children, N/A: <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
12.	Make threatening gestures or faces at you or shake a fist at you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
13.	Spit on you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
14.	Threaten to take or have the children taken away from you? [If no children, N/A <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
15.	Destroy property, for example, hit or kick a wall, door, or furniture or throw, smash, or break an object?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
16.	Drive dangerously to scare you, or when angry at you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
17.	Throw an object at you to scare or hurt you, or when angry at you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
18.	Destroy or harm something you care about?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
19.	Make false accusations to the authorities that you physically or sexually abused [NAME] or the children?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
20.	Ruin your reputation at work or in a community that you care about?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
21.	Threaten you with criminal or immigration action against you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
22.	Threaten to hurt you? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
23.	Threaten to hurt someone you care about? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
24.	Threaten to kill themselves? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
25.	Threaten to kill you? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
26.	Threaten you with, or use, a weapon or something like a weapon against you? <i>If Yes, ask for details (including whether threat or actual use, and what kind(s) of weapon(s) or object(s) and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

**I want to remind you that all my questions concern things that [NAME] may have done during a conflict, disagreement, or fight, or in anger, or to scare or hurt you, but NOT while joking around.**

27.	Hold you down, pinning you in place?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
28.	Push, shove, shake or grab you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
29.	Scratch you, or pull your hair, or twist your arm, or bite you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
30.	Slap you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
31.	Hit or punch you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
32.	Kick or stomp on you?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
33.	Try to choke or strangle you or cut off your breathing?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
34.	Burn you with something?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
35.	Demand or insist that you engage in sexual activities against your will?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
36.	Physically force you to engage in sexual activities against your will?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
37.	Follow or spy on you in a way that made you feel frightened or harassed?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
38.	Try to contact you against your will or communicate in a way that made you feel frightened or harassed, for example, by phone calls, leaving you messages on your voicemail, text messages, mail, or through social media contacts or posting?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
39.	Stand outside your home, school, workplace, or other places where he/she/they had no business being, and in a way that made you feel frightened or harassed?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
40.	Leave items for you to find in a way that made you feel frightened or harassed?	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
41.	Do anything else similar to the kinds of behaviors we've been discussing? <i>If yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

**Now consider the things we've been discussing or similar kinds of things:**

42.	As a result of [NAME]'s behaviors, did you ever feel fearful, scared or afraid of physical harm to yourself or to others? <i>If Yes, ask for whom the party has felt fearful, scared or afraid of physical harm and record here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
43.	I'd also like to know about [NAME]'s family members and friends. Did they do any of the things I've been asking about to you? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
44.	As a result of [NAME]'s behaviors, have you ever received any physical injury, even a scratch, small bruise or swelling? <i>If Yes, ask Questions 45 to 48 below. If No, skip those Questions and go to Question 49.</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b><i>For questions 45-48 relating to injuries, ask: Did you ever receive any:</i></b>			
45.	Scratch, small bruise, swelling, or other mild injury? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
46.	Fracture, small burn, cut, large bruise, or other moderate injury? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
47.	Major wound, sever bleeding or burn, being knocked out, or other severe injury? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
48.	Blindness, loss of hearing, disfigurement, chronic pain, or other permanent damage? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b><i>These final Section 2 questions are for all parties regardless of whether they say they suffered any physical injuries.</i></b>			
49.	Did you seek, or should you have sought medical attention for any physical injury caused by [NAME]? <i>If Yes, ask for details and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>
50.	Did you seek, or should you have sought, mental health or medical assistance as a result of any of [NAME]'s behaviors? (This is different than what I asked about physical injury.)	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

	<i>If Yes, ask for details and record them here:</i>		
51.	As a result of [NAME]’s behaviors, did you or someone else ever call the police? <i>If Yes, ask for details about who called the police, and when and what specifically prompted the call, and record them here:</i>	Yes <input type="checkbox"/> No <input type="checkbox"/>	Yes <input type="checkbox"/> No <input type="checkbox"/>

**Section 3**

***If the party reported that the other party engaged in any of the behaviors in Section 2 above in the past 12 months, ask Questions 1-2; if not, to Question 5:***

1. You said that [NAME] did some of the things I asked you about in the past 12 months. Have these types of behaviors been happening more often recently?

Yes OR  No

If Yes, which behaviors:

2. Have these types of behaviors been getting worse or more serious recently?

Yes OR  No

If Yes, which behaviors:

***If the party answered Yes to 1 and/or 2 above, and reported that they stopped living with the other party less than 12 months ago [from Question 7d in Section 1], ask Questions 3-4; if not, skip to Question 5.***

3. You said that you and [NAME] stopped living together \_\_\_\_\_ months ago. Since you and [NAME] stopped living together, have any of these behaviors been happening more frequently?

Yes  No

If Yes, which behaviors:

4. Have these types of behaviors been getting worse or more serious since you and [NAME] stopped living together?

Yes  No

If Yes, which behaviors:

***For ALL parties, regardless of their answers to questions 1 through 4 above, ask the following questions:***

5a. Are you comfortable mediating with [NAME]  Yes (IF YES, SKIP TO QUESTION 6) OR  No

5b. What makes you uncomfortable?

5c. What, if anything, would make you feel more comfortable?

6a. Do you think there is any reason why you should not participate in this mediation?

No (IF NO, SKIP TO QUESTION 7) OR  Yes

6b. If Yes, please explain:

7a. During the mediation, would you prefer to sit in the same room with [NAME] or in a different room?

Same room  Different room  No preference

7b. If in a different room, why?

7c. If in the same room, why?

7d. If no preference, why?

8. Are you afraid that [NAME] will harm you during the mediation or after you leave because of what you say or do in mediation?  Yes  No

9. If yes, please explain:

10. Do you believe that you are in physical danger from [NAME] at this time?  Yes  No

11. If yes, please explain:

12. Is there anything else you think I/we [the mediator(s)] should know?

Case or ID Number:  
Date of Interview:

Name of Interviewer:

**MASIC-4 MEDIATOR CASE EVALUATION as of January 9, 2020<sup>32</sup>**

Review the information obtained from each party (with your supervisor, if applicable) to consider whether this case is appropriate for mediation, and if so, whether any accommodations should be made to the process.

<i>Consider (and check) the different types of intimate partner abuse or violence that may be present:</i>	Female's report of Male's behavior <sup>33</sup>	Male's report of Female's behavior <sup>34</sup>
<b>psychological abuse</b> (Items 1-2 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>coercive control</b> (Items 3-21 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>threats of severe violence</b> (Items 22-26 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>physical violence</b> (Items 27-30 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>severe physical violence and injury</b> (Items 27, 31-34, and 44-49 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>sexual violence</b> (Items 35-36 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>stalking</b> (Items 37-40 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>

The research tells us that a female victim of intimate partner abuse or violence is at risk of serious injury or death when some or all of the risk factors below are present:

*IF THE VICTIM IS A FEMALE, check the following additional risk factors:*

- victim is a woman of child-bearing age** (up to age 50) (From other intake forms)
- victim has children from another partner/spouse living with her** (Questions 2-3 in Section 1)
- victim is leaving her abuser for a new relationship** (Question 6 in Section 1)
- abuser is currently unemployed** (Question 4 in Section 1)
- victim and the other party are still living or staying together** (Questions 7-8 in Section 1)

<i>Check all risk factors validated for FEMALES, but also indicate if reported against females by MALES:</i>	Female's report of Male's behavior <sup>35</sup>	Male's report of Female's behavior <sup>36</sup>
<b>victim expresses fear of abuser</b> (Item 42 in Section 2; and Questions 5-11 in Section 3)**	<input type="checkbox"/>	<input type="checkbox"/>
<b>abuser is highly controlling</b> (Items 3-21 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>abuser uses drugs and/or alcohol</b> (Questions 10-11 in Section 1)	<input type="checkbox"/>	<input type="checkbox"/>
<b>abuser has access to guns or other weapons (note that guns are of particular concern)</b> (Question 20-23 in Section 1; and Item 26 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>abuser stalks victim</b> (Items 37-40 in Section 2)	<input type="checkbox"/>	<input type="checkbox"/>
<b>abuser threatens violence</b> (Items 22-26 in Section 2) <b>(note that threats of violence involving detailed plans are of particular concern)</b>	<input type="checkbox"/>	<input type="checkbox"/>

abuser is physically violent towards victim, and the violence has been escalating in frequency and/or severity over the past 12 months and/or since the parties stopped living together (Items 1-4 in Section 3)	<input type="checkbox"/>	<input type="checkbox"/>
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In some relationships one partner commits all or most of the abuse or violence; in other relationships the abuse or violence may be committed by both partners.

**Based on each party’s report, identify the victim(s):**

- First party. If Yes, is the party  Male or  Female or  Nonbinary
- Second party. If Yes, is the party  Male or  Female or  Nonbinary
- Neither party.

**If you have identified both parties as victims, considering what each party reported (and the severity of what was reported), do you, as the mediator, subjectively identify one of the parties as the primary victim?**

- Yes  No

This subjective designation (of primary victim) should be based on the interview and the mediator’s clinical judgment, considering especially threats, coercive controlling behaviors, intimidation, injury, fear, and recent changes to frequency and severity of the behaviors.

**If Yes, who:**  First party  Second party

### **INSTRUCTIONS FOR ALL CASES**

*Consider the information above in deciding whether to mediate and if yes, how to mediate.*

\*\*As mediators, we should always accommodate someone who expresses *fear* of the other party. Accommodation will vary depending on the circumstances, but a mediator should **not** insist that a party start or continue mediating when that party says that they do not want to mediate because of fear of the other party. It is also not appropriate to require or force a party who self-identifies or who you identify as a victim of intimate partner violence or abuse to participate in the mediation process.

Some victims of IPV/A may not believe that they are at risk. Although we generally want to empower a victim who affirmatively wants to mediate, in making the decision whether or not to mediate we must also consider: (a) the risks involved and (b) what accommodations to provide if we decide to mediate. In addition to safety risks, be sure to consider any other concerns presented in the specific situation, including balance of power issues, the possibility of coercion, the mediator’s ethical duty not to facilitate involuntary and/or unconscionable agreements, and the mediator’s ethical duty to remain impartial.

It is also important to continue to be alert for IPV/A that was not disclosed in the screening process. This may become apparent after screening, during the negotiation process. Consider the parties’ conduct and/or reactions towards each other.

**In considering the existence and effect of IPV/A in this case, please consider the questions below:**

- 1) Do you believe the case is appropriate for mediation?
- Yes**  **No** **If your**

**answer is Yes, then skip to Question 2.**

**If your answer is No, then answer Questions 1a, 1b, and 1c as applicable; you will not be answering Question 2.**

1a) If you think the case is **not** appropriate for mediation, record your concerns here, considering the violence and abuse reported, and its impact on each party:

1b) If you determine not to mediate or to terminate mediation because of concerns about intimate partner

abuse or violence, are there any ethical constraints and/or any safety concerns in how you should communicate this decision to the parties and/or the court? Record these concerns here:

- 1c) If you determine not to mediate immediately after completing the first party's MASIC (typically the female), consider whether it would be safe or appropriate to conduct all or part of an intake with the other party, including and especially the MASIC interview with the other party. Again, consider the ethical constraints and/or safety concerns in how you communicate this decision to the parties and/or the court. Record these concerns here:
- 2) Are any of the following accommodations necessary in order to help ensure a safe, voluntary, and appropriate mediation process?

**Separation of Parties (check all that are needed):**

- Parties to be in separate rooms at all times (shuttle mediation)
- Videoconferencing, telephone, or online mediation with parties in separate rooms or locations (specify details):
- Staggered arrival and departure times for parties (with the victim, or in the case of two victims, the primary victim, arriving second and leaving first):
- Party needs escort to/from car (for which party/ies):
- Party needs way to leave the building without being seen by the other party (for which party/ies):
- Parties to be in separate rooms if mediator not present, i.e., joint sessions possible, but only if the mediator is present at all times in the room with both parties (note that this is not an option encouraged by the authors and should only be considered by mediators experienced in mediating cases with high levels of intimate partner violence or abuse in conjunction with other accommodations listed, e.g., mediation at secure facility)
- Parties to appear for mediation on separate days

**Security:**

- Mediation at secure facility, passing through security, presence of armed guards, etc.

**Referrals/Representation/Support (check all that are needed):**

- Referral to DV program or shelter (for which party/ies):
- DV advocate (for which party/ies):
- Attorney necessary (for which party/ies):
- Support person necessary (for which party/ies):

**Other:**

- Other accommodation (specify):

### **No Accommodations:**

- No accommodations necessary

In this situation, the mediator may consider conducting joint mediation (i.e., the parties mediate in the same room with the mediator) for the negotiation process. For some mediators, this is their preferred process. Nevertheless, as a matter of cautious practice, the authors recommend meeting separately with the parties for at least some part of the process before finalizing any mediation agreement, especially if the parties are not represented by legal counsel.

- 3) Even with screening before the start of negotiations, there may be times when a mediator learns belatedly of intimate partner abuse or violence. If during the mediation, you become concerned about the possibility of intimate partner abuse or violence, take a break to consider how to proceed. Be sure to keep the parties separate while you determine the appropriate action to take.

**Disclaimer:** The MASIC (including the current version and any and all prior, future, and derivative versions) is intended for screening purposes only and does not provide any formal diagnosis of anyone screened or discussed in screening. The MASIC authors have no legal liability or responsibility for the accuracy and/or completeness of information obtained through screening done with the MASIC, or for evaluations and/or recommendations made based upon information obtained through MASIC screening. Users of the MASIC, or information obtained through MASIC screening, are deemed to have accepted the conditions set forth in this disclaimer.

1. One aspect of Regulation 134/07, that requiring arbitrators to file reports bi-annually with the Ministry of the Attorney General, is not particularly useful; the others however have enhanced the integrity of family arbitration in Ontario.
2. <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/03.html>>.
3. <<https://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/OfficeChiefCoroner/Publicationsandreports/DVDRC2017.html>>.
4. <[https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhancement/neilson\\_web.pdf](https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhancement/neilson_web.pdf)>.
5. <<http://www.learningtoendabuse.ca/>>.
6. <<https://vegaproject.mcmaster.ca/>>.
7. <[https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhancement/neilson\\_web.pdf](https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhancement/neilson_web.pdf)>.
8. *Ibid.*, at p. 46.
9. *Ibid.*, at p. 57.
10. The MASIC was originally introduced in The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain, Family Court Review, Vol. 48, No. 4, 646-662. Initial data on psychometric properties exists for Section 2 of the original MASIC (Pokman, V., Rossi, F.S., Holtzworth-Munroe, A., Beck, C.J.A., Applegate, A.G., & D'Onofrio, B.M. (2014). Mediator's assessment of safety issues and concerns (MASIC): Reliability and validity of a new intimate partner violence screen. Assessment, 21, 529-542. DOI: 10.1177/107319111452872). Additionally, the MASIC has been shown to detect more party reported intimate partner violence than other means of IPV screening (Rossi, F.S., Holtzworth-Munroe, A., Applegate, A.G., Beck, C.J.A., Adams, J.M., & Hale, D.F. (2015). Detection of intimate partner violence and recommendation for joint family mediation: A randomized controlled trial of two screening measures. Psychology, Public Policy, and Law, 21:3, 239-251). The MASIC developers do not yet have such evidence regarding the MASIC-4. For questions about the MASIC, contact Amy G. Applegate <[aga@indiana.edu](mailto:aga@indiana.edu)>, Amy Holtzworth-Munroe <[holtzwor@indiana.edu](mailto:holtzwor@indiana.edu)>, or Connie Beck <[beckcj@uw.edu](mailto:beckcj@uw.edu)>.
11. <<http://www.dbhds.virginia.gov/library/mental%20health%20services/scrn-pw-web.pdf>>.
12. <<https://vawnet.org/material/danger-assessment>>.
13. The various FDR organizations are currently working to design standard best practice protocols for the use of online mediation in the family law context.
14. <<https://www.ontario.ca/laws/regulation/070134>>.
15. <[https://www.fdrio.ca/home/standards\\_guidelines/](https://www.fdrio.ca/home/standards_guidelines/)>.
16. Though the Ontario Court of Appeal in *Marchese v. Marchese*, [2007] O.J. No. 191, 2007 ONCA 34 endorsed the hybrid process of mediation-arbitration, where inevitably the mediator-arbitrator will be in possession of confidential information obtained during

caucus in the mediation phase that will not necessarily be shared with the other party.

<sup>17</sup>. [2012] O.J. No. 1975, 2012 ONSC 2686.

<sup>18</sup>. 138 O.R. (3d) 10, 2017 ONSC 2168.

<sup>19</sup>. [2016] O.J. No. 2781, 2016 ONCJ 327.

<sup>20</sup>. [2018] O.J. No. 676, 2018 ONSC 824.

<sup>21</sup>. [2019] O.J. No. 6450, 2019 ONSC 7203.

<sup>22</sup>. [2020] O.J. No. 568, 2020 ONSC 885.

<sup>23</sup>. *Ibid.*

<sup>24</sup>. [2018] O.J. No. 6639, 2018 ONSC 7552.

<sup>25</sup>. <<https://www.fdrio.ca/2019/01/court-upholds-confidentiality-of-mediation-intake-forms-mediators-file-screening-notes/>>.

<sup>26</sup>. <<https://www.cleo.on.ca/en/publications/plan>>.

<sup>27</sup>. Amy Holtzworth-Munroe, Connie J. Beck, & Amy G. Applegate, Mediator's Assessment of Safety Issues and Concerns Version 4 (hereinafter "MASIC-4") (2019). The MASIC-4 may be reproduced, distributed, and displayed freely for non-commercial purposes. Any use of the MASIC-4 that: (a) is for commercial purposes; (b) does not acknowledge the authors; and/or (c) modifies the MASIC-4 without the authors' consent, including the preparation of derivative works, is strictly prohibited. The first version of the MASIC appeared in A. Holtzworth-Munroe, C.J.A. Beck & A.G. Applegate (October 2010). The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain, Family Court Review, Vol. 48, No. 4, 646-662. The authors acknowledge the Family Court Review, which is a journal of the Association of Family and Conciliation Courts. The questions in Section 2 of this Assessment have been adapted from Marshall L.L., Development of the Severity of Violence Against Women Scale; C.M. Sullivan, J.A. Parisian, W.S. Davidson, Index of Psychological Abuse; P. Tjaden, N. Thoennes National Violence Against Women Survey; and D. Hines and E. Douglas, Sexual Aggression Experiences of Male Victims of Physical Partner Violence: Prevalence, Severity, and Health Correlates for Male Victims and their Children. The Marshall, Sullivan, and Tjaden screening instruments, in their entirety, have been validated. In addition, initial reliability and validity for Section 2 of an earlier version of the MASIC has been demonstrated. V. Pokman, F.S. Rossi, A.G. Holtzworth-Munroe, C.J.A.

Beck, A.G. Applegate & B.M. D'Onofrio (March 2014), Mediator's assessment of safety issues and concerns (MASIC): Reliability and validity of a new intimate partner violence screen. Assessment, Vol. 21 (5), 529-542. The MASIC-4 incorporates portions of the Danger Assessment (J.C. Campbell. (2004) Danger Assessment, Retrieved December 1, 2018, from <<http://www.dangerassessment.org>>; J.C. Campbell, D.W. Webster, N. & Glass (2009). The danger assessment: validation of a lethality risk assessment instrument for intimate partner femicide. Journal of Interpersonal Violence, 24(4):653-74). The authors also wish to acknowledge their law and psychology students who assisted, directly and indirectly, in the development of this Assessment.

<sup>28</sup>. The MASIC (including the current version and any and all prior, future, and derivative versions) is intended for screening purposes only and does not provide any formal diagnosis of anyone screened or discussed in screening. The MASIC authors have no legal liability or responsibility for the accuracy and/or completeness of information obtained through screening done with the MASIC, or for evaluations and/or recommendations made based upon information obtained through MASIC screening. Users of the MASIC, or information obtained through MASIC screening, are deemed to have accepted the conditions set forth in this disclaimer.

<sup>29</sup>. Although males and females can be both victims and/or perpetrators of intimate partner violence or abuse, most research shows that female victims report more sexual victimization, fear, and serious physical injury. See, e.g., Z. Winstok & M.A. Straus (2016) 31(8) Journal of Family Violence, 933-935. This is very important to know and consider in the mediation context. Thus, with male/female couples, we recommend screening the female party first if possible in the event the screening results indicate that mediation would not be appropriate. Screening the male party might then not be necessary or appropriate.

<sup>30</sup>. To obtain a copy of the Confidential Intake Form used by mediators in the Viola J. Taliaferro Family and Children Mediation Clinic at the IU Maurer School of Law, contact Professor Amy G. Applegate at <[aga@indiana.edu](mailto:aga@indiana.edu)>.

<sup>31</sup>. The authors also recommend: (a) do not apologize for asking these questions; (b) do not say or volunteer that everyone is asked these questions; and (c) if a party enquires whether everyone is asked these questions, an appropriate response is: “We ask everyone a series of background questions. We ask the parties some of the same questions and some different questions. No matter what we ask, what you say will be kept confidential from the other parent and the court”.

<sup>32</sup>. *Ibid.*, note 27.

<sup>33</sup>. If the couple being screened is not male/female, then change to Mother 1 and Mother 2, or Male 1 and Male 2. If these changes are not sufficient and you are not participating in a research study, then use parent first names as necessary (so long as confidentiality of the parties is maintained).

<sup>34</sup>. *Ibid.*

<sup>35</sup>. *Ibid.*

<sup>36</sup>. *Ibid.*