

# Safety Screening in Family Mediation

A Discussion Paper

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**Please submit written comments and suggestions to the  
B.C. Mediator Roster Society  
by March 31, 2008.**

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## TABLE OF CONTENTS

|  |    |
|--|----|
| I. ABOUT THIS PAPER  | 1  |
| II. GOVERNING PRINCIPLES AND THE PURPOSE OF SCREENING        | 2  |
| III. BACKGROUND AND CONTEXT                                  | 3  |
| IV. THE SCREENING PROCESS                                    | 5  |
| A. Telephone Interviews                                      | 7  |
| B. Questionnaires  | 8  |
| C. Checklists  | 9  |
| D. In-Person Pre-Mediation Interviews                        | 9  |
| E. Mid-Mediation Prompts or Queries                          | 10 |
| V. DECLINING OR ENDING MEDIATION                             | 10 |
| VI. ADAPTING THE MEDIATION ENVIRONMENT AND PROCESS           | 11 |
| A. The Attendance of Counsel and Other Support Persons       | 11 |
| B. Consideration of the Physical Mediation Environment       | 11 |
| C. Considerations in Joint Pre-Mediation Procedural Sessions | 12 |
| D. Separate Meetings   | 12 |
| VII. IN CLOSING  | 13 |

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## I. About This Paper

Screening for safety is not a new subject in mediation, particularly for family mediators. Section 6.1 of the British Columbia Mediator Roster Society's Standards of Conduct obliges *all* of its Roster members to:

*“make every reasonable effort to identify threats to the safety of any participant, and either make the mediation process safe or end it”.*

Members of the Family Roster, specifically, are further directed in sections 6.2 and 6.3 of the Standards of Conduct<sup>1</sup> to assess mediation participants for the appropriateness of mediation by screening and individual interviews intended to disclose abuse<sup>2</sup>. If abuse is disclosed, they are expected to determine what safeguards must be put in place to ensure a safe and fair mediation and, if none can be devised, to refer the participants to appropriate professionals. Although not a new topic, this paper was prepared with the intention of developing a more complete appreciation of this conduct directive and, more importantly, of its practical application.

While particularly for family mediators, mediators in other practice areas may also find this information useful. As well as contributing to the safety and fairness of mediation, the steps taken in safety screening are also part of a larger assessment of the appropriateness of mediation for the participants — incorporating questions of suitability, capacity, and mediation readiness. They become, simply, part of the pre-mediation conversation in which every mediator engages with participants to inform them about the mediation process, and to determine how best to tailor the process to suit those participants and their specific circumstances.

Researchers in this area have yet to draw full conclusions about the best way to conduct a safety screen, or how to deal most effectively with the results. Given that safety screening is, then, a field that is still evolving, no specific recommendations or best-practice guidelines are being offered in this paper. Rather, a review of the topics most likely to interest mediators in their everyday practice is provided as food for thought. This information is provided as a quick reference rather than a comprehensive overview of the subject. It is assumed that all members of the Family Roster have fulfilled the basic qualifications for entry onto the Roster and are familiar

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<sup>1</sup> Sections 6.2 and 6.3 of the Standards of Conduct read as follows:

- 6.2 A family mediator must assess or be satisfied that the participants have been assessed for the appropriateness for mediation by screening and individual interviews, and be satisfied that:
- a) there is not now nor has there been any abuse;
  - b) if there has been abuse, a fair and safe mediation is still possible;
  - c) if there has been abuse, any vulnerable participant can be protected in the mediation process and all of the necessary safety measures to do this are put in place for the mediation.
- 6.3 If a family mediator ends a mediation because of safety concerns, he or she must refer the mediation participants to appropriate professionals.

<sup>2</sup> “Abuse” is defined in part 2 of the Standards of Conduct as: “a pattern of behaviour or conduct in an intimate relationship that is associated with the unacceptable exercise of power and control, and adversely affects the ability of one or more participants to make free and informed decisions. Abuse may be financial, emotional, psychological, physical or sexual”. There are other definitions of abuse, some of which identify other forms of abuse beyond those associated with the exercise of power and control. Nevertheless, this and other definitions highlight the importance of understanding both the nature and consequences of any abuse that has occurred in assessing the safety and appropriateness of mediation for the participants.

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with the subject matter of family dynamics, patterns of domestic violence, family law concepts, and family mediation practice. There is, as well, a great volume of authoritative information about the issues and processes addressed here.

It is not expected, therefore, that this paper will be a “last stop”, but rather that it will fuel a search for additional information and a broader understanding of the topic. In this way, it is hoped that it will extend the skilled mediator’s own, very substantial intuition about how participants are presenting themselves for mediation — and how mediation can proceed in a safe and fair manner for all concerned.

## II. Governing Principles and the Purpose of Screening

Screening as it is discussed in this paper applies to all types of family mediation as defined in the Standards of Conduct, which includes the mediation of issues about: reorganization of the family after separation or divorce, parenting, financial support and property matters connected to separation or divorce, child protection, family business, family property or finances, family inheritance and estates, responsibility for care of elderly parents, adoption, pre-nuptial issues, and intra-family conflicts. The level of conflict that can exist in these disputes is evident to most mediators. It is incumbent upon them, then, to consider the safety not only of the parties to these disputes, but also their own safety and that of others who may be called upon in support of the mediation process.

Screening for safety is examined here in the context of three very important principles or caveats applied in mediation: self-determination, accessibility, and the ethical dictum of professionals to “do no harm”. These principles provide the backdrop or framework within which screening for safety and appropriateness for mediation takes place.

Self-determination is, of course, a key ingredient for mediation. It has been referred to as the *soul* of mediation<sup>3</sup> — the idea that participants must be free to make voluntary, uncoerced, and informed decisions about the matters that concern them in mediation. Parties who believe their safety is compromised or attend under a threat to their safety — whether implicit or explicit — are not in a position to participate freely in mediation, and are not able to resolve their issues in a manner that can be considered voluntary and uncoerced. Screening for safety is, therefore, a step in the assessment of whether both parties can be self-determining over the course of a particular mediation.

Accessibility is another key principle applicable to the screening process. This principle invokes the idea that, where a mediation service is available — at an affordable cost or free of charge — anyone who wishes to access that service, and participate in mediation, should be permitted to do so. That is, they should be permitted to do so provided mediation is a suitable dispute resolution mechanism for them and their circumstances. Where a fear or anxiety about safety undermines self-determination in mediation, mediation may not be a suitable mechanism. The principle of accessibility, nevertheless, imposes on the mediator the obligation to go one step further — to modify, where possible, either the physical space in which mediation takes place or the mediation process itself — to alleviate the concerns about self-determination, and enable the parties to participate in mediation should they wish to do so. This principle is, then, not so much a

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<sup>3</sup> Judith Cohen, “Convening for Self Determination and Access to the Process”, reprinted from *The Texas Mediator*. Texas Association of Mediators, Volume 18, Number 2, Summer 2003.  
[www.mediate.com/articles/cohen6.cfm](http://www.mediate.com/articles/cohen6.cfm).

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principle that provides the rationale for screening itself, but rather it is one that provides the rationale for further action — once screening has provided the necessary information.

Finally, the ethical dictum that applies to professionals across disciplines — do no harm — is also applicable to mediation and the screening process. Ethicists speak of this not only in terms of knowingly doing harm in the practice of a craft, but also *unknowingly* doing harm — that is, it is the duty of the professional to inform him or herself sufficiently about the circumstances of a client so that s/he does not unknowingly cause harm by the services rendered. In this context, then, mediators should gather sufficient information from their clients prior to conducting a mediation to determine whether the process can take place safely, and whether any harm might come to a party as a result of engaging in that process. Of course, it is not possible to see the future, and this dictum does not assume that there can be foresight — but rather informed insight. It simply requires that adequate care be taken to prevent harm that is reasonably apparent and predictable.

To summarize, then, these governing principles combine to explain the purpose of screening for safety in mediation — and to underscore its importance. Safety screening is, as mentioned earlier, part of a larger assessment of the appropriateness of mediation for the participants. The over-riding purpose of screening specifically for safety is, as the name implies, to maximize safety. But, indeed, its purpose is to maximize fairness as well. The professional mediator's interest in preserving the principles of self-determination and accessibility, as well as their ethical duty to do no harm, places this kind of screening in the categories of both safety and fairness as its ultimate goal.

### III. Background and Context

Relationships — and the issues that arise out of relationships — are the main content of family mediation. As well as the issues, however, there may be violence. Recent changes in the status of a relationship have been found to be a significant risk factor for violence, and violence is one of the larger reasons why couples separate.<sup>4</sup> Some statistics on the incidence of family violence may help to put the problem in context, but first a word of caution about statistics on this topic.

Family violence is an area that has been — and continues to be — the subject of intensive research. Unfortunately, the lack of a standard definition of the problem, and the differing aspects of violence and abuse that are studied in different family settings, have contributed to a confusing array of numbers that make it very difficult to address the incidence of family violence. For this paper, Canadian figures were used from a generally accepted source that regularly surveys the Canadian public on a range of different topics — Statistics Canada.

This choice is not without controversy either, however. Some scholarly articles criticize the reliability and validity of Statistics Canada's self-reported data, quoting the reluctance of abuse victims to report violent incidents, and addressing the differences between men and women in the way they perceive and/or characterize violence, or the differences between men and women in their propensity to report violence in their relationships. Nevertheless, this is the only countrywide source of data on this subject, and it is used here as a means of showing the dimensions of the problem. In the Statistics Canada survey summarized in *Family Violence in*

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<sup>4</sup> Alison Taylor, *The Handbook of Family Dispute Resolution: Mediation Theory and Practice*. San Francisco, CA: Jossey-Bass, 2002, p. 184.

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*Canada: A Statistical Profile 2005*<sup>5</sup>, 7% or an estimated 653,000 women and 6% or an estimated 546,000 men reported having experienced violence by a marital or common law partner during the five years prior to the survey. The proportions are thought to be significantly higher amongst separating or divorcing partners, however — some studies report them to be as high as 70% or more.<sup>6</sup>

The incidence of family violence against older adults is also difficult to assess, as studies suggest that seniors are among those who are reluctant to report instances of family violence. Although this makes police sources less than ideal, police statistics are unfortunately the primary source of data currently available on this subject. In a survey of Canadian police incident reports from 122 police services conducted as part of a Statistics Canada survey in 2003, people over the age of 65 were found to be the least likely age group to be the victims of violent crime, at a rate of 184 per 100,000 persons for men and 119 per 100,000 persons for women. Although, according to these statistics, older men are more likely to be victimized — in general — than older women, women are about twice as likely to be victimized by a family member than are men. The survey showed that family members were involved in about 40% of cases in which there were female victims and about 20% of cases in which there were male victims.<sup>7</sup> In spite of the overall numbers for violence against this population being small, the demographics of an aging population are elevating the concerns about the elderly becoming the targets of family and other types of violence.

The incidence of child abuse or maltreatment is similarly thought to be under-reported. The reasons for this are many, including a fear of or inability to seek help, a child's dependency on the adults who may be abusing them, and a lack of understanding that what they are experiencing may be maltreatment. Additionally, emotional or psychological abuse and witnessing violence are not crimes for which charges can be laid — although, along with physical assault, sexual assault, and neglect, these are defined as forms of child abuse and maltreatment. Nevertheless, police statistics are again used as the closest proxy. In the same survey of incidents reported to police in 2003, family members committed 24% of the 37,200 violent incidents involving children and youth under the age of 18.<sup>8</sup>

The incidence of violence in the family setting has raised concerns about the safety of mediation — for the parties, and for mediation professionals and others who may be present in support of the mediation process. Recent research has not, however, confirmed previous suggestions that mediation is unsafe for separating or divorcing partners, particularly women, who have experienced violence or abuse. Abused women were not found to be more likely than non-abused women to be the victims of physical or emotional violence or abuse during or following their participation in mediation. Nor were abused women in mediation more likely to be victims of such violence than abused women participating in court proceedings or separations or divorces overseen by lawyers.<sup>9</sup>

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<sup>5</sup> *Family violence in Canada: A statistical Profile, 2005*. Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, Ministry of Industry, 2005, p. 14. <http://www.statcan.ca/english/freepub/85-224-XIE/85-224-XIE2005000.pdf>.

<sup>6</sup> Ellis, D. and Stuckless, N. "Domestic Violence, DOVE, and Divorce Mediation", *Family Court Review*. Association of Family and Conciliation Courts, Vol. 44, No. 4, October 2006, p. 658.

<sup>7</sup> *Family violence in Canada: A statistical Profile, 2005, op.cit.*, p. 11.

<sup>8</sup> Calculated based on figures reported in: *Family violence in Canada: A statistical Profile, 2005, op.cit.*, p. 69.

<sup>9</sup> Ellis and Stuckless, 2006, *op cit.*

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Even so, in many jurisdictions where there is a mandatory mediation component to their family justice system, parties are excluded from mediation where there is evidence of domestic violence. The reason for this goes beyond the concern of keeping the parties physically and psychologically “safe” during the mediation process. It is also because of the dynamics known to exist when there is abuse, and the belief that those dynamics undermine the victim’s ability to exercise free will, or to participate freely in the mediation process — the key requirement of self-determination in mediation.

Because of the threat to self-determination, some argue that it is reasonable to apply a “zero tolerance” approach — or, at least, to offer an “opt out” alternative — when there is evidence of abuse or violence. The mandatory nature of these programs also accentuates the need for vigilance. Indeed, this question is becoming more pertinent in our province now, as B.C. contemplates its own new Notice to Mediate process under the *Family Relations Act*. In other areas of practice, however, at least in programs of service in which the parties clearly choose mediation as a constructive way of resolving their disputes, the principle of accessibility behooves the mediator to probe the extent of any barriers to self-determination and to find ways of enabling the parties to exercise that choice — barring evidence of any clear and present danger, of course. As discussed later in this paper, the practice of mediation has evolved over the last decade so that a number of techniques have been found to ensure a safe physical environment within which mediation can take place, and which also successfully mitigate threats to self-determination.

#### IV. The Screening Process

The screening process is somewhat complicated by the fact that predicting behaviour of any sort, including more specifically violent behaviour, is an imprecise science. The mediator is left, nevertheless, with characterizing any violent behaviour that occurred in the past and using that information to ascertain whether there is any present danger. That assessment is then used to determine the extent to which either party is fearful or anxious about the behaviour continuing, and the degree to which any anxiety limits their full and free participation in mediation.

If a violent or abusive relationship is disclosed early in the screening process, different types of information can be gathered about the nature of any violent incidents and about the parties’ present circumstances. A certain amount of elaboration will be necessary in order to understand the extent to which previous violence or abuse in the relationship has affected a person’s ability to be self-determining in mediation. It is recognized, nevertheless, that different mediators not only have different styles and practice preferences, but that they have different levels of experience — and comfort — with exploring aspects of people’s lives that may or may not be directly relevant to the issues being mediated. It is important, therefore, to be self-reflective, and know the point at which it may be best to refer the parties to another professional or resource who can be of assistance.

With this caveat in mind, then, some additional information may need to be gathered if preliminary indications are that there has been a violent or abusive relationship between the parties. The focus of this information gathering is to ascertain whether mediation can proceed safely, and whether the parties can be self-determining in mediation. It may include the following<sup>10</sup>:

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<sup>10</sup> This list has been drawn, largely, from that compiled by Alison Taylor, *op. cit.*, p. 191. Although many authors have addressed this subject, this is presented as one of the more comprehensive and practical lists



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- severity and nature of violent incidents, including, for example whether the violence was mutual or power dominated
  - frequency and timing (past/current)<sup>11</sup> of occurrences
  - nature of the violence, including any lethal force used and access to/use of weapons
  - current levels of contact between the victim and the perpetrator
  - degree to which the person may be willing to flee, and access to alternative living situations and shelters
  - safety plans and physical security within the environment
  - any police or court involvement, and whether there are any court orders in place as a result (such as restraining orders that prohibit indirect and direct contact)
  - any other crimes and victimization, such as stalking or harassment, in addition to a specific violent or abusive event, and
  - whether the person clearly understands that s/he can opt out of mediation without negative repercussions.

The screening process is both part of the regular data gathering activities undertaken by the mediator, and part of the exercise of building rapport with the client. It can and should be designed to suit the style and practice of the individual mediator. Typically, however, it can be described as an iterative process — one that begins with general questions about the manner in which the disputants have managed issues between them in the past, and builds on these as the basis to ask further questions. Depending on the answers to the general questions, the process becomes more specific and probing about particular incidents if there are indications of violence or abuse in the relationship. Although occurring most importantly prior to the start of mediation, a degree of screening or safety checking goes on throughout. Mediators continually watch for cues in body language and verbal presentation, and occasionally get oral confirmation of the participants' comfort level as the mediation proceeds.

It is recognized that, in many cases, clients are referred to mediation by lawyers and that lawyers may be present during mediation sessions. It cannot be assumed, however, that the referring lawyer has necessarily undertaken a screening process or, in any case, that the same kind of assessment regarding self-determination and mediation readiness will have occurred. Although there have been some strides in recent years, studies suggest that there is a lack of awareness within the legal system, generally, of the dynamics and implications of partner violence and abuse.<sup>12</sup> Even if satisfied that the referring lawyer has screened for violence, the mediator may ask different questions or have a different appreciation of how previous violent episodes between the parties may play out or impact self-determination in mediation. It is generally recommended, therefore, that mediators conduct their own safety screen.

Some preliminary information may be accessible from a review of case files or from a referring lawyer or agency. When soliciting details directly from mediation participants, however, there are a number of different methods or mechanisms that mediators use to solicit the information itemized above. These may include any or a combination of the following:

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of screening information for family mediation. Alison Taylor has also compiled a checklist based on these information elements; see Appendix C, p. 426.

<sup>11</sup> Evidence suggests that violence occurring since separation should be weighed more heavily in an assessment of the risk of continuing violence (Ellis and Stuckless, 2006, op cit.).

<sup>12</sup> See: Linda C. Neilson, *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund*. Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick, March 2001.

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- telephone interviews
  - questionnaires, either self-administered or administered by the mediator or a skilled assistant
  - checklists
  - in-person pre-mediation interviews, and
  - mid-mediation prompts or queries.

These methods may be used in conjunction with, or as part of a more comprehensive procedure the mediator is using to examine broader questions of appropriateness for mediation, such as suitability, capacity, or mediation readiness.

### *A. Telephone Interviews*

A telephone call is typically the first point of contact between the mediator and the parties, and it is often where screening begins. Data gathering, generally, about the issues in dispute and the nature of the relationship between the parties begins at this early stage. It is at this point, for example, that information can be sought about whether any restraining or no-contact orders are in place. This alone can lead to further, more in-depth, questions about the nature of any violent episodes, and whether an abusive relationship exists between the parties. These early questions may, indeed, lead the mediator to decline mediation, and to suggest other professional resources to which the party may turn for aid and for resolution of their dispute. Or, it may trigger plans for how the physical environment in which mediation takes place, or the mediation process itself, can be modified to ensure that all concerned are safe over the course of the mediation.

Besides the initial telephone contact, however, a separate, more formal telephone interview — using a pre-determined, structured set of questions — may be arranged for screening and more in-depth data gathering purposes.<sup>13</sup> Particularly if distance separates the mediator from one or both parties in the dispute, a telephone interview may be the most practical means of accessing the necessary information. Prior arrangements should be made so that the person can be alone during the interview. It should be impressed upon them that they must be able to answer the questions freely, without feeling inhibited by someone listening from within or outside the room from which they are calling. They should also make arrangements to have any children cared for during the interview, so that the call can proceed without interruptions or concerns that children may be listening to discussions that may be inappropriate for them.

Telephone interviews are criticized as being less than ideal for screening since, really, there can be no assurances that someone listening in the background is not affecting the way the person is answering the questions. Arranging for the phone call to take place in a location where privacy can be assured — such as a lawyer’s office or the home of a friend or relative, for example — may be a way of addressing this problem. Although there are a number of information and communication technologies that may be suitable for screening — such as web-based video

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<sup>13</sup> Questionnaires or personal interview schedules can be adapted for use over the telephone. For example, the intake form used by the Family Mediation Practicum Project in New Westminster currently contains some preliminary screening questions that are asked of parties either over the phone or in-person at the time parties initially apply for participation in the program. See also “Mediation in the Shadow of Abuse — An Update”, by Deborah Zutter, for screening interview questions that can be used in either telephone or personal interviews (*Family Law Quarterly*. Vol. 20.1, March 2002, pp. 65 – 95. [http://www.debzutter.com/main\\_fs.html](http://www.debzutter.com/main_fs.html).)

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conferencing — the telephone may still be the most practical tool when a face-to-face meeting cannot be arranged prior to mediation. Nevertheless, since there has been no opportunity to observe the non-verbal cues that may prompt further questions, it is usually important to meet with each party individually — if only briefly — prior to bringing them together for a joint meeting.

### *B. Questionnaires*

Questionnaires are another early screening device that can be used to get preliminary information about the nature of the relationship between the parties. They have the advantage of ensuring regularity and consistency in the application of a screening tool for all clients. In addition, the completed questionnaire forms an important written component of the record of mediation for those clients. Since they are typically more structured than an interview might be, however, they can be somewhat limiting if the line of questioning does not anticipate the client's situation — that is, there are fewer opportunities to explore circumstances beyond the questions in the questionnaire.

Questionnaires may be self-administered in a written form by clients, the mediator may administer them orally<sup>14</sup>, or there may be a combination of the two in which the client completes the questionnaire and the mediator reviews it with them in a subsequent interview.<sup>15</sup> The oral format is preferable if client literacy is a concern. And both the oral and interview follow-up formats are preferable to the extent that oral administration is more interactive, offering opportunities to clarify questions or to elaborate if the client wishes to expand on his or her answers. They also offer an opportunity to convey non-verbal information — such as tone of voice or facial expression — which can be important, if subtle, clues to the existence of an abusive relationship between the parties.

The content of the questionnaire may be general — particularly if it is a forerunner to a more in-depth interview process — or it may be both general and specific. Typically, the questionnaire should begin with more general, less intrusive questions, and then become more specific depending on the answers to those general questions. Questionnaire construction is, in itself, a skilled craft, and it is usually a good idea to consult a professional in questionnaire or survey design in the course of developing one — preferably one who has some background in this subject area. The professional literature on this topic is rife with commentary about assessment tools that suffer validity and reliability problems — suggesting that, indeed, questionnaire development is not for the faint of heart.

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<sup>14</sup> For an example of a questionnaire that is administered orally, the *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation: Model Screening Protocol* is used in matters referred to Domestic Relations Mediation by the Michigan Supreme Court (see: Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court; January 2006. <http://www.courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf> )

<sup>15</sup> Questionnaire and interview instruments may yield different results in terms of the degree to which abuse is likely to be reported (see. Henriette Jansen, *Challenges to measuring violence against women*. Geneva Foundation for Medical Education and Research, 2005). [http://www.gfmer.ch/PGC\\_RH\\_2005/Research\\_design\\_in\\_studying\\_violence.htm](http://www.gfmer.ch/PGC_RH_2005/Research_design_in_studying_violence.htm) ) Follow up by a trained interviewer provides an opportunity to solicit important information that may not be disclosed in a written questionnaire.

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### C. Checklists

Checklists are, essentially, an organizing aid for the mediator. They form a list of all the pertinent questions, or areas of questioning, that should be asked in screening a client before and during mediation. Typically, they also provide a means of recording what the answers are to those questions — using tick boxes or open answer fields.<sup>16</sup>

Mediators who are uncomfortable with written questionnaires or with structured interviews are more likely to choose a checklist as an aid to their screening process. Generally, a checklist does not prescribe particular words or a format for questioning, but rather provides a rough guide as to the content and order of the questions that should be asked. Checklists are generally used to support in-person pre-mediation interviews and the ongoing process of screening as the mediation proceeds.

Some mediators use checklists in conjunction with other methods — such as questionnaires or structured interviews — simply as a means of ensuring that all steps in the screening process have been taken, and that any necessary adaptations to the mediation process have been explored. In this way, the checklist acts as much to verify that no stone is left unturned as it does a memory aid in asking the questions.

There are useful safety checklists that can be found in current mediation literature and in the research literature on partner violence. A word of caution is warranted, however. Many of the checklists — and other tools, such as questionnaires and interview schedules — found in the literature are specially designed for research purposes. It will be important, therefore, to ensure that the instrument chosen is suitable for practical mediation purposes.

### D. In-Person Pre-Mediation Interviews

According to the professional literature on this topic, the preferred method for safety screening is to hold an in-person interview with each party, separately, prior to mediation. Holding an in-person interview or meeting with a person is a particularly important step if, for example, a telephone interview or a questionnaire has disclosed instances of abuse or violence in the relationship between the parties. It may also, however, be used as the first step in screening for safety — and be part of the larger data gathering and rapport-building exercise in which the mediator engages as a forerunner to mediation.<sup>17</sup>

Either a structured or unstructured interview procedure may be used, but typically it will follow the general-to-specific pattern of questioning described earlier. A structured interview format adheres to a set of pre-determined questions, in a pre-determined order. The unstructured format entails a rather more *ad hoc* questioning process — possibly guided by a checklist to ensure that all pertinent questions have been asked. Both formats provide participants with the opportunity to elaborate further on the answers they give, and mediators with the opportunity to probe further into a given response. Both formats also provide the mediator with the opportunity to observe

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<sup>16</sup> For a checklist crafted around the list of information elements listed earlier on page 5, see Alison Taylor *op. cit.*, Appendix C, p. 426.

<sup>17</sup> As mentioned earlier in respect of telephone interviews, Deborah Zutter explores the screening interview process and provides interview questions in her article “Mediation in the Shadow of Abuse — An Update”, *Family Law Quarterly*. Vol. 20.1, March 2002, pp. 65 – 95. [http://www.debzutter.com/main\\_fs.html](http://www.debzutter.com/main_fs.html).)

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important non-verbal cues, such as facial expressions, tone of voice, posture, and other body language.

### *E. Mid-Mediation Prompts or Queries*

The skilled mediator is constantly looking for cues from the participants about the level of emotion they are experiencing, and watching for conflict or behaviours that are indicative of that emotion. Screening, therefore, goes on throughout the mediation process. Where a violent or abusive relationship has been disclosed between the parties, however, more proactive steps need to be taken to ensure the safety of participants, and others, over the course of the mediation.

From time to time, the parties should be asked explicit questions that are designed to gauge heightened levels of stress or anxiety about safety, and about anger, as mediation proceeds. These explicit questions or prompts about safety may be part of one of the adaptations discussed in the next section. For example, as part of a discussion about how the parties will conduct themselves at the outset of mediation, there may be provision for separate caucus sessions with each party or some other process by which concerns about safety can be queried. Alternatively, upon observing the associated body language cues, the mediator may call a caucus session to ascertain the feelings of the parties and to determine what interventions, if any, may be necessary.

## V. Declining or Ending Mediation

If violence or abuse is disclosed using any of the above screening techniques, the most important first step is to ensure that the parties are presently safe. If it is determined that there is a continuing and present danger, mediation cannot proceed under these circumstances. Mediation also cannot proceed if it is determined that the barriers to self-determination are sufficiently great that no adaptation to either the physical environment or the process itself can be made to offset those barriers. In both these instances, mediation should be declined — or ended, if it has already begun — and the individuals concerned should be assisted in finding a resource or professional who can help them. In some cases, it may be possible to consider mediation at a later date.

Explaining to clients that mediation is not suitable in their case is an important skill, and can be challenging, particularly if the mediator is required to end mediation once it has already begun. This is especially the case if one or both clients are adamant that the process can and should continue. Recommending other resources that may be helpful, and explaining — in general terms — that mediation is not suitable because of the characteristics of their case, is a place to start. The mediator may also wish to conduct separate meetings with each party, recommend legal counsel, or assist them in developing a safety protocol.

Confidentiality is a key consideration in declining or ending mediation in these instances. Full and honest disclosure of a person's relationship history during the screening process is very often dependent on some assurance of confidentiality. Additionally, it is critical that the person not be put at further risk from an abusive partner because they have expressed safety concerns to the mediator. It will normally be important, therefore, to seek the permission of each party before discussing any details on the nature of those concerns with the other — particularly if an Agreement to Mediate specifying the expectations around confidentiality has not yet been entered into.

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## VI. Adapting the Mediation Environment and Process

If screening reveals that there is no clear and present danger, that both parties are insistent in their wish to proceed with mediation, and that any barriers to self-determination can be overcome, there are a number of adaptations to the mediation process that can be utilized. These include:

- the attendance of counsel and other support persons
- changes in the physical environment in which mediation takes place
- consideration in pre-mediation procedural sessions of ways to manage discomfort or emotion, and
- separate meetings.

These adaptations are intended to ensure a safe and fair mediation environment, and to mitigate barriers to self-determination that may be present because of a formerly violent or abusive relationship between the parties. Any or a combination of these adaptations may be used, and all can be tailored to suit the needs of specific mediation participants.

### *A. The Attendance of Counsel and Other Support Persons*

It is not uncommon for legal counsel to be in attendance during mediation, and they can be very helpful in allaying the safety concerns a party may have. Indeed, if the parties have retained them before mediation begins, some mediators insist that legal counsel be in attendance during the mediation sessions. Not only can they provide legal advice to their clients as issues arise, but their presence may be calming if the discussion becomes volatile. Additionally, in instances where the parties differ in their capacity or power to engage in mediation discourse, the presence of legal counsel can help to compensate for a deficit. It is, of course, important that both parties be represented under these circumstances.

Sometimes safety concerns can also be addressed for mediation participants simply by arranging for a friend or family member to accompany them to and from the mediation sessions. This person may wait outside the mediation room, or there may be an agreement that this individual can stay in the room — but not participate — as the session proceeds. As a word of caution, however, the mediator should consider how best to manage the dynamics created by the presence of non-participants in the mediation room under these circumstances.

### *B. Consideration of the Physical Mediation Environment*

Care and attention to the physical arrangements within the mediation room itself — and immediately outside it and in waiting areas — may be an important feature of providing a safe and fair mediation environment. The question about where the parties would like to sit, vis-à-vis each other during mediation, will sometimes be asked during screening or in a pre-mediation session prior to the start of mediation. To the extent possible, the wishes of the parties in this regard can be respected. But there are other considerations. The importance of seating — and factors such as distance between persons, location, arrangement around a table, and so on — as it

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affects communication in mediation is almost a science on its own.<sup>18</sup> In the context of safety, however, the key factor is whether or not the seating arrangement supports a reduction in any tensions that might lead to hostility.

It is recognized that, in many areas around the province, mediation has to take place in borrowed spaces located, for example, in a church or community centre, and that the mediator often has little control over the physical space under these circumstances. Nevertheless, a review of that space before mediation begins can be instructive. Separate waiting areas — or schedules for the parties to arrive and leave at different times — may be considered, and arranged prior to mediation. The professional literature on this topic suggests that considerable thought can go into objects and their arrangement in the mediation room. Sometimes it is not so much what is in the room, as what is brought to it — flowers or food, for instance, can create a more relaxed atmosphere. It is simply emphasized that all objects in the mediation room should be examined from the point of view of safety, and — once again — the degree to which the room supports a reduction in any tensions that might lead to hostility.

### *C. Considerations in Joint Pre-Mediation Procedural Sessions*

Section 11 of the Society's Standards of Conduct obliges mediators to enter into a formal, written Agreement to Mediate with mediation participants. For most mediators, the meeting to discuss and confirm the content of the Agreement to Mediate is also an opportunity to obtain the parties' joint commitment to a range of different procedural rules for the mediation.

During this session, prior arrangements can also be made to permit a person who has trouble with anger management to leave the room briefly when beginning to feel angry. On occasion, it may be necessary to negotiate a "safety contract" to be in place while mediation is underway. This might include ground rules stipulating no contact with each other, and about how a breach of those rules would be handled. Other matters that deal with possible hostility and anger management can also be discussed, ranging from where the parties would like to sit to how they would like to handle emotional outbursts or interrupting — even devising a non-verbal cue for each party by which they could request a caucus meeting. Using mechanisms that have been developed ahead of time to address these matters can not only have a tension-reducing effect, but they can break timeworn communication patterns between the parties that may have led to hostility between them on previous occasions.

### *D. Separate Meetings*

Caucusing will be familiar to most mediators as a useful means of achieving a range of positive outcomes in mediation. Additionally, as mentioned earlier (see *Mid-Mediation Prompts or Queries*, above), they may provide an opportunity for more directed inquiries about safety concerns over the course of the mediation. Alternatively, if tensions escalate between the parties to an extent that mediation in the same room becomes unproductive, meeting with the parties separately from time to time can be an invaluable adaptation to the mediation process.

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<sup>18</sup> For a helpful overview of space and other non-verbal factors in mediation, see: Amy Starr and Norman Page, "Dealing With Nonverbal Cues: A Key To Mediator Effectiveness". *Mediate.com*, March 2005. <http://www.mediate.com/articles/starrpage1.cfm>.

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Indeed, the entire mediation can proceed with the parties in different rooms — in which case the process becomes “shuttle mediation”. This may be the only way to proceed if, for instance, one of the parties is under a restraining or non-contact order — but both parties, nevertheless, clearly express a wish to settle their dispute by mediation. There must be a very careful reading of the non-contact order, of course, to ensure this process is consistent with the order. If both direct and indirect contact is prohibited, for example, even shuttle mediation cannot proceed.

The mediation could also take place at an entirely different time and place — in which case it becomes a kind of “asynchronous mediation” process. Both shuttle and asynchronous mediation may be the most desirable way to proceed if hostility between the parties so limits the communication process that the issues simply cannot be effectively mediated with the two of them in the same room together. Under all these circumstances, however, a very careful assessment of any barriers to self-determination must be undertaken before proceeding with mediation.

## VII. In Closing

Screening is clearly an important aspect of ensuring the safety of all participants in the mediation process — including the parties, mediators, and any other guests or professionals who may be attending in support of the process. Because of the incidence of family violence, family mediators must be especially vigilant in ensuring a safe mediation environment, and exposing any barriers to self-determination that may exist because of a violent or abusive relationship.

Over the past ten years, there have been changes both in mediation practice and in the thinking about mediation in the event that family violence has been disclosed. Many effective screening and assessment tools have been developed, and are in use in many jurisdictions. As well, some creative adaptations to the mediation process have been tested, and found to successfully address the threats to self-determination that arise because of violent or abusive relationships.

Screening can and should be a natural part of the data-gathering, rapport-building exercise that the mediator always undertakes with parties in preparation for mediation. This paper discusses a number of methods that can be used in screening, along with some of the ways that either the physical environment or the mediation process itself can be adapted to address safety concerns and barriers to self-determination. The suggested screening methods and adaptations are very flexible — they can be used in various combinations and altered to suit the style of the particular mediator, the circumstances of the parties, and the nature of the mediation service being offered.

One of the tributes to mediation as a form of dispute resolution is that it has the power to improve communication, and provide the basis of a healthier means of resolving differences that will remain operative even after mediation has ended. By obtaining the parties’ commitment to keeping and “growing the peace” over the course of a mediation, there is potential for that peace to extend beyond the resolution of a particular dispute to the way people conduct themselves with others on an ongoing basis. If mediation can contribute in this way, not only to the lives of participants but also to the welfare of the larger community of which they are a part, society as a whole can be the beneficiary.



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