

Lawyers, Mediators must Screen for Abuse in Family Mediation

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May 23, 2001

The debate continues over whether it is appropriate to mediate in the face of spousal abuse¹. The reality is that family mediation does take place in abusive relationships, at times with the abuse unrecognized by both the mediator and legal counsel.

The debate is complicated by assertions that “women are as violent as men”. According to the 1999 Statistics Canada General Social Survey on Victimization (GSSV)², 7% of Canadians in relationships reported physical or sexual violence in the last 5 years, increasing, particularly for women, if the spouses were recently separated. The rates for women were 8% and 7% for men. Despite the findings that women and men reported approximately the same number of incidents of spousal violence in the preceding 5 years, the GSSV disclosed that women suffered serious physical violence and sexual assault disproportionately more than men did. Women were more than twice as likely as men to report being beaten, five times more likely to report being choked, and almost twice as likely to report being threatened by or having a gun or knife used against them. Younger wives suffered even higher rates of spousal violence including homicide.

The Conflict Tactics Scale (CTS) has been used for many years to gather statistics about abuse. This scale records the frequency and type of violence, grouping acts of violence into minor violent acts and severe violent acts. However, the CTS fails to take into account the consequences of the violent act. For example, a man pushing his spouse into a table may result in the wife suffering a broken arm whereas the same wife pushing the same man into the same table may cause no injury at all. Generally women are shorter and weigh less than men. Statistics substantiate different consequences for spousal violence by gender: many more women require medical treatment than do men. The CTS also fails to take into account the context of the violent act and the dynamics of the relationship. A woman is more likely to use violence to escape, to defend herself or to retaliate while a man is more likely to use violence to dominate and control.³ Furthermore, “... a battered woman’s appraisal of the threat implicit in a batterer’s behavior is based on his pattern of prior violence and abuse. When she has been exposed to severe violence by her partner on previous occasions, she has had the unfortunate opportunity to learn the behavior clues that signal danger. Thus, the meaning of threat behavior can best be understood in light of a woman’s unique knowledge of her partner’s prior behavior.”⁴ If only the CTS is used to describe violent acts, it may appear that an incident between spouses involves mutual violence. When the consequences of the acts

¹ Other words used to describe this phenomenon include: domestic violence; wife-battering; wife abuse, violence; partner abuse; couple violence; patriarchal terrorism.

² “Family Violence in Canada: A Statistical Profile, 2000.” Canadian Centre for Justice Statistics, Statistics Canada, 2000 reported at www.statcan.ca/english/IPS/Data/85-224-XIE.htm.

³ Tutty, L. “Husband Abuse: An Overview of Research & Perspectives.” Ottawa: Health Canada, 1999 found at www.hc-sc.gc.ca/nc-cn.

⁴ Dutton, M.A. “Validity of Battered Woman’s Syndrome”, M. Gordon (ed.) in National Institute of Justice *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials*. U.S. Department Health and Human Services, 1996.

as well as the context are considered, the same incident may be characterized as an incident of spousal abuse during which the victim used violence to defend herself.

The problems with recognizing abuse are further complicated by gender. Women and men, including women lawyers and male lawyers, conceptualize violence differently. Although research discloses that 40-60% of the separating and divorcing population are involved in abusive relationships, 78% of Canadian lawyers participating in a recent survey significantly underestimated the incidents of abuse for their family law clients: 49% of respondents estimated 0-20%; 29% of respondents estimated 21-40%.⁵ Dr. Nielson notes that:

... male lawyers tended to conceptualize abuse in terms of action and intention, while female lawyers tended to conceptualize abuse in terms of context and result. When abuse is understood in terms of action and intention, a controlled negotiation process between the parents with a third party present, appears relatively safe. If abuse is understood in terms of intentional action, mediators have merely to ensure that abusive people are prevented from acting abusively towards each other (in or outside the sessions) during the mediation process. Once abuse is understood in terms of context and result or consequence, however, ... the mediator must do more than ensure a lack of abusive actions during or between sessions.

Both legal counsel and mediators need to identify whether clients involved in family disputes are immersed in abusive relationships. They need to screen for abuse. Doing so will allow legal counsel to better assess the client's legal needs, to assess the best interests of the children contextually, and to assist the client in selecting the dispute resolution process that is appropriate. Given the risks of physical danger and further victimization if spousal abuse exists during mediation, it is essential for mediators to screen for abuse. Indeed, Family Mediation Canada requires that its member mediators screen for abuse and recommends caution if mediation is proceeded with once abuse is identified.⁶

Screening for abuse can take various forms: written questionnaires filled in by the client(s) and returned to the lawyer or mediator; telephone interviews of the client by the lawyer, the mediator or and intake person; completing specialized questionnaires administered by mediators⁷; and in-person interviews with the lawyer or the mediator.

⁵ Nielson, L. "Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, law for the Futures Fund." March, 2001 found at www.unb.ca/arts/CFVR/spousal-abuse.pdf.

⁶ Nielson, L. and P. English for Family Mediation Canada. "Family Mediation Canada Practice, Certification and Training Standards." (Kitchner, Ontario: Family Mediation Canada, 1999) sections 2 and 3.

⁷ Ellis, [note 24]. Dr. Ellis discusses the use of three questionnaires: the Domestic Violence Evaluation (DOVE) to screen out identified abusive situations; the Resource Differential Questionnaire (POG) to assess potential power; and Gray's Power Observation Grid (RDQ) to assess actual power. The RDQ is administered while observing the parties negotiate.

Although some court-connected programs have a policy of not mediating in spousal abuse cases and therefore screen out abusive relationships before mediation, exit surveys disclose that up to 30% of mediated cases in these programs involved spousal abuse.⁸ How did this occur?

In some cases, the abuse may be “separation-engendered and post-divorce trauma”⁹ occurring only during this stressful passage. It may have occurred after the mediation commenced and before it ended. Clearly, it is important to continuously screen for abuse as mediation and legal representation progresses.

In other cases, spousal abuse existed prior to the mediation and was not reported. Australian research suggested that survivors did not appreciate the voluntary nature of mediation; that they felt coerced to participate in mediation. Regulations pursuant to Australia’s *Family Law Reform Act, 1995* now require that mediation participants be made aware of the nature of mediation at least one day before the mediation commences.¹⁰ Thus, it is important to stress that participation in mediation is voluntary.

In still other cases, abuse was not detected because of the nature of the screening procedure. Survivors of abuse are often intimidated and afraid of their partners. If spouses are interviewed together during a pre-mediation meeting, it is unlikely that a survivor of abuse will acknowledge abuse in the presence of the abuser. Therefore, effective screening for abuse must involve separate interviews.

The tendencies of survivors of abuse to minimize the abuse, to blame themselves, and to resist disclosure due to embarrassment can result in inaccurate assessments of abuse unless the interviewer is aware of these tendencies and utilizes screening tools that uncover abuse. For example, once trust has been established with the interviewer, survivors will provide details of abuse in response to direct questions. Thus, screening tools should include direct inquiries about abuse at appropriate points during the interview.

The tendencies of abusers to deny and minimize abuse, to blame the victim, and to claim mutual abuse can also result in inaccurate abuse assessments. The interviewer needs to appreciate that men and women conceptualize abuse differently. Screening tools that will

⁸ Nielson’s study reports on New Brunswick court registry files between 1998 and 2000 and finds that 30% of the cases that were mediated involved spousal abuse even though the policy was to exclude these disputes. An Australian study: K. Young, “Research/Evaluation of Family Mediation Practice and the Issue of Violence.” Attorney-General’s Department, August 1996 that reported that spousal abuse was identified in 30% of cases entering mediation while exit surveys disclosed spousal abuse for up to 75% of the cases.

⁹ Johnson, J.R. and L. Campbell. “Parent-Child Relationships in Domestic Violence Families Disputing Custody.” (1993) 31 *Family and Conciliation Court Review*, 282.

¹⁰ Section 63 (1) A least one day before a mediation exercise is commenced ... each party to the mediation must be given a written statement that sets out the following information: (d)that mediation may not be appropriate for all disputes, particularly if a dispute involves violence that renders one party unable to negotiate freely because of another’s threats; (e) that mediation is not compulsory in order to commence divorce proceedings in the Family Court; and (g) that a party has a right to terminate the mediation at any time.

uncover spousal abuse despite the resistance to admit it and that will uncover the extent of the abuse despite gender-specific conceptualizations must be used. It is essential that the interviewer treat a person who has been abusive with respect. While conveying the message that abusive behavior is not tolerated in the mediation context, the mediator must not treat the abuser as a bad person.

Nielson and others argue that spousal abuse is not an action or several isolated actions, it is a pattern of behavior or conduct in the context of the power dynamics of an evolving intimate relationship producing psychological injury. There is a power imbalance between the parties that could impact how each party negotiates as well as each spouse's ability to negotiate. Therefore, once abusive behavior in the relationship has been identified, and assuming that each spouse continues to independently express a willingness to participate in voluntary mediation, the mediator is encouraged to have the following discussion with each party separately:

What needs to be in place so that you can feel safe to say what you need to say and hear what your spouse has to say?

The answers to this question may result in a mediation process designed specifically to meet the needs of the couple. For example, the mediator may take on the role of a “go-between” with the spouses never working in the same room, or, support persons may assist each spouse during a mediation that combines both joint meetings and separate meetings (caucuses).

In addition to designing a mediation process that addresses safety and power imbalances together with checking with each spouse about safety and lack of coercion throughout the mediation, the following quote taken from Nielson's study suggests the need for a cooling off period between the mediation before any agreement reached at mediation is finalized:

At the time you're signing that – you're leaving a man who's been beating up on you, insulting you. You name it, he's done it. You don't care. You will agree to anything. It says you sign this under no stress, no threat, whatever – Yea, Right! You sign it, you don't care. But once things calm down and you get your feet back under you, it's not the same thing.