

Best Practices for Screening for Family Violence and Power Imbalances in Family Mediation-Arbitration

Hilary Linton, 2016

Summary

1. Screening is a *process of identifying, assessing and managing power imbalances*. Its purpose is to assess if parties are appropriate for the proposed FDR process, and if it can be designed and managed in a way that empowers the self-determination, participation and safety of all. In screening interviews, clients have a safe place to disclose their procedural concerns. This is not evidence.
2. Screening enables FDR professionals to provide well-designed, effective and safe processes that satisfy the procedural interests of *both parties*. It is highly unusual that a case is 'screened out' to court.
3. Effective screening is *more important* in family arbitration than mediation because:
 - Parties can withdraw from mediation; once they have signed an Arbitration Agreement they are bound.
 - Arbitration takes place informally-- in private board rooms without metal detectors or security, without police escorts, without access to family court support workers, and without the ability to obtain an immediately enforceable protection order.
 - Arbitration is an intimate process. It offers many opportunities for interaction, bullying, threats and harassment that would not be detected by an arbitrator (or counsel) who do not understand the nature of the abuse and the unique means by which the abuser controls the victim. Private arbitration offers many more opportunities for abuse of process than do the courts or mediation.
 - Arbitrations result in binding outcomes. A person who is too afraid to tell the truth (see *Morgan-Thompson*, Schedule A, for an example) is more prejudiced by participating in an arbitration process without effective screening than in mediation.
 - Lawyers do not protect their clients from safety risks. (See the tragic case of *Kyle and Katherine Newman*, Schedule B, for how challenging it is for lawyers not trained in screening to accurately identify risk,

even when the client's own family members have predicted the danger.)

- Parties who are not good candidates for private arbitration, for whatever reason, are more prejudiced by participating in a mediation-arbitration without effective screening than in mediation. (See the complaint by *a mediation-arbitration client*, attached as Schedule C, and also the case of *Docherty v Catherwood*, Schedule D.)

4. Screening policy should therefore be progressive, placing a priority on the principles of safety and empowerment of those who participate in FDR processes.

5. The policy in BC, clear on its face that all FDR professionals- including arbitrators-- must screen their own clients, is the most progressive standard. (See Schedule E for details on the BC policy and practice.) *The BC Attorney General has stated at a CLEBC training that the intent of the Act is for arbitrators and mediator-arbitrators, like all other family dispute resolution professionals, will do their own screening. Carol Hickman of Vancouver, the leading trainer on screening in BC, confirms that this is the practice that is being taught.*

What/Whose Risk are We Concerned About?

6. Over half of all FDR files will involve violence or abuse. Of all the known cases of clients, mediators or lawyers murdered during or after a mediation process, there was no screening. (See Schedule F).

7. Of all the known cases of mediator-arbitrators resigning, resulting in needless financial losses to the clients, the screening was not done by the mediator-arbitrator themselves. Rather the mediator-arbitrator relied on a third party, either counsel or a third-party screener. (see *Docherty v Catherwood* (Schedule D) for example, where the mediator-arbitrator was forced to resign after failing to conduct screening at the outset of the mediation. See also the recent complaint from *a client*, Schedule C.)

8. There are no known cases of arbitrations being set aside because the mediator-arbitrator did their own screening. A great many mediator-arbitrators, including all certified family mediators, conduct their own screening in mediation-arbitration.

9. Some traditional (mediator-) arbitrators are concerned that the integrity of their quasi-judicial processes will be compromised if they are privy to the

information provided during confidential screening interviews with clients. These concerns are not substantiated because:

- Mediator-arbitrators routinely have confidential caucuses in mediation.
- Mediator-arbitrators and arbitrators routinely chat informally and separately with clients during the process.
- Arbitrators routinely conduct voir dices.
- Arbitrators possess the intellectual and procedural sophistication to manage confidential, procedural information and to disregard information that is not evidence.
- There are no examples of arbitral awards being challenged on the basis of bias arising from the screening process.
- Parties can easily contract for screening, acknowledging that it will not form the basis of a claim for bias.
- *Arbitrators are not judges.* The Arbitration Act allows for much that is different from court. Family arbitration is not the same as court. It is not relevant what judges do or don't do.

The far greater risk is that people will be harmed by the procedural choices of an uninformed arbitrator (or mediator-arbitrator). Case law supports this proposition. Case law further supports the best screening practices in both family mediation and mediation-arbitration. (see *Wainwright v. Wainwright, Schedule G*). *Wainwright* remains the *only* relevant case on topic.

Arbitrator (or Mediator-Arbitrator) Should Do Their Own Screening

2076837512. Screening is identified as the process by which FDR professionals comply with their responsibility to “identify, assess and manage power imbalances and family violence”.

2076838888. In order to reliably comply with this responsibility, the person conducting the FDR process needs to have certain information to inform procedural choices.

2076838889. Experienced screeners will confirm that this information can only be reliably obtained through a confidential pre-process interview between the process provider and each client. When this is done, there is no "report" on the screening. The mediator-arbitrator does not write a "report" to themselves; they consider the information they learned and apply their skill and knowledge to identify, assess and manage power imbalances and safety risks throughout the process. This includes the important ability to engage in safe termination and safety planning when it becomes apparent that it is no longer safe to continue a process.

2076838890. Having lawyers screen their own clients has proven ineffective. This practice has led to great confusion about what the process is. Cases are failing after the clients have spent thousands of dollars in legal and mediation-arbitration fees because the mediator-arbitrator did not have a sense of the power imbalances and was unable to manage them effectively.

2076838891. Having a *third party screener* meet with each client, for the purpose of providing a report to the arbitrator (or mediator-arbitrator) is, although better than having counsel screen their own clients, still problematic and fraught with other challenges. Even if the parties each meet with the same third party, any report from such a process may not provide the arbitrator with the information they need to effectively identify, assess and manage power imbalance. It is also a poor policy choice because:

- The concept of "third party screening" has not been tested or researched. It was invented in haste to strike a compromise between competing interests when the Regulation under the Arbitration Act was being drafted. It is an unnecessary compromise of procedural integrity and safety when better practices are in use elsewhere.
- A third party cannot know what information a given arbitrator might need to identify, assess and manage, himself or herself, the power balance and safety issues during a mediation-arbitration. The only person who knows what information they need in order to do that effectively is the arbitrator.
- A report by someone else cannot reliably inform the process provider of what they need to know in order to decide, themselves, whether they are capable of identifying, assessing and managing risk in their process and, if so, how to do it.
- Third party screeners have the least stake in the process. Relying on them for screening places the critical threshold question ("is this case

appropriate for my mediation-arbitration process?") in the hands of the wrong professional.

- Third party screeners will assume liability for anything that might go wrong in the arbitration process, resulting in potential litigation and professional complaints. More cases, that might be appropriate for arbitration if screening was effectively done, will be screened out by professionals not prepared to assume this disproportionate liability.
- There is and will continue to be disagreement and confusion about, and likely litigation over, what the reports from third party screeners should contain and who has access to them.
- Having such a report done by a person who is not party to the arbitration process adds an unnecessary layer of expense and complication to the arbitration process, requiring separate process agreements for this step, separate liability insurance coverage for a new class of professional, a third party screener, uncertainty about the relationship between the third party screener and the clients, counsel and the arbitrator.
- If we are to take the role of screening seriously, and the risk of harm to victims of violence and abuse seriously, we must require ALL FDR professionals are trained to and do in fact conduct their own screening processes, as is required in BC. This acknowledges that arbitration is a flexible, adaptive process that can be designed to meet the procedural needs of the parties; and that family arbitration is even more unique in that the risks facing parties, counsel and mediator-arbitrators must take priority over unfounded fears of bias.
- A clear and simple policy will be the easiest to manage and enforce. FDRIO, which will be the agency setting standards for family arbitration designations in Ontario, will benefit from having a simple, clear and easy to understand screening policy.

2076838892. The best practice is that in British Columbia, namely that all FDR professionals are required to have designed training in identifying, assessing and managing power imbalances and family violence and are further required to conduct their own screening processes.

Schedule A FDRIO Brief: (excerpts: see highlighted parts)

CITATION: Morgan-Thompson v. Thompson, 2011 ONSC 2787
NEWMARKET COURT FILE NO.: FC-07-27827-00
DATE: 20110504

SEPARATION AGREEMENTS

- [1] The evidence of the parties is that on June 29, 2007 they signed two agreements in Hamilton, Ontario even though both were residing in Woodbridge at that time, although had been in separate residences since March. One agreement is entitled "Separation Agreement; Non-Matrimonial Home Items" and is dated June 29, 2007 (the "first agreement"). It is important to reproduce it in its entirety:

SEPARATION AGREEMENT
NON-MATRIMONIAL HOME ITEMS

THIS SEPARATION AGREEMENT made on the 25th day of June,
2007

BETWEEN:

CLYDE THOMPSON
Hereinafter referred to as "Husband"

-and-

NATASHA MORGAN-THOMPSON
Hereinafter referred to as "Wife"

WHEREAS:

The parties were married on July 12, 1998 and have lived separate and apart since on or about October 1st, 2006.

The parties wish to finalize their rights and obligations with respect to their Matrimonial Home known as 42 Fonteselva Avenue, Woodbridge, Ontario ("Matrimonial Home").

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises contained herein and the sum of \$1.00 each paid to the other, the receipt and sufficiency of which is hereby expressly acknowledged by both parties, the parties agree as follows:

1. Husband shall pay to Wife the sum of \$50.00 per child per month (2) children.
2. Upon this payment being made, Wife releases to Husband any and all claims she has against Matrimonial Home.
3. Wife completely releases and shall sign over the Matrimonial Home known municipally as 42 Fonteselva Avenue, Woodbridge, Ontario by deed of coincident date with this agreement.
4. Husband shall release any and all claims that he has against the truck being a 1998 GMC Jimmy and he will sign over sole ownership to the Wife.
5. Husband releases any and all claims he has against the GEO Holiday timeshare Being account number 10-4001959-4/1477535 and that the Wife will assume all payments now and in the future.
6. Both Clyde and Natasha Morgan Thompson shall have joint custody of children named Shantana Morgan Tajae Thompson born May 25, 1993 and Nathanael Clyde Earl Thompson born March 12, 2001. Primary residence with their Mother.

SIGNED, SEALED AND DELIVERED

In the presence of

"Signature"

Witness:

"Signature"

Clyde Thompson

"Signature"

Witness:

"Signature"

Natasha Morgan-Thompson

- [2] The other agreement is entitled "Separation Agreement with Respect to the Matrimonial Home Only" (the "second agreement"). It is accompanied by what purports to be a certificate of independent legal advice, undated other

than "June 2007", and indicates that the applicant was given advice in respect of the separation agreement regarding the matrimonial home by a solicitor named Andrew Loucke. The certificate indicates that Christopher Sherk acted for the respondent in respect of this transaction. This agreement is reproduced in its entirety:

SEPARATION AGREEMENT WITH RESPECT TO THE
MATRIMONIAL HOME ONLY

THIS AGREEMENT made on the day of June, 2007

BETWEEN:

CLYDE THOMPSON
Hereinafter referred to as "Husband"

-and-

NATASHA MORGAN-THOMPSON
Hereinafter referred to as "Wife"

WHEREAS:

1. The parties wish to finalize their rights and obligations with respect to their Matrimonial Home known as 42 Fonteselva Avenue, Woodbridge, Ontario ("Matrimonial Home").

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises contained herein and the sum of \$1.00 each paid to the other, the receipt and sufficiency of which is hereby expressly acknowledged by both parties, the parties agree as follows:

1. Husband shall pay to Wife the sum of \$0.00.
2. Wife releases Husband any and all claims she has against the Matrimonial Home.
3. Wife completely releases and shall sign over the Matrimonial Home known as 42 Fonteselva Avenue, Woodbridge, Ontario by deed of coincident date with this agreement.

SIGNED, SEALED AND DELIVERED
In the presence of

"Signature"
Witness:

"Signature"
Clyde Thompson

"Signature"

Witness:

"Signature"

Natasha Morgan-Thompson

- [3] In her amended application the applicant does not seek an order of invalidity or to have the separation agreements set aside. Her lawyer has characterized the issue in the pleading as "all items of the written agreement are in dispute as they are unreasonable, unconscionable, and the agreement was signed under extreme duress from the respondent". She also seeks an order for equalization and an order for the sale of the matrimonial home.
- [4] In her testimony the applicant described a situation that existed in her household that ultimately led her to leave with the children. That situation was, in part, that she and the respondent routinely engaged in heated verbal arguments in the presence of the children. Having observed their demeanour in this courtroom over the course of the 5 days of this trial I have no difficulty accepting that as true, and in fact the respondent likewise described these verbal confrontations. But it went much further. The applicant describes that on a frequency and with a severity that was escalating prior to their separation, she was physically harmed by the respondent. Her evidence was that the physical "beat downs", as she referred to them, began when Shantana was a toddler and prior to their marriage. The applicant's description of these events includes having a phone broken on her head, being punched in the jaw, being pulled by her hair, being kicked, being punched in the stomach, and being threatened that she would be burned with a heated iron. These were not described as a handful of incidents, but an ongoing reign of terror, including the characteristic makeup or "honeymoon" period following violent outbursts. The violence was also aimed at the applicant's possessions, including having her computer smashed, her vehicle door kicked and the sun visor ripped off, and her clothing disposed of. Additionally, she was subject to being followed, being driven off the road, having her purse stolen, being told that she would be killed, being told that any man that she would be involved with would be killed, and being shown a bullet. The applicant kept all of this a secret from her family and her friends until after her separation.
- [5] The respondent denied having done any of these things except for kicking the vehicle door. The respondent did admit that he was convicted of assaulting the applicant, but his record has been pardoned.
- [6] During the following years of the parties' marriage the applicant stated that she called the police on two occasions and they did nothing to help her.
- [7] In my oral reasons delivered on December 3, 2010 in respect of the custody and access order made in this proceeding, I indicated that I accept the

applicant's version of events and reject the respondent's. The applicant gave her testimony in relation to these facts with a force and emotional intensity that can best be described as tormented and unrehearsed, and I found her to be a credible witness.

- [8] The applicant's testimony was corroborated by Ms. Ilana Tamari, a clinical investigator who testified in this proceeding on behalf of the Office of the Children's Lawyer. She testified that her interviews with the children bore out that they had been witness, particularly Shantana, to a great deal of verbal conflict between their parents, as well as physical violence inflicted on their mother by their father. Ms. Tamari herself was able to observe confrontational and angry behaviour exhibited by the respondent toward both herself and Shantana.
- [9] With respect to the signing of the above agreements, the applicant testified that the day before she travelled to Hamilton, she was in her vehicle with Nathanael travelling down Martingrove Road when she saw the respondent pull out from behind her and motioning for her to pull over. The applicant stated that she pulled over in a parking lot because she knew that if she did not he would follow her to the condominium in which she then lived. She described how he began to call her profane names. He then opened his car door and removed an object from his dashboard that she believed to be a copper coloured bullet, and told her that the bullet was meant for her. The applicant testified that on other occasions when the respondent told her that he was going to kill her she believed him, but never before had she seen a bullet.
- [10] Sometime before the applicant left the home in March 2007 the respondent began to pressure her to sign over the matrimonial home located at 42 Fonteselva Avenue, Woodbridge, to him. The applicant describes how she received a call from a mortgage broker who she knew as "Maurice", who talked to her about the value of the home and told her that it was not worth \$400,000.
- [11] The day that she was shown the bullet she told the respondent that she would transfer the matrimonial home to him. She later received a call from "Maurice", who told her where she was to meet him, giving her an address in Hamilton.
- [12] The following morning, being June 29, 2007, the respondent called her to ensure that she was still planning to drive to Hamilton. She put her children in the car and drove to the address provided, which she described as a house as opposed to an office building, where she found the respondent waiting for her. She stated that "Maurice" was also at the house. She testified that the respondent began giving her "the look" and he said "you'd best not play with me". She testified that she signed the first agreement at

the house. She recalled that Maurice was one of the witnesses and does not recall the name of the other person who was at that meeting although she thought that he was also a mortgage broker. They were then given the address of a law firm to attend at next.

- [13] The applicant testified that the respondent drove behind her to the next meeting, which was at a law office. She did not recall the name of the firm or who she met with, but does recall being told that a man explained to her that he could not witness the signatures of both herself and the respondent. They then drove to another lawyer's office, the respondent again following her. She was not able to identify the names of the witnesses on the second agreement. She did not recall the name of the lawyer who signed the certificate of independent legal advice. Her memory was unclear as to whether she signed the second agreement at the house, or at one of the law firms. The applicant testified that she felt that when she signed she was going to live, and that was her primary concern.
- [14] The applicant had never met either of the lawyers involved prior to the day of these events and was unable to recall what, if any, advice she was given.
- [15] The respondent did not testify regarding these events. Neither of the lawyers or other persons involved in the signing of these agreements was called to testify.
- [16] The Request to Admit adds the following admissions to this scenario:
- (i) The applicant states that she was coerced into signing the agreement, against her better judgment and due to the respondent's violent actions and domestic abuse;
 - (ii) The respondent attended the office with the applicant to ensure that the agreement would be signed;
 - (iii) Coupled with years of abusive (sic) brought on by the respondent, the applicant felt that her safety would be in danger should she refuse to sign the agreement and the respondent ensured that she would sign the documents regardless of whether she agreed or not.¹

¹ Exhibit 10, p. 99

Schedule B: FDRIO Brief: [see pages 22-24](#)

Safety Planning in Family Law Cases: An Emerging Duty of Care for Lawyers?

*Six Minute Family Lawyer, Law Society of Upper
Canada, December 4, 2014*

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Safety Planning in Family Law Cases: An Emerging Duty of Care for Lawyers?

Hilary A. Linton²

Summary:

Research and experience tells us that intimate partner homicides are the most predictable and preventable of murders. We also know that adversarial processes and adversarial lawyering escalate conflict and therefore risk. Our knowledge base of the predictive factors for domestic murder and murder-suicide is extensive. The research supporting the accuracy of various screening tools in identifying predictive factors is well known. And the steps that family/collaborative lawyers, mediators and arbitrators can take, based on informed screening, to enhance their own clients' safety (and their clients' spouses' safety)—the protective factors—are also well established.

Given this state of knowledge, this paper asks whether there is an emerging duty of care for family/collaborative lawyers, mediators and arbitrators to understand the predictive factors and protective factors, to apply the most appropriate screening tools and to engage in appropriate safety planning for clients who are at risk of being harmed or killed by their spouses.

Article:

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; more family lawyers are holding themselves out to be mediators and arbitrators; clients and professionals are more knowledgeable about the factors that influence negotiation, its effectiveness and safety; and best practices for identifying, assessing and managing power balance and family violence in negotiation are evolving rapidly and are supported by credible data.

In this context, procedural triage (screening) has emerged. Family lawyers, mediators, arbitrators, collaborative practitioners and parenting coordinators are

²Hilary Linton is a Toronto lawyer, mediator, arbitrator and teacher, and the founder of Riverdale Mediation. She provides family information and mediation services in Toronto's Superior and Provincial Family Courts through her company mediate393 inc. She has designed CPD-accredited training to help family law professionals learn how to identify, assess and manage risk in their practices. She designed the curriculum for the training mandated by the new Family Law Act in British Columbia and has designed & delivered workshops across Canada and the US, and also in the UK, Scandanavia and Ireland. She is the 2014 recipient of the Ontario Bar Association Award of Excellence in ADR.

increasingly seeking to identify, assess and manage power imbalances and risk before starting or even accepting a file.

There are three compelling reasons for family law dispute resolution providers to implement procedural screening and safety planning protocols into their work.³

First: there is a proven connection between family law negotiations and spousal homicide. "Membership in the marital status categories of separation and divorce significantly increases the risk of an early or premature death."⁴ A legal consultation alone increases the chance that an abused spouse will be murdered. The Chief Coroner of Ontario noted in one case:

"This case represents one of many that have been reviewed where abuse victims have sought advice from family law lawyers shortly before being killed by their partner".⁵

Adversarial processes and adversarial lawyering increase conflict between separating parties more than collaborative processes like mediation.⁶ The risk of femicide will be greater among separated parties participating in adversarial proceedings.⁷

Second, spousal homicides in the separation context are the most predictable and preventable of all murders. Research of such cases has yielded a clear set of

³ Screening is 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, and 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.

⁴ Ellis, Desmond, *Marital Separation and Lethal Male Partner Violence* (2014) *Violence Against Women*, p. 3

⁵ Annual Report of the Domestic Violence Death Review Committee, 2011, Office of the Chief Coroner for Ontario, p. 36. In the case in question, the Report recommended that "*The Law Society of Upper Canada should adopt a policy of ensuring that lawyers who deal with family clients are aware of the risk and safety issues in domestic violence cases.*"

⁶ Ellis, *supra*, p 13

⁷ Ellis, *ibid*, p.16. Also, 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 DVDR-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 Public 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); and Neilson, Linda C., "Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems" (2012), *Centre for Research and Education on Violence against Women and Children*, Western University, London, Ontario, Canada.

predictors of spousal homicide.⁸

Third, even if no such risk of harm is present, the process of screening itself is procedurally invaluable as it helps family law professionals identify, assess and manage power imbalances and risk in their practices. It provides important information to 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, more satisfied clients, and safer processes.

Family mediators have incorporated screening principles and processes into their work for years.⁹ The process is also now applied, by legislative requirement, to family arbitration¹⁰ 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 identify, assess and manage power imbalances and family violence, are screening cases that are before mediators, judges and dispute resolution officers as part of the family information and mediation services they provide.¹¹

Lawyer Malpractice

The suggestion that lawyers may have a duty to incorporate current knowledge and best practices of screening for family violence into their daily practices is not a new one. Associate professor Margaret Drew (University of Cincinnati College of Law) wrote in 2005:

“Failure to recognize when a client or opposing party is or has been abused by a partner and failure to consider abuse in making strategic decisions are forms of lawyer malpractice..... No reason (for failing to take such steps) may be sufficient to overcome a cause of action for malpractice or other action for failure to recognize, advise on and strategize around issues of domestic violence.”¹²

⁸ Ontario's coroner produces an annual report, the Domestic Violence Death Review Committee Report; see also www.spotthesigns.ca.

⁹ See the *Ontario Association of Family Mediation Standards of Practice* and *Abuse Policy*, requiring all accredited family mediators to personally screen for domestic violence and abuse at the beginning and throughout the mediation.

¹⁰ The Ontario Ministry of the Attorney General's website has detailed information about the [screening requirements in family arbitration](#).

¹¹ 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.

¹² Drew, Margaret B., “Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?” (2005) 39 *Fam. L.Q.* 7; University of Cincinnati College of Law, *Public Law and Legal Theory Research Paper Series* No. 08-28, December 1, 2008.

Drew explores the reasons why some family lawyers may be inclined to avoid this subject, including that they may have their own difficult history with family violence; they may not want to deal with the additional financial and legal complications that arise in such cases; they may feel they are inadequately trained and therefore just avoid asking questions all together; or they may wrongly assume that all they are dealing with is “high conflict” or emotional immaturity. But, she writes, standards of professionalism have evolved.

“At the heart of domestic violence practice is safety planning. At each stage of the litigation, the attorney and the client must discuss whether or not a certain action, inaction or strategy raises or decreases the risk of abuse to the client and other family members. ...“Family law may be one of the few areas of law where malpractice may be committed solely by the attorney’s aggressively pursuing all legal remedies available to the client...For example, if the perpetrator has threatened that he will kill the client if she ever pursues him for child support, the well-intentioned lawyer may dramatically increase the risk to the client by filing and insisting that the father be required to pay every dime to which the client and the children are entitled.”

13

Screening Tools and Research

Family mediators use data-based checklists and protocols to help them engage in the task of identifying, assessing and managing power imbalances and family violence.¹⁴ There are many such checklists, the Mediator’s Assessment of Safety Issues and Concerns being one of the more recent, publicly available and comprehensive such tools.¹⁵ Another widely researched and respected tool for assessing the potential for lethal outcome is Jacqueline Campbell’s Danger

¹³ Drew, *ibid.* Drew & Buel, Sarah, address the symmetrical “duty to warn” that lawyers for abusive clients may have, in “Do Ask and Do Tell: Rethinking the Lawyer’s Duty to Warn in Domestic Violence Cases”, (2006) 75 *University of Cincinnati Law Review* 447-496.

“Empirical data document that while domestic violence victims face high risk of recurring abuse, batterers’ lawyers may be privy to information that could avert further harm. ... We contend that a lawyer handling domestic violence cases has a higher duty to recognize risk factors unique to those matters, including verbal and non-verbal clues a client might give that a third party is at heightened risk...apart from whether an attorney discloses client threats, she may be held liable in tort for failure to properly investigate, attempt to dissuade or warn in the context of domestic violence cases.” (447, 449)

¹⁴ All mediators who are accredited by an accrediting organization such as the Ontario Association of Family Mediation, Family Mediation Canada, or the ADR Institute of Canada, are required as a condition of their status to engage each client in an individual, confidential pre-mediation screening process before deciding whether to accept the case. See for example the OAFM Policy on Abuse, <https://www.oafm.on.ca/docs/abuse-policy.pdf>, which sets out in some detail the steps accredited family mediators must follow when screening their clients.

¹⁵ See Footnote 6, *supra*.

Assessment. <http://www.dangerassessment.org/>.

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.¹⁶ 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.

Predictors of Continuing Violence:

Linda Neilson, in a 2012 research paper¹⁷, explains the factors that predict domestic violence and compares them to the factors that predict domestic homicide, finding that the following are associated with continuing domestic violence:¹⁸

- 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 or control
- Prior criminal conviction for violence (keeping in mind that the fact that domestic violence is raised for the first time is not a reliable indicator that the domestic violence was a first-time occurrence. The normal tendency is for domestic violence to occur many times before it

¹⁶ Ontario's Superior Court of Justice, in *Wainwright v. Wainwright*, 2012 ONSC 2868(Canlii) established the best practices in screening for power imbalances and family violence in family mediation and arbitration cases, confirming that the Abuse Policy of the OAFM should be applied in family mediation and mediation-arbitration processes. For more information on best practices in mediation-arbitration screening, see Linton, H., "Risky Business: Why Family Mediator-Arbitrators Should Take Risk Screening Seriously", (2014) 23 *Canadian Arbitration and Mediation Journal* No. 1, 59-64.

¹⁷ "Enhancing Safety": see footnote 6.

¹⁸ Neilson, *ibid*, p. 49.

is disclosed to police or to lawyers.)

- The degree to which the violence is recent. While, subject to the cautionary comments in the endnote, the degree to which domestic violence is recent can be an important risk factor, the research is indicating that the pattern of past domestic violence conduct is as important as the particulars of the latest incident.
- Abuse and violence toward other family members, former intimate partners, and members of the public
- Escalation of frequency or severity of abuse and violence
- Patterns of generalized violence against non-family members
- Controlling and obsessive forms of emotional or psychological bond (e.g., monitoring, stalking, high levels of possessiveness, jealousy).
- Failure to comply with restraining or no-contact orders, support and other court orders, and dropping out of domestic violence intervention programs. All are documented indicators of heightened risk. (Note: This is why maintaining a continuing record of compliance with court orders and treatment programs is extremely important as is requiring domestic violence intervention programs to release information regarding participation. When a party drops out of a program, risk increases and clients should take preventative action.)
- Victim fear of the perpetrator. Targeted persons' fear of perpetrators has been empirically verified as a reliable predictor of continuing domestic violence (although the absence of fear is not a reliable indicator of safety). People who are targeted by domestic violence are often unaware of their own danger.
- Unstable lifestyle (for example erratic employment, refusal to assume family responsibilities)
- Substance abuse (alcohol or drug)
- Separation, which is known to be a period of enhanced risk,

particularly for women.

Predictors of Lethal Outcome:

Compare these with the factors that Neilson's research¹⁹ suggests are predictive of domestic homicide:²⁰

- Access to weapons, particularly guns. Removal of access to guns is critically important in domestic violence cases.²¹
- Unemployment. Perpetrator unemployment is identified regularly and appears to be a strong predictor (when associated with other indicators). This is perhaps, in part, because avoidance of support obligations is a form of continuing harassment and control as well as a form of economic child abuse. It may reflect some of the behaviors characteristic of many domestic violence perpetrators such as self-indulgence, entitlement, and non-acceptance of responsibility. Alternatively, social circumstances that produce stress are known to increase danger.
- Pending or actual separation (for female victims).
- Prior domestic violence, escalating in severity or frequency. Not all cases will include documented incidents of prior domestic violence known to the police. The absence of a record of police involvement does not indicate safety.
- The presence of children in the home, particularly children not biologically related to the perpetrator.
- Death threats. (The absence of a death threat may not indicate safety)

¹⁹ Neilson, *ibid*, p. 60-62.

²⁰ Neilson notes that about 15% of cases of homicidal domestic violence are not predictable using any current indicators or assessment tools.

²¹ Neilson notes that judicial options for removal of guns in a family law context are now considerably reduced with the abolition of Canada's long gun registry.

when other factors are present.)

- Attempted strangulation (choking). Prior non-lethal strangulation is strongly associated with homicidal domestic violence
- Suicidal tendencies and attempts to commit suicide. Perpetrator threat of, consideration of, or attempted suicide should be taken very seriously since suicidal tendencies are strongly associated with domestic violence homicide followed by suicide in the domestic violence literature
- Stalking, monitoring
- Forced sexual acts and sexual abuse. Keep in mind that both victims and violators are known to under-report sexual abuse.
- Victim fear of being killed
- Controlling, obsessive forms of psychological bond. For example a pattern of coercive domestic violence and inability to contemplate the possibility of life without the other; high levels of possessive jealousy.
- Threat(s) with weapons
- Violence during pregnancy
- Significant perpetrator life changes

Other factors that have commonly been identified as predictors of lethal domestic violence outcome are: ²²

- Child abduction
- Threats to harm children
- Prior police involvement
- Violation of protection orders
- Age disparity
- Common law relationship and young age of victim (under 25)
- Anti-social personality disorder
- Depression
- Child custody and access dispute

²² Neilson, *ibid*, p. 62

- Relocation of victim with children to different jurisdiction
- Animal cruelty
- Alcohol and drug abuse

For those seeking a comprehensive understanding of the factors that predict murder, the Domestic Violence Death Review Committee Report of Ontario's Coroner includes a list of the risk factors present in the cases it reviews.²³

A Case Study: Katherine and Kyle Newman

On January 12, 2012, Oakville Ontario resident Kyle Newman went to the home of his estranged wife Katherine and stabbed her to death. He then went to the Halton police station and began ramming cars in the lot. When confronted he drew a knife and was shot by the police. The tragic murder-suicide left their three young sons without parents and shocked the community. It also came as a surprise to the lawyers, according to an article written by Kyle Newman's lawyer:²⁴

"There had been four-way meetings and case conferences at which they were more than civil to each other. They were nice people.... One day we were emailing each other about travel consents..... two days later, they were both dead. No clues. No hints."²⁵

And yet, at least one person close to the couple saw deeply troubling behaviors. Katherine's father, retired judge Walter Stayshun, said at the time:

"I've been worried for the last year and a half because he's changed. I was afraid he was going to do something to her."²⁶

He noted that because there was no history of violence, his daughter had been unable to obtain a restraining order. He spoke of his son-in-law becoming more and more irrational, and of having difficulty facing hard financial realities. "He needed help, and he didn't get help", Justice Stayshun was quoted as saying. He

²³ The list of 39 risk factors are described in some detail in Appendix B to the Report.

²⁴ Cochrane, Michael, "Hearts Broken All Around". JUST magazine, September 2012.

²⁵ Cochrane, *ibid.*

²⁶ "Father Mourns Daughter Murdered Thursday", Hamilton News, January 16, 2012. <http://www.hamiltonnews.com/news/father-mourns-daughter-murdered-thursday/>

believed his daughter's murder was planned.²⁷

The Newman case highlights the challenges faced by family law dispute resolution professionals in our practices. The case is discussed in this paper without any criticism of the capable counsel acting for Katherine and Kyle. It is not possible, nor necessary, to blame or pass judgement on anything either counsel did or did not do in this complicated, unusual case. But the profession can, in hindsight, learn valuable lessons from cases where such tragedy occurs.

The parties had been separated for about 20 months when the murder-suicide took place. During this time, with the assistance of counsel, they had tried negotiating settlements, documented by voluminous correspondence in the court file. However, the conflict was escalating, even as the parties were able to resolve some issues at a case conference held two months before the murder-suicide. After many efforts to negotiate through counsel, Katherine eventually instructed her lawyer to bring a motion. Katherine was murdered three weeks after Kyle was served with her affidavit, less than a week before the scheduled motion date.

According to her affidavit (Kyle never filed a responding affidavit), Katherine was doing all she could to work with Kyle, but he actively worked against her at every turn. She described his behaviour with such words as bitter, hostile, denigrating, defensive, disdainful, belligerent, aggressive, threatening, angry, and accusatory.

She felt stymied in her efforts to cooperatively parent the children, obtain financial disclosure, sell the house, communicate respectfully in front of the children, and obtain appropriate child and spousal support. She claimed that Kyle was harassing her and accusing her of blocking his access to the children. On one day he called eight times and left four voice messages. "Since we separated, (Kyle's) communications with me have become increasingly harassing, critical and abusive."²⁸

Although there was no known history of violence, Katherine's affidavit discloses several of the predictors of spousal homicide identified by Linda Neilson:

²⁷ "A Shattered Father Speaks", Toronto Sun January 14, 2012.

²⁸ Katherine Newman swore a detailed affidavit, in support of her motion seeking primary care and decision making for the parties' three young sons; retroactive child support; retroactive spousal support; financial disclosure including credit and mortgage applications, bonuses and credit card statements; non-communication provisions; and orders requiring Kyle to refrain from disparaging Katherine or discussing the case with the children, to refrain from permitting the children to drive a car and requiring him to use seat belts when the children were in the car. The affidavit was sworn and served December 23, 2011 with a motion return date of January 18, 2012.

- *Separation*: the parties had been separated for over one year.
- *Suicide threat*: As the negotiations proceeded, Kyle became “increasingly belligerent and aggressive towards me. It was also during this period that (Kyle) threatened to kill himself.”
- *Presence of children in the home*
- *Police involvement*: the police were called to the home in February 2011 when Kyle refused to leave the home (the parties had a nesting arrangement after the separation.) Kyle later called the police himself on another occasion.
- *(Indirect) death threat*: Kyle insisted on an urgent agreement to name guardians for the children “in the event of their deaths”, which may have been or been perceived as an indirect threat.
- *Unemployment*: Kyle had a history of employment instability, having lost his job in 2009, obtaining new work and then leaving it in 2010, and being terminated from another job in 2011. He had just started a new job in the fall of 2011.
- *Significant perpetrator life changes.*
- *Child custody and access dispute*

The Newman case highlights many of the tensions facing family lawyers and other dispute resolution professionals and raises professionalism questions such as:

- In all too many cases, the person who may be at risk of being harmed may also need the protection and assistance of the court. If adversarial processes are more likely to increase conflict, what should a lawyer do when representing an at-risk client?
- How do we interpret risk when there is no known history of violence?
- How do we help clients who do not perceive themselves to be at risk?
- What do we do once we have assessed risk? How can we help both parties stay safe?

Safety Planning in Family Law: be guided by the research

Family law professionals can turn to the research for guidance on how to respond when they have concerns about risk.

“Separation is the most common risk factor present in a domestic homicide. (81%). While leaving may be the best response to a violent relationship, it is in leaving without adequate safety planning that the majority of women are killed.”²⁹

One recurring theme emerges: mediation can be safer than lawyer negotiations or litigation for victims of violence, their children, and perpetrators of violence when it is provided by a professional who designs a supportive, non-judging and empowering process that includes extensive screening for power imbalances and family violence.

Research has found that voluntary mediation (if it includes appropriate screening by a skilled mediator) can be safer for victims of violence than adversarial processes such as lawyer-negotiations.³⁰ As well, research confirms the conclusion that the litigation process escalates conflict, and thereby escalates risk of parties being harmed or killed.³¹

Research findings show that those who engage in violent acts are less likely to do so again if they are supported or feel supported by friends, family, “the system” and society.³²

Some Suggested Steps for Safety Planning in Potentially High Risk Cases:

- 1- Take all clients through extensive screening interviews before choosing a dispute resolution process and a professional to provide that process. Ensure that best screening practices are followed in any mediation,

²⁹ Coupal, Jocelyn, “Spot the Signs- Before Someone Dies”, www.spotthesigns.ca

³⁰ see Ellis, Desmond and Stuckless, Noreen, Supra note 6, page 62.

³¹ See Ellis, Desmond, “Divorce and the Family Court: What can be Done About Domestic Violence?”, (2008) 46 *Family Court Review*, 531.

³² See “Men’s Accountability From Two Voices” (2011) Centre For Research and Education on Violence , London Ontario. http://www.vawlearningnetwork.ca/sites/learningtoendabuse.ca.vawlearningnetwork/files/Mens_Accountability_from_two_voices.pdf

arbitration or med-arb process in which you are participating. Become informed about those best practices. Take screening seriously.

- 2- Do not make assumptions about the risk involved in any case, no matter who the parties are, what their incomes are, what the issues being negotiated are, and who their lawyers are. High risk cases cut across all personal and professional demographics.
- 3- Mediate whenever possible and appropriate, using a mediator who follows the screening protocols and Abuse Policy of the Ontario Association of Family Mediation. (See *Wainwright v Wainwright* for judicial comment on best screening practices in family mediation and arbitration.³³) If mediation is not an option because the parties need more support, consider collaborative process. Adversarial lawyering and approaches should be avoided.
- 4- Never let clients be alone together to discuss settlement options. Not during a mediation, negotiation or four-way meeting, even if they ask to be left alone. Never assume that you have accurately assessed risk and do not take unnecessary risks with your clients' safety. Risk assessment is hard to get right, and even the most seasoned professionals' make mistakes. Err on the side of caution when you can.
- 5- Arrange, as a rule, to have the vulnerable person arrive last for mediations, meetings or at court, and have the potentially dangerous person arrive first. Have the vulnerable person leave first, holding the dangerous person back long enough for the first party to be assured that they will not be followed.

³³ Wainwright, supra note 15.

- 6- Ask clients what process will make them feel safe and empowered. Discuss process options with clients from a safety planning, power balance perspective. Elicit from clients all concerns they may have about a process. Be adaptable in how you practice and be prepared to require accommodations for clients in all family dispute resolution processes. If you cannot address a client's concerns, recommend another process.
- 7- Have separate waiting areas and as a rule do not permit parties to wait alone together at any time, either for mediation, arbitration, four-way meetings or at court.
- 8- If you are using shuttle mediation, ensure that clients' caucus rooms are far apart and that neither party knows what room the other is in.
- 9- Train staff and colleagues to understand the basics of risk and safety planning, and have them familiar with your standard safety protocols at the office.
- 10- Create a safe environment for clients to disclose their fears and concerns to you as lawyer, mediator, parenting coordinator or mediator-arbitrator.
- 11- Ensure that the confidentiality of safety disclosures, in all processes, will be respected by the process and the person providing the process. If confidentiality of disclosures of fear, risk, violence, etc., is not maintained, clients and children could be put at risk of harm. Ensure that any mediator, parenting coordinator and mediator-arbitrator follows best practices in screening, confidentiality and safety planning.

- 12- Be familiar with basic safety planning guides. The services in your community for abused men and women will have safety planning resources. All family law professionals should have copies of such resources in their offices and available to clients. One excellent general such resources is "Safety Planning Across Culture and Community", published by Ending Violence Association of BC.
http://www.endingviolence.org/files/uploads/ure_and_Community_Manual_-_EVA_BC_Dec_9_2013.pdf
- 13- Be familiar with the many risk assessment resources available to victims of violence, to help them (and their lawyers) better understand the potential risk they (and their families, and/or their spouses) may be facing. For example, www.dangerassessment.org.
- 14- Understand different types of violence, how to identify each, and what the implications are of such differentiated assessments. The article by Joan Kelly and Michael Johnson is an excellent resource for this purpose. (see footnote 16)
- 15- Be familiar with the various screening tools including their limitations.
- 16- Secure a working relationship with the Family Court Support Workers in your jurisdiction. Know when to refer a client or prospective client for support or counselling before, during and after a family dispute resolution process.
- 17- Use the court connected onsite mediators whenever possible to meet with and screen clients where there are any concerns. Use the resources in

the Family Law Information Centres in all courts, including the knowledgeable Information and Referral Coordinators.

- 18- Understand link between violations (however minor) of bail terms (however seemingly minor the assault) and risk of escalated assault or murder, and have a working relationship with a good criminal lawyer to whom victim clients can be referred for advice about violations of bail and restraining orders.
- 19- Be familiar with the resources to support men, particularly if the man appears depressed, isolated, and unable to take responsibility, is blaming and critical and unsupported.
- 20- Discuss your risk assessment directly with the client. If you are mediator, mediator-arbitrator or parenting coordinator, discuss your concerns for each party with each party, ensuring that you maintain confidentiality of all that they both told you and yet are still supportive of the needs and concerns that each disclosed to you in confidence. Help clients better assess their own risks and better engage in their own safety planning.
- 21- Discuss with clients the reasons for the instructions or settlement positions they give. A client may be prepared to settle for an amount that you think is unreasonable because that is what they believe will keep them safe.
- 22- Always take very seriously client perceptions of danger. Research shows that a client's fear of being killed is a reliable predictor of his or her murder.

- 23- Know the steps to take and referrals to make if a client hints at suicidal thoughts or plans. Have a resource sheet to provide to clients who are suicidal, including referrals to local agencies. Take client disclosures of suicidal thoughts or acts very seriously. Take client disclosures of the other party's suicidal thoughts, threats or acts very seriously.
- 24- Know your obligations under the *Rules of Professional Conduct* to report any information suggesting that a person is at risk of imminent harm. (Rule 3.3-3 of the Amended Rules of Professional Conduct.)
- 25- Know your obligations as a mediator, arbitrator or PC under s. 72 of the *Child and Family Services Act* to report a child at risk of harm.
- 26- Take appropriate steps to keep yourself safe. There are too many cases where family lawyers, mediators and their clients have been harmed or killed and where little or no screening/safety planning was done.
- 27- Pay attention to and take seriously the fears, intuitions and instincts of family and friends.
- 28- Support both parties. If you have a concern that a party is depressed, address that concern in a supportive and positive way and seek undertaking that clients will obtain counselling and other supports. Design your process with the safety and well being of both parties and their children in mind and do not proceed until you are satisfied that your and/or your client's concerns have been appropriately addressed.
- 29- Educate clients about the harmful impact that adversarial court

processes can have. When they are providing instructions to take procedural steps, ensure that you have helped them contemplate, identify and assess risks. Ask clients to consider and share with you their safety plan for the most dangerous times, including when clients are retaining counsel, having lawyer meetings, serving proceedings, four-way meetings, mediation, an arbitration hearing, and the time leading up to and immediately following a court hearing.

Exhibit 10, p. 99

Schedule C: FDRIO Brief; Edited letter from a client

Dear FDRIO Board and Members:

.....I wanted to tell you my story about my involvement in the dysfunctional mediation-arbitration process.

For the last three years, I have spoken to a number of mediators, arbitrators, counsellors, lawyers, etc. about the family law med.-arb. process in Ontario. In my specific family law case, the principles of such organizations as the Ontario Association of Family Mediation (OAFM) and the Association of Dispute Resolution (ADR) clearly did not apply. The OAFM's Policy of Abuse was completely ignored by my "reputable" mediator-arbitrator (a lawyer).....- this while my ex-spouse was verbally abusive, making a litany of false allegations against me, etc. No screenings for abuse were ever done - not during mediation and not during arbitration. Only after the mediator-arbitrator resigned (after 18 months) did I find out ... (*matters not relevant to issues of screening...*)....

.....

After the mediator-arbitrator resigned, my new lawyer suggested I be screened for power imbalances and abuse. Professional X, who you know is a leading expert in screenings, confirmed that my case was in fact, not suitable for mediation-arbitration because of previous abuse and power imbalances by my ex-spouse. The result - I was one of a about a handful of individuals in Ontario who moved from private mediation-arbitration to the open and accountable court system. I believe this is a screening process that needs to be adopted provincial wide by both lawyers and non-lawyers.

How do mediators, arbitrators and mediator-arbitrators get away with such conduct? Simple. There is no one watching. There is no accountability in the mediation or arbitration systems. **Sure, the OAFM and ADR have boards who review complaints, but they are not independent by any means.** Case in point: I made a complaint to both organizations against this very "reputable" mediator-arbitrator. In the OAFM's case, (*client details concerns about the fact that the complaint was not acted upon by OAFM*)...

.....

So this is where the mediation process is - where there is no oversight and accountability, anyone can do anything. As someone once told me, mediation-arbitration is like the "Wild West".

In 2012, lawyers Phillip Epstein and Gary Joseph laid out the pros and cons of the mediation-arbitration process in separate *Law Times* articles. Mr. Joseph identified

his concern with the process ("Lawyer disturbed by med-arb," January 16, 2012); Mr. Epstein flaunted its benefits ("Lawyer touts benefits, responds to critics of med-arb," March 12, 2012).

Based on my experience as one of the participants in a high-conflict mediation-arbitration process, Mr. Joseph's concerns cannot be more accurate while Mr. Epstein's characterization is completely flawed – and embarrassingly so.

First, let me say that I went to mediation-arbitration not knowing exactly what it was. My hope was that it would be a quick process and help my children adapt to their new life in the best way possible. Mr. Epstein suggests in his article that "Mediation-arbitration works because essentially the parties want it to work. The reason the parties choose mediation-arbitration is they want a process that will bring certainty, finality, and an expeditious resolution to their family law dispute."

Not in my case – not even close. My high-conflict ex-spouse wanted to avoid going public (edited)..... Throughout our dysfunctional mediation-arbitration process, my ex-spouse made lists of false accusations against me; harassed me with up to ten e-mails a day; verbally threatened me; and ultimately went to child protective services against me. **And the mediator/arbitrator did nothing about it.** Nothing. In fact, at times the mediator-arbitrator would suggest that I be "more communicative" with my ex-spouse, contrary to the advice most counsellors had given me in how to deal with an abusive co-parent.

And I was literally "stuck" in the process, for I needed my ex-spouse to agree to terminate the mediation-arbitration. And..... (edited).....the mediator-arbitrator refused to end the process even though OAFM and ADR guidelines suggest otherwise. The process was not working and was destined to fail because of my co-parent's toxic behaviour. **And the more they used the mediator-arbitrator as a sounding board, the more dysfunctional the mediation-arbitration became.**

Mr. Joseph suggested in his review that, "Those of us in the profession should consider the appropriateness of family law arbitrators continuing to practise family law. Consider full-contact family law litigation with an opponent who the following month will be the adjudicator in a family law dispute for which you are then counsel for one of the parties."

Mr. Joseph appears to be hinting to a **potential conflict of interest** that could occur when the mediator-arbitrator plays dual roles in the legal system. He is dead on.....(edited)....

..... (edited)...issues relating to matters other than screening.....

As for the OAFM and ADR, I have learned that they are two organizations designed to protect the mediators and arbitrators – not those individuals affected by the corrupt and negligent practices of those who ignore the laws they are supposed to adhere to. As Mr. Joseph correctly states, “We have an unregulated profession of mediators and arbitrators who have mostly decided that the rules should apply only to those foolish and/or poor enough to engage the public court system.” He could not be more correct.

.... Edited.....

Phil Epstein suggests in his article that, “Most arbitrators are also members of professional bodies such as the ADR Institute of Ontario, which has a code of conduct. Virtually all mediators are members of the Ontario Association for Family Mediation, which has a very specific code of conduct and also requires training. Accredited family mediators under the Ontario Association for Family Mediation must take very extensive training during which they are mentored and must follow a strict code of conduct.” That may be true. But that does not mean that they will adhere to the codes of conduct outlined by either organization nor does it mean that the OAFM or ADR will hold them accountable for ignoring the requirements. Mr. Epstein implies that they will – but my experience demonstrates just the opposite will occur.

I applaud Mr. Joseph’s assertion that the mediation-arbitration process be “better regulated and more firmly grounded in the principles of due process and independence.” He is 100% correct. **An unregulated process enables the mediator-arbitrator to say or do whatever he or she wishes; to ignore codes of conduct and policy; and, to favour one party over the other(edited).....** And they do so without any oversight by those “professional bodies” created to oversee the actions of their own peers.

Mr. Epstein’s suggestion that, “Mediation gives people an opportunity to explore their differences in a controlled setting with someone who has family law experience” is true but significantly flawed. Because it is not just family law experience that is required in the mediation-arbitration process, but the experience of counsellors and psychologists who are needed to assess the profile and mental state of the parties. This simply did not happen in my case. Screenings for abuse were never undertaken – not at the beginning of mediation and not during arbitration. Nor was it done when my co-parent threatened me, sent harassing e-mails to me or made false allegations against me.

As a result of my dysfunctional mediation-arbitration process, there is no doubt who suffered the most. My children..... (edited..)

I have spoken to other families who went the route I took (with the same mediator-arbitrator), and have seen many suffer even more. Because divorce is

not fun, but there are mediators and arbitrators who are only more than willing to take advantage of those families in disarray.

(edited)....

Phil Epstein suggests the family law system is broke. I would suggest that he is half right. It is the lack of oversight (the system) that allows mediators and arbitrators to act like they did in my case. I expected better. You should demand the same. Thanks for listening.

Regards,

"a client".

SCHEDULE D “Risky Business: Why Family Mediator- Arbitrators Should Take Risk Screening Seriously”

be difficult people) which can be highly prejudicial in the intimate context of mediation and arbitration; outcomes that are coerced; a party, child, lawyer, or mediator/arbitrator being threatened, harmed or killed; or simply expensive, failed processes.

These risks are present even when the parties have lawyers. Unlike arbitrators, lawyers have no duty to take screening training. There are legitimate barriers between lawyer and client when it comes to disclosing such things as mental illness, depression, a history of violence. (Read [this story](#) for more.)

Regulation 134/07 requires arbitrators to be trained to identify the types of family violence; the factors and behaviours that predict post-separation harm or murder; the steps to take when a mediator-arbitrator believes such risks are present; and the ways to support both parties in finding a process that will be better for them (“safe termination”). It requires family arbitrators to certify that they have screened the parties themselves or that someone else has done the screening. Family arbitrators must pay attention to the results of the screening process throughout the arbitration.

Why is screening essential in family arbitration?

1. Domestic homicides increase exponentially at separation. A legal consultation alone increases the chance that an abused spouse will be murdered. Adversarial processes escalate risk further.
2. Arbitrators provide a private service with a hefty price tag. It requires parties to opt out of many rights: a court hearing with full appeal options, a public record, security, access to quick restraining orders, easy enforceability of orders, access to family court support (domestic violence) workers, the authority of a sitting judge, access to duty counsel, access to free or heavily subsidized court-connected mediation that includes extensive screening, and other features that benefit the vulnerable.
3. Once a party agrees to arbitrate, they cannot change their mind. In a med-arb, they can quit the mediation— but not the

arbitration unless both consent.

Since family arbitration screening was mandated many mediator-arbitrators have relied on the lawyers to certify that their clients were screened. This is a poor practice. Lawyers meet only their own clients; the arbitrator cannot meaningfully “consider the results of the screening”; and confidentiality cannot be maintained if each lawyer is reporting results of screening to the arbitrator. Any violation of screening confidentiality can put a client’s safety at risk.

Those of us who do our own screening (everyone who is an accredited family mediator must screen) we find it makes for a much better process for everyone. We meet each client confidentially, before taking the case, to learn what each person needs procedurally to fully participate. If our risk assessment suggests the case is not suitable for med-arb, we will refer the parties to a process that we feel is better suited to them. Screening is supportive of each person; non-judging, non-fact-finding and purely focused on risk assessment and safety planning.

Can confidential meetings with mediation clients who may become arbitration clients lead to a biased arbitrator? Probably not; it really is no different from caucusing, something we all do routinely. And if it does, I would argue that the case is probably inappropriate for private med-arb.

Those mediator-arbitrators who are uncomfortable with the idea should, as a second-best option, send both clients to the same respected third party screener, and receive a *confidential* report from that person, rather than rely on counsel.

Risks of family lawyers screening their own clients under the Arbitration Act Regulation

Those of us working in family law can count on one thing never changing: we are in a danger zone.

The percentage of separations involving some form of family violence/abuse has remained steady at about 50%. The num-

bers are higher among cases in court. There are more cases still involving violence plus mental illness, job loss, substance abuse, depression or other significant imbalance of negotiation power that can indicate a safety or other risk.

The first six months post-separation, when the parties are often dealing with lawyers, are the time of highest risk to personal safety.

We know that victims of domestic violence are often too afraid, embarrassed or unaware of the seriousness of the risk they face to disclose it to their lawyers. The higher the incomes and social status, the more obstacles to disclosure.

And we also know that if you only ask questions about violence, you will miss a large number of potentially highly dangerous cases, because the dangerous power imbalances arise in relationships based on coercion and control; violence may be a relatively minor factor.

Cases may not be appropriate for private dispute resolution for many reasons: the parties are too far apart; they are too high conflict; one or both lacks insight; the parties are not governable enough to comply with the rules; one party lives in fear for their life or that of their children; one party is too depressed to participate effectively, etc., and the oversight of the court is required.

Under Ontario’s Arbitration Act Regulation, only family arbitrators are required to take training in assessing whether a case is suitable for private ADR, known as screening. Screening is a process of identifying, assessing and managing these forms of power imbalance, family violence and risk. Many family lawyers have not taken this training.

Most of us who provide ADR processes believe that we have the responsibility to provide, to the best of our ability, a safe, effective and appropriately-designed process of negotiation and/or determination. This duty can be implied by the Standards of Practice and Codes of Conduct of our governing organization (eg. the Abuse Policy of the Ontario Association of Family Mediation) or the law (eg. the regulation

under Ontario's Arbitration Act; in British Columbia, s. 8 of the Family Law Act).

If neither the lawyers nor the mediator/arbitrator knows about a significant power imbalance resulting from coercive controlling violence, for example, the safety of clients or their children could be at risk by something as seemingly benign as sitting together in the waiting room.

Parties may participate in a process for which they are poorly suited, ungovernable, or incapable of participating effectively. Victims of violence may, unbeknownst to the mediator-arbitrator or lawyers, be coerced. Subtle threats of retaliation, undetected by anyone but the victim, may prompt unbalanced agreements or irrational behaviours. Victims may be seen as difficult, unpredictable, inconsistent, unreliable, unreasonable, and judged critically because they are terrorized or traumatized... with none of the lawyers nor mediator-arbitrator understanding why.

A mediator in a mediation-arbitration, not having conducted a risk assessment, may confront or "take on" a bullying aggressor, unknowingly exposing a victim or children to retaliatory harm after the proceeding. Mediators and arbitrators may be charmed by the professionalism and reasonableness of an abuser and, unconsciously, align with him or her to the detriment of a victim and/or the children. A depressed or angry client who has risk markers that have not been identified by the mediator or arbitrator, unable to effectively manage his or her emotions, may attack the other party in the parking lot afterwards; or may come back to the mediation room with a knife or gun; may take his or her own life after a meeting with the mediator or arbitrator; or arrange for someone to stalk and beat up the mediator-arbitrator. (Recall the [recent case in Arizona](#) where a party and his lawyer were murdered in the mediator's building following a mediation.)

These are some of the reasons why mediators, arbitrators and the parties' lawyers may want to ensure that effective risk assessment is done before a case is accepted. Otherwise, one runs the risk that, part way through an arbitration, the identification and assess-

ment of risk is made and the arbitration must be aborted. (We routinely advise our arbitration clients that the on-going requirement of screening means there is no guarantee that an arbitration will proceed or be completed.)

Experts will tell you that it can often be difficult to accurately assess power imbalances, and the assessment may not be made correctly right away, if ever.

This is why, under the Regulation, arbitrators must consider the results of the screening not only before the process begins, but also throughout.

There are two common arguments made against screening in family arbitration, aside from the concerns about bias and costs noted in the first post in this series.

First: judges don't screen so why should we? The answer is easy: we are not judges. We are taking people's money, in a private process, presumably because we can offer something better.

Second: we are lawyers, not mental health professionals. Again, the answer is easy. Screening is not mental health work; it is risk assessment, a valuable step in contemporary family dispute resolution.

It is important to acknowledge that none of us is perfect. The best screening processes provided by the most experienced screening professionals can still result in parties entering processes to which they are not suited. We do not guarantee safety or accuracy of assessment; we can only conscientiously and consistently implement the best practices we know.

What is, then, the best practice for screening in family mediation-arbitration? The community of those who teach and practice screening have agreed on this. They will be discussed in the next section.

Best Practices in Screening in Family Med-Arb

There is a consensus among those who teach and practice screening for power imbalances and domestic violence that some ways of doing it are better than others.

The best practice has been established and

used for years in the context of mediation, and is adapted for family arbitration.

We suggest that family arbitrators should take responsibility for the integrity of the screening processes that are used in their arbitrations, and follow these guidelines:

1. Before starting the mediation phase of a mediation-arbitration, mediator-arbitrators should meet with each party, separately and confidentially, to assess whether the case is appropriate for mediation-arbitration. The mediator-arbitrator will seek to learn the concerns each client has about procedure; it is not a fact-finding exercise.

2. A key element of screening is its confidentiality. A person who has been threatened with death or fears for their life, or that of their children, will not disclose this fear unless they feel safe. The risk of retaliation for letting the 'cat out of the bag' in such cases is too great. Parties must be able to trust mediator-arbitrators to respect the confidentiality of all disclosures made in a screening process.

Screening is supportive of the needs of both parties. It is not for the purpose of finding out who is truthful, who is "good" or who is "bad." It is a non-judging, supportive procedural risk assessment, designed to inform the mediator arbitrator sufficiently to decide whether to take the case and, if so, how to structure it well and safely for all.

It is the mediator-arbitrator's job to find out what is needed to do this, and to get that information in a safe way. If the mediator-arbitrator relies on the lawyers to do the job, then each party will be screened by a different person, making it obvious who disclosed information that caused the arbitrator to decide to terminate the process. This breach of confidentiality can be dangerous to someone in a coercive controlling relationship.

No one, other than the mediator-arbitrator, should know who "caused" the process to not proceed.

This is why the best and safest practice is for the mediator-arbitrator to do his or her own screening; or, alternately, send both clients to the same expert on screening processes, who will meet with them each separately and confidentially,

Schedule E: FDRIO Brief: B.C. Family Law Act s. 8 and excerpts from "Family Law Act Transition Guide August 2014, CLEBC).

"family dispute resolution professional" means any of the following:

- (a) a family justice counsellor;
- (b) a parenting coordinator;
- (c) a lawyer advising a party in relation to a family law dispute;
- (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
- (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
- (f) a person within a class of prescribed persons;

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
- (e) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
- (f) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
- (g) stalking or following of the family member, and
- (h) intentional damage to property, and
- (i) in the case of a child, direct or indirect exposure to family violence;

Duties of family dispute resolution professionals

8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect:

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

(2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must:

- (a) discuss with the party the advisability of using various types of family

dispute resolution to resolve the matter, and
(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

From "Family Law Act Transition Guide, p. 2-4:

"Assessing for family violence is a particular skill that not only involves significant knowledge about the dynamics of family violence but also requires the ability to conduct an interview in a manner that ascertains the necessary information."

Schedule F: FDRIO brief: examples of cases where mediators, lawyers and/or parties were murdered in or after mediation.

CASE STUDY 1

Date: February 20th 2002

Location: Boca Raton, Florida

Charles Thomas Ott, shot his sister, Peggy Jones, to death in a law office during the mediation of the sale of their deceased parents' home.

Even with the knowledge that Ott had threatened to kill his sister, his lawyer requested that the mediation take place at their law offices rather than the more secure Courthouse.

CASE STUDY 2

Date: January 30th 2013

Location: Phoenix, Arizona

Lawyer Mark Hummels, 43, was shot in the neck and back at the end of a failed mediation in a civil action in Phoenix, Arizona. He later died from his injuries.

Mr. Hummel's client Steve Singer, 48, was also shot and killed. Singer was the CEO of Scottsdale-based Fusion Contact Centers LLC, which had hired Harmon.

The gunman — Arthur Harmon, 70, had participated in the mediation at a law firm over a \$20,000 office furniture dispute, and was unrepresented.

CASE STUDY 3

Date: March 25, 2004

Location: San Mateo, California

Lawrence May and his wife, Sharen Sulpizio-May, met with a California mediator to discuss child custody arrangements.

In the months leading up to the murder, Lawrence had become erratic and violent, and had threatened to take the children away from Sharen.

They left the mediator's office separately. When Sharen stepped into the elevator, Lawrence was waiting for her and attacked her, stabbing her to death with a pair of scissors.

CASE STUDY 4

Date: December 4th 2013

Location: Manchester, Tennessee

In December 2013, Brenda Bartee shot and killed her husband outside a Tennessee law firm following a failed divorce mediation.

The couple was in the process of divorcing and had attended a mediation.

During mediation, the couple, had a heated exchange. When they walked outside, Brenda shot her husband multiple times.

Schedule G: FDRIO brief: Excerpts from: Feldstein Family Law Blog

Wainwright v. Wainwright – Screening Requirements in Arbitration

February 8, 2013 in Alternative Dispute Resolution, Arbitration, Mediation Taged with Family Law Rules, OAFM, Ontario Association for Family Mediation

The parties were married in 2007 and separated in 2009. The separation came after a domestic incident in which the father was found guilty of assault on the mother. There was one child of the marriage, Ellie, who was born in 2008.

After attending several motions, the parties signed a settlement agreement which contained mediation/arbitration clauses.

Justice Nolan took issue with these clauses and questioned whether they should be included in the final order. She noted that a court can refuse to include a mediation/arbitration clause in a final order if it is determined that the clause would not be in the best interests of the child. In this case because of the domestic abuse, there is was issue whether the mother would be freely engaged in mediation (**editor: or arbitration**) as there was a possibility of a power imbalance.

In conclusion, Justice Nolan found that the parties could participate in mediation/arbitration, but only if there was a proper intake for mediation in accordance with Rule 17(8)(b)(iii) of the Family Law Rules which include screening in accordance with the procedures approved by the Ontario Association for Family Mediation (“OAFM”) and the Ontario Ministry of the Attorney General.

Through her decision, Justice Nolan provides an in depth analysis regarding the role of Screening Requirements in Mediation/Arbitration. In summation, Justice Nolan discusses the literature as well as her thoughts on screening and the policies of the OAFM. The OAFM has a specific policy on abuse which states that parties must be screened before they attend mediation.

Justice Nolan begins by noting that Alternative Dispute Resolution (“ADR”) is appropriate in many family law cases, and that parties should be encouraged to explore alternatives to litigation. At the same time, she notes that mediation is not appropriate in every circumstance involving a family breakdown.

The assumption is that mediation in cases of domestic violence is probably inappropriate as the concern in mediation is the impact that abuse has on its victim. Abuse functions to secure power and control for the abuser and to undermine the safety, security, self-esteem and autonomy of the abused person. This being the case, mediation cannot be fair if one of the parties is unable to

mediate effectively and competently. For this reason, “mediators need to identify which cases are inappropriate for mediation, which are appropriate for specialized mediation and which may proceed in the usual way.”

The first step of OAFM’s standards for assessing whether mediation may be appropriate is a screening process which screens clients for any occurrence of abuse to determine which case are inappropriate for mediation, which require additional safeguards, in addition to, or instead of mediation, and which should be referred to other resources.

Initial screening is conducted separately with each party, commonly using a structured questionnaire. Screening should also continue throughout the mediation process.

Screening is a simple concept, with its purpose to ensure that parties choose a process to best suit to their circumstances, needs and personalities.

Screeners are looking for anything that might make one or both of the parties vulnerable. These factors include mental health, drug or alcohol abuse, physical illness, difficult personalities, or a history of domestic violence etc.

CITATION: Wainwright v. Wainwright, 2012 ONSC 913
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