

"Mediation in the Shadow of Abuse – An Update"

By Deborah Lynn Zutter

The debate continues over whether it is appropriate to mediate in the face of spousal abuse. The reality is that family mediation does take place in abusive relationships, at times with the abuse unrecognized by the mediator. The debate is complicated by assertions that "women are as violent as men" supported by statistics as well as the notion that "children have a right to equal contact with each parent" even where there has been spousal abuse. This article will not engage in this debate. Rather, I will discuss some recent findings concerning mediation in the shadow of abuse.

I believe that identifying abuse is the first step in the process of looking for procedures that respect people who are in abusive relationships and who are immersed in a family dispute. To assist with the identification of spousal abuse, I will define abuse and consider the gender-specific perspectives of abuse. Characteristics of survivors of abuse and of abusers will be listed. An in-person screening protocol for use by family lawyers and mediators is presented in conjunction with a discussion about behaviors that contra-indicate mediation. In those abusive relationships where mediation may be appropriate to resolve the family dispute, a refined family mediation procedure is suggested.

DEFINITION

[Spousal abuse] is a situation where one partner in a relationship is abused by the other: statistics show that one in three women experience some kind of domestic violence in their lives. [Spousal abuse] can take many forms. You do not have to be physically hurt to be abused or to receive help.

- * PHYSICAL ABUSE includes hitting, punching, pushing or shoving, slapping, being thrown against walls or furniture, choking and being hit with objects or injured by weapons.

- * SEXUAL ABUSE includes rape and any forced or unwanted sexual contact.

- * PSYCHOLOGICAL ABUSE includes comments and behaviour that makes you feel worthless.

- * VERBAL ABUSE includes constant put-downs, criticisms and threats of physical abuse.

- * FINANCIAL ABUSE can include controlling, withholding money or not allowing you a say in how it is spent.

- * SOCIAL ABUSE includes cutting you off from family and friends, making you account constantly for everything you do, embarrassing you and keeping you from earning your own money.

- * Damage to property occurs when the house, furniture or anything else that you use or own is damaged or broken.

A perplexing aspect of spousal abuse is the reality that, at one time or another, each spouse in virtually every relationship has indulged in abusive behavior. To put this another way, at some point in their intimate relationship each spouse has probably criticized the other, called the other names, hid some money or an item, thrown a pillow at the other spouse or slapped their spouse. Does this behavior constitute spousal abuse? It may not. Neilson 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. The fact that serious violence occurred once may be enough to control a partner's current behaviour. Spousal abuse can only be understood in the context of the relationship together with the consequences of the abuse.

GENDER AND CONTEXT

While acts of physical violence or sexual assault may amount to spousal abuse, they are often considered separately. In some surveys, only physical violence and sexual assault are counted. The 1999 Statistics Canada General Social Survey on Victimization (GSSV) was the first occasion that Statistics Canada included questions about emotional and financial abuse. According to the 1999 GSSV, 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. In support of the contention that violence occurs within the context of emotional abuse and controlling behavior, the GSSV found that the rates of violence were ten times higher in relationships where there was also emotional abuse.

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. Women were more likely to report repeated victimization. Women were three times more likely than men to be injured by their spouse and five times more likely to require medical attention. Women were much more likely to report negative emotional consequences as a result of the spousal violence including fear, depression, anxiety attacks, sleeping problems and lowered self-esteem. Younger wives reported disproportionately higher rates of spousal violence, including homicide. Particularly distressing, girls were twice as likely as boys to be assaulted by a family member. Fathers were responsible for 98% of sexual assaults on girls and 71% of physical assaults on girls.

Some surveys suggest high rates of mutual spousal violence. 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 partner 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. 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." 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 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.

Women and men conceptualize violence differently. Although research discloses that 40-60% of the separating and divorcing population are involved in abusive relationships, Neilson reports, from her recent survey of Canadian lawyers, that lawyers significantly underestimated the incidents of abuse for family law clients: 49% of her respondents estimated 0-20% and 29% of respondents estimated 21-40% of their separation and divorce cases involved allegations of abuse by either party. She concluded:

... 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 situation becomes more complicated. Then the mediator must do more than ensure a lack of abusive actions during or between sessions. The mediator will also ascertain:

- whether or not the survivor's fears and apprehensions about safety and well-being affect ability to participate fully;
- whether or not such fears and apprehensions about safety can be addressed while mediation is being conducted;
- whether or not abuse that occurred in the past has affected the survivor's ability to communicate and negotiate with the former partner on an equal footing;
- whether or not the survivor's ability to obtain, assess and analyze information pertinent to the matters being discussed has been affected; and
- whether or not the survivor's ability to withstand settlement pressures and delays has been affected.

THINGS TO BE WARY OF

Moreover, Neilson reports from the same survey that Canadian lawyers indicated that they would encourage clients, who were survivors of abuse, to agree to access or even share custody with abusers unless there was evidence of child abuse on the assumption that it was in the child's best interest to have maximum

contact with both parents. She noted that, while this assumption is consistent with section 16(10) of the Divorce Act (1985) and reflects beliefs about how children adjust best to separation and divorce that were predominant at the time section 16(10) was enacted, subsequent research has demonstrated that maximum contact with both parents is beneficial to children PROVIDED the contact does not expose children to continuing conflict and the maximum contact does not adversely affect the health and well-being of the primary caregiver. Children who are continuously exposed to conflict are traumatized.

Survivors of abuse are particularly vulnerable during the separation process. They may agree to settlements without considering the consequences, just to get the marriage over with. For example, one of the women who participated Neilson's study, as quoted in Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund. March, 2001, (Neilson Spousal Abuse Report) commented as follows:

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.

Survivors of abuse may feel intimidated and pressured in the mediation process. A survivor may participate in the mediation process out of fear of losing the children.

Some mediators may be settlement driven and communicate pressure to agree. For instance, a woman who participated in mediation in New Brunswick is quoted as follows in the Neilson Spousal Abuse Report:

... the mediator said either sign or we go to court.

Moreover Neilson reports findings that some abusers use the mediation to continue the abuse. Thus one participant in her study commented:

He doesn't want the mediation to end. He wants to keep in contact and if he agrees, he won't have a reason to be in touch again.

It is important to note also that some abusers use access to continue the abuse. Points of exchanging the children may become opportunities for violence or to continue the abuse by arriving erratically: sometimes late, other times early, and still other times, not at all.

Neilson asserts that parenting practices in existence prior to the divorce and separation tend to continue following the divorce and separation and notes that parents who exhibit inadequate anger management, lack of responsibility, or alcohol and drug abuse prior to the dissolution of the marriage tend not to change these patterns just because of the separation and divorce. She states:

Families experiencing high levels of hostility, conflict and abuse before separation tend to continue that pattern after separation and divorce.

Both Neilson and Goundry report abusers using the court system to continue the abuse of their ex-partner, by making frequent applications to the court.

Quotations from the Neilson Spousal Abuse Report illustrate the danger of mediators losing their impartiality and judging the parties:

Because both my husband and I are professional people, I have a feeling that the legal system and even family services, gave him more credibility. He's one of these people that can put on a really professional looking form and I think they were snowed by his ability to convince them that he's reasonable.

Survivors can be difficult to deal with particularly when they repeatedly complain about apparently inconsequential matters. Yet, as Neilson illustrates in her Spousal Abuse Report, when lawyers and mediators do not explore fully the history and dynamics of abuse in such cases, they may judge such women unfairly - as irrational or vindictive. Thus one of the participants in the Neilson study is quoted as follows:

I was made to feel that my efforts to get support were vindictive moves... It will never be an amicable relationship because of the anger there and I can't even bear to be near him [my ex-partner]; he scares me so. I'm not able to function well when he's around.

One time the mediator said 'Maybe you need your head examined' the mediator spoke to me like that.

It is important too that lawyers and mediators understand that accusing the survivor of promiscuity is a common tactic used by abusive persons in legal proceedings and in mediation. Interview comments quoted in the Neilson Spousal Abuse Report illustrate this point:

And the mediator treated me like garbage, was not for me at all, only for the other party and that was it... My ex tried to say I was promiscuous in my past, stuff like that. I walked out of there, I was so mad... He [my ex] walked out of there with a big grin on his face saying, "See, there you go!"

Victims of abuse have a heightened sensitivity to danger. Neilson reminds us that an abuser may engage in behavior that an objective observer would not view as abusive or threatening.

Abusers do not necessarily present as angry, aggressive individuals. In fact, as illustrated by the following quotation taken from the Neilson Spousal Abuse Report, they may seem quite charming:

He could be so sweet. Old people loved him. When I was married to him, he would say, 'I'm doing the cupboards at this lady's house' and he would say, 'She likes chocolate chip cookies. Would you make her some?' He would take me there for [a] visit but then would come home and beat the crap out of me.

Neilson concludes that what may be considered a "fair" or "generic" settlement in a non-abusive marriage, may be wrong in an abusive relationship. For example, she notes that regular, unsupervised access with an abuser can amount to child abuse in a variety of situations: if the parent verbally abuses the children during visits; if the parent physically abuses the children during visits; if the parent fails to feed and provide clean clothing and bedding during visits; if the environment is not safe – because of who the parent is associating with during visits or because the parent is driving the children around while intoxicated; if the parent continues to be verbally or physically abusive towards the other parent; if the parent is using the visits to criticize and denigrate the other parent; or if the parent refuses to or lacks the knowledge of how to participate in age appropriate activities with the children during visits.

It is important to note too that some abusers use a "preemptive strike" tactic – they accuse the victim of all the things that s/he has done.

Some survivors refuse access but Neilson's Spousal Abuse Report suggests that this appears to occur when the parent is concerned about the child's safety. For example, if the abusive parent returns children who were not fed during most of a weekend visit or the abusive parent drinks and drives with the children, subsequent access may be denied. One of the participants in the Neilson study is quoted as having struggled to deal with her custody and access dilemma as follows:

Daughter and I made an agreement. I said, 'I'm not going to allow you to go anymore. He'll have to hire a lawyer and make me go back to court. ... you're going to end up dead and I'm going to blame myself forever.' (She said) 'Can I go if I promise never to get in [the] car?' I said, 'If you promise and speak up to him about those things', And from that day forward, she doesn't get in the car. But in [the] meantime, she'd go; they'd get drinking and she'd call from friend's house to come and get her.

Nicholas Bala reports that children's wishes can be very problematic in spousal abuse situations because the abused parent may be seen as weak and ineffectual, and children may wish to align themselves with the stronger, more powerful, abusive parent. He notes that an abusive spouse can be very manipulative and the denigration of the other parent may influence a child's relationship with a victim of abuse, or the abusive parent may coerce or threaten the children to express views favorable to himself.

CHARACTERISTICS OF SURVIVORS AND ABUSERS

The survivor and abuser characteristics listed in this part of the paper have been drawn from Dr. Neilson's Spousal Abuse Report and from Leslie Tutty's article. They should be treated with caution. While some are supported by statistics, most are preliminary propositions drawn from qualitative research. My purpose in

reporting them is to provide lawyers and mediators with additional information to utilize in reaching procedural decisions in individual cases.

Whether female or male, survivors of abuse display similar characteristics. They:

- * tend to minimize their partner's abusive behavior;
- * feel ashamed;

I didn't want to admit that I was living with this person who abused me.

- * express concern for the children, speaking of the children's needs and parenting

responsibilities, often indicating that their concern for the children was one of the reasons for remaining in the abusive relationship;

* feel some empathy for the abusive partner, perhaps even explaining that the abusive partner grew up in an abusive home;

- * tend to not report the abuse, however, if asked direct questions will admit to being abused;
- * blame themselves;
- * have low self esteem;

... everybody who has been involved in an abusive relationship always gets to think negatively about themselves.

* may use violence to defend themselves. Some survivors of long term abuse reported isolated incidents of their own violence at the point of separation.

Some characteristics of survivors of abuse tend to be gender-specific:

- * women are significantly more likely to be injured than men;
- * women fear their partner's aggression;
- women report patterns of demeaning, controlling, intimidating interactions;
- * men report despair and frustration over the abuse;
- * while there are incidents of severe physical abuse of men, men complain more often of psychological abuse;
- * men perceive little societal empathy for male survivors of abuse and may fail to report abuse due to their fear of being stigmatized as "weak".

The following abusive behaviors have been observed regardless of gender. Abusers tend to:

- * deny or minimize their own acts of physical aggression;
- * resist accepting any responsibility for the continuing conflict with their ex-partner;
- * have no fear of their partner;
- * present with more bravado;
- * claim mutual violence;
- * denigrate their ex-partner;
- * have a history of documented arrests, perhaps convictions;
- * use language of "rights" or "entitlement" when speaking about their children as opposed to discussing the children's needs and their responsibilities towards their children.

WHEN MEDIATION IS NOT SUITABLE

Research indicates that if one or more of the following occurrences have taken place in a relationship, not only is mediation contra-indicated, the victim and children may be in significant danger:

- * the partner has committed extreme acts of physical violence against the victim or children;
- * the partner has attempted or threatened suicide;
- * the partner has uttered death threats, or threats to cause harm to the victim or children; and

* the partner is obsessively jealous (such as: a pattern of repeated allegations of infidelity; calling the victim a whore or slut; monitoring phone calls; and limiting the victim's contact with friends, family, employers or colleagues).

The foregoing indicators cannot be ignored. Consider the following findings by Wilson and Daley:

Men often pursue and kill estranged wives while women hardly ever behave similarly; men, but not women, kill spouses as part of planned murder-suicide; men perpetrate familicide, killing spouse and children together; while women do not; men, but not women, kill after prolongedly subjecting spouses to coercive abuse; men kill in response to revelations of wifely infidelity, while women almost never react similarly; and women, unlike men, kill mainly in circumstances with strong self-defense or defense of children.

SCREENING FOR ABUSE

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.

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 mediators; and in-person interviews with the lawyer and the mediator.

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. How did this occur?

In some cases, the abuse may be "separation-engendered and post-divorce trauma" 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 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. 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. As previously discussed, survivors of abuse are often intimidated and afraid of their partners. If spouses are interviewed together, 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 that are also scheduled so that the spouses do not encounter each other in the mediator's waiting room. Consider the following criticism by a family mediation client:

In my mediation – prior to joint both parties had to go at same time – spoken to separate. I found this uncomfortable. I think separate appts. for 1st visit would be better.

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 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.

MAKING THE MEDIATION DECISION

Table 1 describes a family mediation process that endeavors to incorporate the essential aspects of the foregoing discussion. Table 1 assumes that each spouse's lawyer has screened for abuse and found that the relationship is or has been abusive. It further assumes that each spouse's lawyer has satisfied him/herself that the abusive relationship does not amount to "intimate terrorism" and that it does not include extreme acts of physical violence involving the spouse or children, threats of or attempted suicide, death threats, threats to cause harm to self/children and obsessive jealousy. As the risk of harm is so significant, Dr. Neilson argues that for cases with these levels of violence the spouses [and children] demand partisan advocacy. The collaborative nature of mediation is likely to be inconsistent with the extent of partisan advocacy required. Moreover, it may not be possible for either spouse to participate in a process that involves negotiation as well as expressing one's needs and hearing the other's needs. The survivor may be too afraid. The abuser may be unable to let go of control. Another dispute resolution process, together with community resources to support and assist spouses involved in abusive relationships move through separation and divorce, may be appropriate.

A flow chart is never a "blueprint" to be utilized in every situation. At best, a mediation flow chart suggests a proposed process that will be varied as the individual needs of the participants are identified. Table 1 endeavors to stress the diagnostic and creative aspects of mediation by using various shapes within the chart.

The spouses must make the decision separately. Each client must want to participate. There must be no coercion to participate. As coercion can take many forms, it is suggested that both legal counsel and mediators be diligent in satisfying themselves that the client's desire to participate in mediation is indeed voluntary.

Successful mediation also requires that clients be committed to negotiate a resolution. Clients should understand that: the mediator will not make decisions for them; mediation is not a forum in which to persuade or force the other party to agree to one spouse's solution; mediation is not the place to vindicate oneself by proving that one spouse is right or good or that the other spouse is bad or wrong; nor is mediation a forum to continue patterns of control that existed during the marriage. There should be a willingness to give and to take as well as a willingness to express one's own needs and to hear the other spouse's needs.

Furthermore, clients need to have realistic outcome expectations. Expectations are best informed by legal counsel. At the commencement of mediation, clients benefit from learning: the worst outcome that could happen at trial; the best outcome; the most likely outcome; what will happen if the matter does not settle at mediation; trial cost; as well as the length of time before trial and the probable duration of trial. The appropriateness of mediation needs to be carefully reviewed when a client expresses rigidity about achieving an unrealistic outcome.

Separation and divorce mark the end of a marriage. Consequently each spouse is emotionally involved in stages of healing. Does the client currently possess the emotional capacity to participate?

Given that spousal abuse has been identified, is the client psychologically ready to participate in mediation? Consider the following quotations extracted from Charlton's, *Dispute Resolution Guidebook*:

I think its important for mediators to understand the discrete stages one passes through after separation from a violent relationship.

....My greatest fear in the first three months after leaving would have been his remorse, which would have consolidated the guilt I felt at leaving....If I had gone to mediation say 10 months after leaving I would have been very angry by then about what had happened to me.

Perhaps the best time to mediate for me would have been between 18 months and two years after leaving. This time frame may have operated to protect me from his remorse, to work through my anger and thus enable me to negotiate to my best advantage.

Acting upon information disclosed during counsel's screening for abuse, legal counsel can assist clients by directing them to community resources that they may benefit from. This could include: therapy, information about child development and responsible parenting practices; anger-management programs; or assertiveness training. These programs can empower spouses and assist them to prepare for and participate fully in mediation.

Separating and divorcing spouses require information to make good decisions. Counsel can play a significant role in ensuring that information about family income, expenses, assets and debts is obtained, exchanged and understood. As has been pointed out, some abusive relationships involve the control of information. If this has been the situation, not only will the survivor require counsel's assistance to obtain information, it is likely that the survivor will also require counsel's assistance in interpreting that information.

Whether or not legal counsel has screened for abuse, and in addition to other screening tools, the mediator should screen each party separately for abuse at a preliminary meeting. By scheduling these meetings approximately one week before a possible joint mediation meeting, parties have time to prepare themselves for the mediation, to put in place support persons for the mediation and to commence gathering the information upon which decisions will be made. During the preliminary meeting, the mediator should discuss with each client:

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?

When mediation occurs in cases where spousal abuse has been identified, the mediation process ought to be varied to address the issues of safety and empowerment. For example, the literature discourages face-to-face meetings and suggests 'shuttle negotiation' where the mediator acts as a 'go-between' the parties. Thus, the mediation process may be varied so that the spouses are never in the same room. In fact, there are many possible variations, such as:

both lawyers attending with both clients for a joint meeting lasting an entire day;

Table 1. Family Mediation Process

- * whether the meetings are joint or separate, selecting a co-mediation team to reflect gender/age/ethnicity;
- * arranging for the spouses to arrive/leave the mediation at different times;
- * if face-to-face meetings are occurring, a pre-determined procedure is agreed upon that allows each participant to keep the mediator(s) informed of whether the process continues to feel safe;
- * if face-to-face mediation is chosen, joint meetings are combined with at least one separate meeting (caucus) with each party during every joint mediation session;
- * rather than pursue comprehensive mediation at separation to develop a final resolution, engage in a short, preliminary mediation to develop a "without prejudice" plan at separation to reduce tension and provide some time for parents to adjust to living apart before final negotiations occur;
- * combine mediation with other dispute resolution processes. Thus, the child support decision could be delegated to a joint financial planner; a non-binding opinion may be obtained from senior, respected lawyer about how to divide property; or a neutral expert could provide a non-binding recommendation about who the children need to fill the role of primary caregiver;
- * and providing "creature comforts" during the mediation that are intended to reduce stress and support and respect the spouses, including a spacious room with sunlight and comfortable chairs, the presence of a dog or plants, and offering food and refreshments.

It may also be beneficial to put in place support persons for each spouse. A support person might accompany a spouse to/from the mediation. This person could be a friend, family member, financial expert or therapist. If a support person is coming to the mediation venue, all participants need to understand and agree to the role that this person will fill at the mediation. For example, if a support person enters the mediation room, may that person participate? Support persons could be used between mediation sessions

such as an anger management coach for abuser who could work through issues with the abuser and a therapist who could help the survivor practice expressing her needs.

When family mediation occurs as a series of mediation meetings, contact between counsel and client between sessions can serve many important purposes. Contact with legal counsel between meetings allows the client to vent, provides an opportunity for counsel to give legal advice and facilitates the continuous checking of the suitability of the mediation process. Depending upon the nature of the client's complaints about the mediation, it may be appropriate to: discontinue the mediation; adjourn the mediation; or vary the design of the mediation.

THE PRELIMINARY INTERVIEW

In-person interviews provide nuances of meaning inferred through the observation of body language and tone of voice that supplement verbal answers to questions. Given the risks in working with couples involved in abusive relationships, it is suggested that separate, in-person interviews are an essential aspect of the mediation process.

Table 2 contains a list of questions that may be employed during a preliminary interview. These questions are designed to screen for abuse. Legal counsel may use questions listed from A to J; the remaining questions are intended for use by mediators during separate preliminary interviews with each spouse. Where legal counsel has not screened for abuse, the mediator may utilize the entire questionnaire.

Table 2 is offered as a guide. It cannot act as a substitute for a lawyer or mediator's intuition. The intrusiveness of the questions gradually increases on the premise that spouses must first establish rapport and trust with the interviewer. Thus, some clients may need more "chatting" before they are able to disclose such intimate and painful details to a virtual stranger.

When using this screening tool, interviewers are reminded that it is extremely difficult to be relentlessly asked many questions. Interviews are encouraged to summarize what they are being told after every 3-4 questions. This gives the spouse a needed break from the "hot seat". Summaries are also opportunities for the lawyer or mediator to check his/her understanding of both context and emotion and to clarify or to explore apparent gaps or inconsistencies. Finally, every question need not be asked every time, and, the answers to questions may encourage further exploration.

The preliminary meeting requires both an introduction and conclusion. Girdner suggests opening with:

I will not share any of the information you tell me with your spouse unless I have your permission. Is there anything you would like to ask me or tell me before we continue?

And closing with:

Is there anything else you would like to ask or tell me? If you remember something later that you did not bring up in this session, don't hesitate to let me know.

By opening with an invitation to the client to ask a question, should there be a matter that might interfere with the client's ability to focus during the meeting, the opportunity to address it first is created. Similarly, asking if there is anything else at the end of the interview should catch details missed during the interview. The closing invitation to advise the mediator of something remembered later addresses both the frailties of human memory and the need that some people may have to carefully consider whether to disclose abuse.

Girdner's language implies that the preliminary interviews are confidential; that the mediator will keep secrets between the parties. Whether or not the preliminary meetings are confidential as between the parties is a matter that should be discussed and determined at the commencement of the interview. There are reasons for and against treating these interviews as confidential. Some mediators do not to keep secrets as between the spouses. This is consistent with the requirements of Appendix 2 of the Professional Conduct Handbook of the Law Society of British Columbia. These mediators may advise the parties that s/he is having the same discussion with each spouse and that the mediator's interest is in providing a safe mediation for both of them.

However, as previously discussed, survivors may be afraid of their spouses and of what will happen if they tell another about the abuse. For these individuals, the promise of confidentiality may be essential to create an atmosphere in which it is safe to disclose the abuse. Promising to keep secrets can raise significant ethical dilemmas, such as: Can the mediator behave neutrally if spousal abuse is uncovered? If the survivor or the mediator decide that mediation in any form is not appropriate, how is this decision communicated to the abuser without placing the survivor at risk while at the same time treating the abuser with honesty and respect?

Given the likelihood that lawyers and mediators will encounter abusive relationships, these professionals may find it prudent to develop a list of resources available within their community that spouses involved in abusive relationships may access. These could include mental health professionals, anger management treatment groups, safe homes, and access supervisors. It may also be very helpful to create a list of relevant books, videos and websites that these spouses may access to inform themselves about the emotional process of separating and divorcing experienced by adults and children, spousal and child abuse concerns, and dispute resolution alternatives.

CONCLUSION

The prevalence of spousal abuse in the divorcing and separating population coupled with its impact on children calls for increased knowledge on the part of counsel and family law mediators. Appreciating that men and women conceptualize spousal abuse differently allows for greater empathy and understanding of apparently inconsistent stories of abuse. Understanding spousal abuse in the context a relationship facilitates choosing appropriate dispute resolution processes and making them safe as well as fair. This article has relied on recent research to develop a screening tool to identify abuse and to propose variations to the mediation process when mediation occurs for couples who have been involved in abusive relationships. Undoubtedly, as knowledge about abuse in intimate relationships increases, better screening tools will be developed and dispute resolutions processes will be refined.

It is clear that a great deal more research is needed to determine how to define a failsafe screening tool. It is equally important to determine the type of training needed to ensure that mediators are fully competent to use screening techniques and processes. Such training must include methods to assess the success of techniques used to balance power between parties and to ensure that parties remain safe throughout the mediation process. Finally, mediator training with respect to these important issues requires ongoing and careful scrutiny as to its relevance and usefulness. The failure to rigorously examine the use of screening mechanisms, of related training and its effects may result in mediation becoming yet another forum in which women are re-victimized by the very process which it ostensibly designed to assist in their removal from an unhealthy and unsafe situation.

Table 2. FAMILY LAW CLIENT SCREENING INTERVIEW

Combined Lawyer/Mediator

A through J may be used by both the Lawyer and the Mediator

A. Setting the Tone

What brings you to my office? What are the circumstances that led to your separation?

What is your goal? Where do you want to be at the end of this process?

B. Concerns

What concerns do you have about separating? How are the children doing now? What are your concerns for the children as you and your spouse separate? Looking into the future, what are your concerns for your children once you and your spouse have established separate homes?

Has there been any recent change in behavior by either of you? Details.

C. Financial Management

How has money been managed? How are decisions made about money? What happens when you disagree about financial matters? Do either of you keep information about money separate from the other? Is either of you dishonest with the other about financial matters?

D. Control

Are there limitations placed by you on what your spouse wears? Does? Eats? Who s/he visits with? Details.
Are there limitations placed on you by your spouse about what you wear? Do? Eat? Who you visit with?
Details.

E. Disagreements and Anger

What happens when the two of you disagree? Is one of you more powerful than the other? Who? Does this person get his/her own way? Details.

How do you handle anger? How does your spouse handle anger?

F. Safety

Is it safe to disagree? What happens?

Have there been threats? By you? Against you? Your children? Your property? Pets? Family? Details.

G. Violence

Has there been any slapping, hitting, pushing? By you? Have you been pushed, hit, slapped? Have your children been pushed, hit, slapped? What about your pet or other family members? Details.

Has there been any use of objects or weapons? By you? Against you? Against the children? Details.

Have you (or the children) suffered injury caused by your spouse? Details, including severity and need for medical treatment.

Have you caused injury to your spouse or children? Details, including severity and need for medical treatment.

H. Sexual Abuse, Suicide, Addictions

Has either you or your spouse talked about suicide? Tell me about it.

Are there any drug or alcohol problems? Details.

Have you been forced to take part in sexual activities by your spouse? Details.

Have you forced your spouse to take part in sexual activities? Details.

Have either of you involved your children in sexual activities? Details. Note: you may be required to report the answer to this question to the Director of Child, Family and Community Services.

I. Criminal and Court Involvement

Has there been any police involvement with your family? In what circumstances? When?

Have there been any convictions of you? Of your spouse? Details.

Are there any restraining or no-contact orders in place? Have there ever been? Details.

J. Fear

Are you afraid of your spouse? What are you afraid of?

Do you think that your spouse may be afraid of you? Tell me about it.

What therapy or counseling are either you or your spouse receiving? Received in the past?

What support persons do you have who will be there for you as you move through this separation?

Do you want to make decisions about your family? Would you rather have a judge make these decisions?

Can you and your spouse problem solve and make decisions together? For Use by the Mediator Only

K. Mediation?

Why do you believe that mediation may be the right process for you?

What concerns do you have about mediation?

L. Activities that tend to Escalate Conflict

What behavior "presses your buttons"?

What do you do to "press your spouse's buttons"?

What happens for you when you become emotional? How can that be addressed?

M. Safety

Will you be able to stand up for your own needs, or the needs of your children, when you are face-to-face?

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

What is the worst thing that could happen if the two of you were negotiating in the same room? How can that be addressed?

N. Planning the Mediation

If you decide to meet together in the mediation, where would you like to sit?

If you decide to meet together in the mediation, how do you feel about arriving or leaving at the same time?

If you decide to meet together in the mediation, what do you need to be able to do if you become emotional?
If you decide to meet together in the mediation, how do you want to manage interrupting?
If you decide to meet together in the mediation, would either of you benefit from bringing a support person to the mediation? Who? What would be the role of that person?
What other aspects of the mediation process can be adjusted so that you and your spouse have the best chance of making decisions consensually? E.g. Co-mediator by gender or ethnic background; food; smoking; duration of meetings; presence of lawyers; and time of day.

O. Late or Missed Mediation Meetings

How do you want to deal with either of you arriving late for mediation?
What are your suggestions about how to deal with one of you needing to reschedule a mediation meeting, or simply not turning up?

P. Continuous Checking

I will be talking to each of you between mediations to make sure that each of you continues to feel safe, and that the mediation process is working for you. What concerns do you have about these private conversations?

It is important that you, and your children, feel safe throughout the mediation process. Please let me know immediately if you are ever concerned about your own behavior or about the behavior of your spouse.

Q. Mediation Preparation

How do you plan to work with your lawyer during the mediation?
What decisions have you and your spouse reached agreement on?
What decisions do you need to reach agreement on?
What is important to you about the decisions that both of you are about to make for your family?
What do you think is important to your spouse about the decisions that both of you are about to make for your family?
What information do you need to have before you can make good decisions? What do you think your spouse needs? How can this information be obtained and provided to each of you?

R. Trust

Can you trust your spouse?
Do you think that your spouse trusts you?
How can you see yourself mediating in these circumstances?

S. If the mediation terminates

What will happen if either of you, or I, decide that the mediation is not working?

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