By: Hilary Linton

Identifying, Assessing and Managing Power Imbalances & Risk in the Design and Delivery of Family Law Dispute Resolution Processes

The manner in which family law negotiations are conducted is in the midst of profound change.

There are many reasons for this. More parties are unrepresented; more clients want collaborative, non-adversarial negotiations; the variety and complexity of issues being negotiated has grown; the demographics of our clients have changed; and clients and professionals are more knowledgeable about the factors that influence negotiation, its effectiveness and safety.

In this context, the broad notion of "procedural triage" has emerged. Family lawyers, mediators, arbitrators, collaborative practitioners and parenting coordinators are increasingly engaging in some form of such triage before starting accepting a file.

There are three compelling reasons for family law dispute resolution providers to implement a screening protocol into their work.[1]

First: there is a proven connection between family law negotiations and spousal homicide. Domestic homicide rates increase exponentially at and after the time of separation. A legal consultation alone increases the chance that an abused spouse will be murdered. Adversarial dispute resolution processes escalate risk further.[2]

[1] Screening is now mandated under the new British Columbia Family Law Act, s. 8, for all family dispute resolution professionals. Designated forms of training are required for all professionals providing such services and screening for family violence and power imbalances must be done by all family lawyers, mediators, arbitrators, parenting coordinators for the purpose of identifying, assessing and managing power imbalances, to ensure that the most appropriate and safest negotiation process is being used. B.C. is the first jurisdiction in Canada to formally recognize the emerging duty on family law professionals to conduct such screening. For more information, see "Family Law Act Transition Guide", *CLEBC*, 2013.

[2] See Ellis, Desmond and Stuckless, Noreen, *Mediating and Negotiating Marital Conflicts*, (1996) Sage Publications; 2011 *Ontario Domestic Violence Death Review Committee Report,* Office of the Chief Coroner, Case DVDRC-2011-02- OCC file # 2003-16227; Holtzworth-Munroe, Amy; Beck, Connie J. A.; & Applegate, Amy G., "The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Pubic Domain" 48 *Family Court Review* (2010), No. 4, 646-662; Ver Steegh, Nancy, "The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers", 38 *Hofstra Law Review* 699 (2009).

Second, spousal homicides in the separation context can often be predicted. Research of such cases has yielded a clear set of predictors of spousal homicide--- something family lawyers, mediators, arbitrators and parenting coordinators should be able to identify.[3] Many if not most spousal murders that occur while parties are separating are predictable and preventable. Professionals providing dispute resolution services at the time of separation therefore have a duty to conduct a credible screening process so that they can, in accordance with the emerging standard of care, identify, assess and manage such risks.

Third, even if no such risk of harm is present, the process of screening itself is procedurally invaluable. It provides professionals with important information that will help them design and deliver a dispute resolution process that is more likely to be effective in addressing the procedural needs of each client. This invariably will lead to better and more lasting outcomes, and more satisfied clients.

Family mediators have incorporated screening principles and processes into their work for years.[4] The process is also now applied, by legislative requirement, to family arbitration[5] and parenting coordination, and is increasingly being incorporated into collaborative practice, four-way lawyer-client meetings, and even litigation. In the courts, Information and Referral Coordinators and mediators in Family Law Information Centres, all trained to indentify, assess and manage family violence, are screening cases that are before mediators, judges and dispute resolution officers.[6]

This short Q&A will help answer any questions readers may have about the process.

Q: What is screening?

A: Screening is a process of risk assessment. It is conducted by the professional who will be providing the dispute resolution process, before accepting the case.

---

[3] Ontario's coroner produces a bi-annual report, the Domestic Violence Death Review Committee Report; see also www.spotthesigns.ca.

[4] See the Ontario Association of Family Mediation Standards of Practice, requiring all accredited family mediators to personally screen for domestic violence and abuse at the beginning and throughout the mediation.

[5] The Ontario Ministry of the Attorney General's website has detailed information about the screening requirements in family arbitration.

[6] See the Ontario Ministry of the Attorney General website for more information about the services provided by court connected family information and mediation services; see also www.mediate393.ca.

Q: What is the person conducting the screening looking for?

A: Screening is designed to identify those cases where private dispute resolution is not likely to be effective or safe, or where specific procedural requirements are needed to make it effective and safe. For example, mediators will screen prospective clients to assess whether either fears for his or her safety or the safety of their children, whether a party feels too intimidated or threatened to fully negotiate, or whether there are concerns about mental illness, addiction, physical violence, or emotional volatility that could make a mediation process ineffective or unsafe for a client or for the mediator.[7]

Screening is intended to identify any factor at all that could create a significant imbalance of negotiation power. Many such imbalances can be resolved or addressed in the design of the dispute resolution process. But some power imbalances cannot be safely or effectively managed, and in those cases private dispute resolution may not be appropriate. In the case of family violence, screening is intended to identify whether the violence is likely to be of the sort that could make negotiation unfair or dangerous. The person conducting screening is therefore performing three functions: the identification, assessment and management of power imbalances and risk.

Q: How does screening differ from a standard lawyer-client interview?

A: Professionals who conduct screening interviews should be trained in the dynamics of power, coercion and control. The training teaches how use specific interview tools, skills and strategies that help identify, assess and manage a range of potential risks. They are familiar with the different types of family violence, how victims and perpetrators of different forms of violence behave, the risks of certain forms of behavior escalating into serious or even lethal harm, and the appropriate ways to manage such risks as safely as possible. They are also trained to identify and assess various behaviours that could make private dispute resolution ineffective or unsafe, including high conflict behaviours, or those suggesting specific personality characteristics and needs.

Q: Do I need to be a mental health professional to conduct a reliable screening process?

A: No. But you should be trained in screening research, protocols, tools and best practices.

Q; Who should do the screening interview?

[7] Although the focus of screening is on the physical, emotional and legal safety of parties and children, mediators and lawyers are also at risk of being harmed or killed in high risk situations.

A: Screening should take place before a dispute resolution process is chosen or committed to. This means that a qualified professional should meet, privately and confidentially, with each party and conduct an assessment to determine that individual's procedural needs. The most effective screening takes place when the same, trained, professional meets both parties (separately) before any process is chosen, to help them make an informed decision about the most appropriate process for them and their family. Mediators screen in confidential intake meetings with each party before an Agreement to Mediate is signed. In collaborative practice, a mental health professional or mediator member of a collaborative team can do it in confidential pre-process intake meetings.

Family lawyers can "screen" their own clients to identify and assess their that client's procedural and safety needs. However, as recent case law has shown, it is difficult to maintain confidentiality of the screening process if each lawyer screens his or her own client in any legal process, or if the parties are screened by different people.[8] In cases of high risk, a violation of confidentiality could jeopardize the safety of a client or professional. For this reason, it is always better practice to have a third party meet with and confidentially screen both clients before they begin any dispute resolution process.

Q: What are the key elements of a screening interview?

A: Screening is a fully supportive, confidential [9] interview in which each person is asked his or her procedural concerns. It is not a fact-finding exercise; rather an attempt to get the information necessary to understand what each person needs in order to feel safe-- emotionally, physically, legally and psychologically-- in the negotiation. It should be conducted in a private and non-judging environment. The client is asked general and specific questions about the nature of the relationship with the other person, and any fears or concerns he or she has for his or her safety, well-being, ability to negotiate and ability to fully participate in the process. Importantly, screening does not involve challenging the person being interviewed about things the other party may have said, or asking the person being interviewed questions about his or her behaviour. It is not intended to be an objective finding of facts; rather an exploration of the subjective concerns and needs of each person. The person conducting the interview will use this information to identify and assess the various sources of negotiation power that each person believes they have, and

[8] In Docherty v Catherwood, the husband in a mediation-arbitation was screened by counsel and the wife by a third party screener. Because the screening was done by different people, the results of the screening were inevitably made known to all, a practice that can put a vulnerable party at risk of harm. Screening results should be kept confidential between the screener and each individual party. See this three-part blog post series for further comment.

[9] The standard exceptions to confidentiality apply to screening and clients must be informed about them before participating in a screening interview: disclosures of information suggesting that a child is in need of protection; information suggesting that any individual is at risk of imminently harming another or themselves; where ordered by a court.

in particular will assess whether any factors--- such as a pattern of coercive, controlling behavior—suggest that a party could be at risk of harm, or negotiation for other reasons cannot be made safe or effective at this time.

Q: Why is confidentiality so important?

A: In cases of high risk, it can be dangerous for a victim of family violence to disclose information about the violence to anyone. Such disclosures can put that person, their children or even the professional at risk of retaliatory harm. If fear or other indicators of coercive controlling violence are disclosed, the professional conducting the interview needs to know how to handle the situation so that the vulnerable person can be referred to a safer process and the potentially dangerous person can also be provided with appropriate supports and help.

Q: How does one differentiate among different forms of family violence?

A: The percentage of family law cases involving some form of family violence/abuse has remained steady at about 50% in all research to date. The important first step is therefore to structure a screening interview that permits prospective clients to feel safe enough to disclose any history of violence. Victims of family violence are often too afraid, embarrassed or unaware of the risk they face to disclose it to their lawyers or to understand its significance. The higher the incomes and social status, the more obstacles there are to disclosure. Screening training includes extensive review of the research and literature around family violence, and how one can, through careful and specific forms of questioning, learn enough information to accurately assess the risk of harm resulting from any violence that is disclosed. [10]

Q: What are the range of outcomes of a screening process?

A: The outcomes vary from proceeding with the process being considered without any adaptations, to terminating the process and contacting police because a party has disclosed an imminent and credible threat to a person's safety. Between these extremes are many options including:

- Making adaptations to the intended process, such as: incorporating third party professionals, requiring security, ensuring that the "dangerous" person arrives first and the "vulnerable" person leave first, requiring parties to attend with supportive individuals, never allowing the parties to be alone together, use of technology, and other creative

[10] See Kelly, Joan B., and Johnson, Michael B., "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions", 46 *Family Court Review,* (2008) No. 3, 476-499.

measures to permit each party to feel able to fully and safely negotiate.

- Referring the parties to another process, or another process provider, who is better suited to the personalities of the parties, or whose strengths or training makes them better qualified to handle the matter.
- Referring the parties to counselling, lawyers, or other professionals before they can begin the negotiation.
- Requiring assessments or restraining orders before the process can begin.
- Requiring parties to provide confirmation from a mental health professional that they understand the negotiation process and are able to fully participate.
- Ensuring that both parties obtain the supports they need in order to effectively and safely participate in the negotiation.
- Referring the vulnerable person to resources such as Family Court Support Workers for safety planning for themselves and/ or their children, as a pre-condition to starting a negotiation process.
- Referring the "dangerous "person to supports, counselling or other resources to enable him or her to feel better able to negotiate effectively and safely. [11]
- Requiring a victim of violence to consult with a criminal lawyer to be fully informed of implications of taking certain steps or refraining from taking certain steps.
- Requiring the negotiation to take place in a location where there are metal detectors and security guards.

Conclusion:

The field of screening for power imbalances and family violence is still emerging, particularly in its adaption to forms of family dispute resolution other than mediation. The conclusiveness of research supporting a link between family law negotiations and spousal assault and homicide is however well established. That link will continue to guide professionals as best practices in family law negotiation evolve.

[11] Research shows that men who are supported and not judged are less likely to recidivate than men who are isolated, rejected and unsupported.