

QUESTIONS ABOUT FAMILY COURT DOMESTIC VIOLENCE SCREENING AND ASSESSMENT

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Increasingly, family courts are seeking ways to focus limited resources on cases that require the most intervention, tailor court responses and dispute methods to each case, and account for the real differences among domestic violence cases. One of the means to that end may be the triaging or screening of cases. This article raises a number of questions about screening and urges that they be addressed by courts and communities that are considering whether and how to design a screening protocol. Issues include: How should we define domestic violence for the purposes of screening? Who should carry out the screening? How can we maximize the likelihood that we will fully assess the context of the violence in each case? How should we assess the risks or dangers inherent in the parties' situation? How should a screening effort account for changing circumstances as a case proceeds through the courts? How can information gathered in a screening effort improperly impact subsequent decisions of the court?

Keywords: *screening; triage; family court; divorce; domestic violence; case management; court administration; differentiation*

INTRODUCTION

Court systems in North America are currently being challenged by a decline in the number of judicial officers available to handle an increasing number of family law filings, a diminishing percentage of litigants represented by attorneys, and fewer dollars with which to pay custody evaluators or other court-annexed personnel who could assist the court in its critical fact-finding process.

Simultaneously, the number of cases involving domestic violence, whether they are protection orders, criminal cases, or child custody matters involving allegations of abuse, is rising. Legal system practitioners are being asked to respond in more effective ways to the cases in which abuse is alleged, as well as to cases in which, despite the fact that it has not been alleged, domestic violence is an invisible factor in the lives of the parties. The combination of increasing need and decreasing resources has driven many courts to look for ways to focus their efforts on the cases that require the most intervention and to account for the real differences among domestic violence cases.

Triaging new cases, especially in the family court system, is one solution. Screening for domestic violence clearly must be a part of any such triage effort, as such violence can have a tremendous impact on the victim parent, the children, and on the needs of all family members. A history of domestic violence, especially the kind that is accompanied by coercion, threats, and controls over the victim and children, has real significance for decisions related to child custody and may also determine the efficacy of certain dispute resolution methods or other family court services. Furthermore, screening can have the very desirable

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effect of increasing the safety and autonomy of a battered victim if it has risk assessment and safety planning components.

As research and experience has shown, while there are some generally recognized groupings of perpetrators, such as “batterers” who exhibit controlling and terrorizing behaviors in addition to physical violence, domestic violence can vary from relationship to relationship. The differences between perpetrators can be viewed as contextual (a primarily historical concept) in nature. There can be variation from case to case in: (1) the perpetrator’s intent in using violence and abuse against a partner, with implications for his or her approach to parenting; (2) the meaning which the victim and children take from the violence; and (3) the effect of the abuse on the adult victim and children, including the harm done and the risk of physical and other forms of violence.¹ All cases are not the same and there are many potentially dangerous cases that come into the court system that require very careful intervention. Courts need nuanced and full information in order to determine how cases should be handled, how justice is to be served, and what relief might be appropriate.

This article raises a number of issues that must be addressed by any court or community exploring the possibility of triaging cases or implementing domestic violence screening. The issues can be reduced to three basic questions. First, if one were to screen for domestic violence, what type of actions or effects should one be looking for? Second, how should screening for domestic violence be accomplished or administered? Third, what should be the result of a positive screen for domestic violence, especially in the context of family court?

WHAT IS “DOMESTIC VIOLENCE” FOR PURPOSES OF TRIAGE OR SCREENING?

There are several vantage points from which to define domestic violence for the purposes of screening and triage.

Legal Definitions

The legal definition of domestic violence might be significant for some screening or triage purposes. For example, if state law or court rule directs which parenting arrangements would be appropriate where domestic violence has been found, screening should seek to uncover behaviors meeting those relevant legal definitions.

Context: Purpose, Meaning, and Effect

Domestic violence is defined and understood in other nonstatutory ways that should inform the screening process. The characteristics of a particular perpetrator, including the context within which the violence was used, can be meaningful. For example, it should be significant for most of the court’s purposes, especially child custody or protection order matters, whether the use of violence was part of an overall pattern of coercive control.

In cases involving coercive control, the motive of the perpetrator (not to be confused here with the concept of *criminal* intent or lack thereof) is to achieve control over the victim through the use of several tactics, such as violence, isolation, threats, and stalking. The impact of this violence on the adult victim and the children can be significant and long-standing; even long separation periods might not diminish the effect. The victim of this kind of violence often takes from it the following meaning: her noncompliance with the rules of the perpetrator may have serious consequences. The perpetrator of coercive, controlling

violence is unlikely to stop without interventions that address his beliefs about family and gender roles and unless he is held accountable for the violence and its effects. The victim of coercive, controlling violence often needs advocacy, carefully crafted safety measures, and other relief which increases her autonomy.

In stark contrast to such a case of battering, the perpetrator who has used violence in response to being battered has very different intervention needs. The battered mother, for example, who strikes back at her abusive husband, may well have committed an act of domestic violence according to the terms of a protection order, child custody statute, or criminal law and the legal system may be acting in response to her violence as well as to that of the initial batterer. The intent of this perpetrator's violence may be to resist or to defend herself or a child from violence. The effect of the violence against this "victim-batterer" may be minimal, but can be quite serious, as when a weapon is used. However, the victim of this kind of reactive/responsive violence (the perpetrator of the ongoing violence and coercive controls) has very different safety needs than victims of battering. The meaning of the violence to the victim of reactive/responsive violence may be simply that his partner is angry enough to fight back. Or it could mean that his battering tactics need to be refined in order to permit him to regain control. In any event, the court's response to her use of violence must be contextual in order to be just and effective; her history of being battered by her "victim" should trigger further inquiries into the impact of the violence used by each party.

Because the purpose, meaning, and effect of the violence are critical factors in determining what interventions are most effective and protective, any screening for domestic violence should be designed to explore all three of these aspects of the context for the violence. It must focus not only on the presence of violence, but also on the extent to which violence or threats are accompanied by attempts at subordination, control, stalking, sexual abuse, and coercive rulemaking. These characteristics can only be identified by measuring the nature, frequency, severity and injurious nature of the acts.

Risk

One of the central features of violence in an intimate relationship is the risk associated therewith. Screening for domestic violence must, above all else, seek to determine what risks are faced by the victim. Such an assessment is difficult, but not impossible.² The critical question for those designing assessment tools involves clarifying the kind of risk to be measured. It is widely understood that past domestic violence can be associated with the risk of future assaults, serious injury, or attempts to kill. But past domestic violence may also be associated with a risk of intensified nonviolent coercive tactics such as financial controls and threats of protracted custody litigation or reports to child protective services. Because such tactics are experienced by many victims as more significant and controlling than that of a threat of injury, and because they can have serious effects on children, screening should identify risks in addition to the likelihood of physical injury. An important question is which of these risks of nonviolent abuse are most critical to identify in the screening process.

Existence of Fear Without Allegations of Physical Violence

A final question concerning what should be screened for is this: if one party expresses fear of the other, even where there is no allegation or evidence that acts of physical violence have taken place, should that constitute enough evidence of abuse to trigger a positive

screen for domestic violence? I believe that, if someone expresses fear of assault, the origin and meaning of the fear should be investigated and that fear alone could constitute a positive screen for domestic violence. Depending on the purpose of the screening itself, it would be preferable to include cases than to exclude cases. For example, if the primary purpose of the screening is to determine what kind of dispute resolution might be appropriate for the parties, being overly inclusive would be safer. Where domestic violence has been identified, the process should continue to flesh out its context.

HOW SHOULD SCREENING FOR DOMESTIC VIOLENCE BE ACCOMPLISHED OR ADMINISTERED?

Ongoing Screening

It is quite common that victims decline to disclose the violence against them to court personnel. A 2002 California study of custody mediation cases showed that “(e)ven in cases with a history of relatively severe acts of domestic violence or restraining orders, the parents surveyed often did not raise issues of violence before or during mediation.”³

Experienced battered women’s advocates and lawyers know that it is not unusual to discover critical facts about abuse quite late in the advocate–client relationship. In truth, many victims fear (for good reasons) the possible negative outcomes of such disclosures and will avoid making those that might endanger them until adequate trust in the other party and the process has been established. Screening which is done once, and perfunctorily, is unlikely to be very successful.

Because risk in domestic violence cases is a function of so many factors, it is dynamic, not static. For example, a victim may not be in danger of lethal violence today, but that may change the day she starts dating another man; a batterer might transfer his or her violent attentions to his new partner, putting aside the first one and thereby leaving her at reduced risk. Financial ruin, impending homelessness, or shunning by her community may make a victim even more vulnerable than she was when she was in a violent relationship, but otherwise connected to support systems.

These realities mean that screening must not be treated as a one-time event. Rather, screening must be recurrent and take place at several points in time and at different stages of the case. Each time the parties are given the opportunity to disclose information about violence or risk of violence, they should be assured that they will be asked again. In this way, the parties will be able to make safe, strategic, and informed decisions about disclosure when they are comfortable. Screening could take place at the time of filing and should occur whenever court-annexed services are offered or mandated. Perhaps screening should take place each time a party interacts with the system. Arguably, screening (though somewhat less thorough at this stage) should be administered at each mediation session or each meeting with a custody evaluator.

One cautionary note on the issue of timing: screening must never result in a delay in the administration of justice. For example, if a party approaches the court in a critical situation seeking allowable *ex parte* restraining orders, the court must respond with alacrity.

Sources of Information

There are varying sources of information which could be considered in any triage or screening process. Parties are the primary source for most screening purposes, and it is

clear that any screening or triage must be done in sessions or settings where the parties are physically separated from each other and not within sight or hearing, nor in a public area. Ideally, there should be a comfortable setting in which a party could leave her child with a responsible caretaker in order to do an interview outside the child's hearing if she wished. Language and cultural barriers to communication must be addressed as well if the screening is to be useful for the most vulnerable and disenfranchised of victims.

Court files themselves could be a source for information to be considered in any screening process. Court personnel could check for the existence of existing or prior court cases, local or otherwise, and other proceedings involving the parties, including criminal, civil protection order, child protection/juvenile court, and family law cases. There may be relevant information about the family in these court files. However, there are three concerns related to the review of court files. First, while the search might help to clarify facts by corroborating a party's allegations, the absence of any corroborating court files should not be treated as evidence that the allegations are false or the risk low. Second, court file information should not be considered unless the parties are given an opportunity to respond to issues raised therein. Third, it is possible that a victim may be dissuaded from seeking protective relief or disclosing violence against her if she knew that the court was also going to examine the file in another case, such as her past prostitution conviction matter. It is not clear whether the advantages of searching court records to victims, children, and the courts would outweigh the possible chilling effect.

Who Should Screen

A major screening issue relates to who should administer the screening interviews. The advantages of using court personnel are that they are present in the court building, have knowledge of court processes, and can be directed by the courts. However, conversations with court personnel are not confidential and victims might be reluctant to disclose information because disclosures can endanger victims of ongoing violence, especially if their abusers are threatened by attempts to separate. Court personnel would need to be trained concerning the many issues raised in domestic violence cases in order to do the interviews well. In addition, their skills would need to be sharpened through close supervision and ongoing education.

In the alternative, advocates employed by nongovernmental groups could provide screening. While advocates might need training in court processes, they would not need to be educated about domestic violence and many states afford victims confidential relationships with their advocates. Of course, the results of such a confidential screening interview could only be disclosed to the court with the victim's informed consent. Requiring informed consent prior to disclosure would increase safety for victims but would not necessarily result in better decision making by the court. I believe that every victim should be offered the option of consulting a confidential advocate *before* participating in a court-annexed screening process so that triage will not result in increased danger to the victim.

WHAT IS THE IMPACT OF SCREENING FOR DOMESTIC VIOLENCE?

Screening could be most effective as a tool for courts to determine the track on which a case should be placed as it moves through the courts. As such, it should seek to both identify whether domestic violence is an issue and, if so, what its context may be. Most of

the potential problems associated with screening for domestic violence relate to the impact such screening may have on a victim's access to the courts and legal remedies, but others relate to the potential difficulties of obtaining enough reliable information to give the screening process integrity.

Level of Evidence Triggering a Positive Screening Result

An initial question concerns the level of evidence of domestic abuse required to constitute a positive screening result. For example, should an allegation of physical domestic violence, without other supporting evidence, suffice? For most purposes, such as tracking for alternative dispute resolution (ADR) or other court processes, an allegation alone should cause the case to be scrutinized more thoroughly. Of course, a state's willingness to accept this lower-level triggering of a positive screening result may depend on the impact and repercussions that flow from it. For example, if the screening process is used to feed information to a custody evaluator and, therefore, the implications of a positive screen were great, an allegation alone (depending on the nature of the allegation) may be considered insufficient to constitute a positive screen.

Use of Information Obtained From the Screening Process

Other important questions concern what happens to information gleaned during the screening process. For example, (1) will each party have access to the information disclosed by the other one? If so, disclosures under certain conditions would endanger a victim and the children. Therefore, if the abuser can obtain access, each party screened must be told that this will occur before any questions are asked. (2) Will the information obtained be released to others in the public sphere? If law enforcement will have access, victims should be advised not to disclose anything that would be self-incriminating. If child protective services will have access (and especially where a victim's disclosure that her children were exposed to domestic violence or maltreatment will result in punitive or unproductive interventions), victims should be advised of that fact so that they can make informed choices about what to say and when. (3) Will the information obtained in the screening process or the results (such as any conclusion drawn) be evidence in the case or used for other purposes? Will it be disclosed to the judge hearing the matter? Might not a judge be able to divine that a screening had identified domestic violence in a case simply from the fact that it was screened into a domestic violence track? Or, more worrisome, where a case is screened and no domestic violence is identified, resulting in the case being tracked with other low-conflict matters, what impact would that fact have on the judge later hearing her motion to restrict visitation because of domestic violence? (4) What other purposes will the information be used for? (5) Will the screening file be sealed as a routine basis or on the motion of a party? If so, what is the standard for deciding whether it will be sealed?

Issues for Implementation

In light of these and other questions, any court implementing a screening protocol needs to consider the following questions:

First, what impact will any results have on the access victims have to such relief as civil protection orders? For example, if a person comes to court seeking a civil protection order and is subject to screening (a generally excellent idea if the purpose is to determine the

context for the violence or to identify cases requiring more court resources, such as a custody evaluation), and the screening tool purports to show that the risk to the petitioner is low, would the screener, the court, or the judge be less inclined to grant the requested relief? If the screening seems to show that the children are not at risk, but the petitioner is seeking restrictions on the parenting time of the other parent, might the petitioner be denied the right to a full hearing on her petition? Certainly any screening process must guard against such outcomes.

Second, a major purpose for triaging new cases, generally, is to determine which of the court's services, including dispute resolution methods, might be most appropriate. Domestic violence screening would aid in setting couples on separate tracks, such as for cases with a history of high conflict, cases involving domestic violence, and cases not including domestic violence or high conflict.⁴ Real problems would result, however, from a system in which screening resulted in the denial of access to certain methods or tracks. For example, if a battered mother is screened and, despite her fear, is placed into mediation with her abuser over her objections, the screening process would work more as a detriment than a benefit to her and to the children who are the subject of the dispute.

Third, because so little has been done to develop the questions and techniques for screening and for the differentiation of cases, the paucity of tools represents a major impediment to effective screening at this time. The potential for false positives and false negatives is very high, and a screening protocol would have to minimize these in order to be worth the effort. Even today, however, appropriate tracking, resource allocation, and legal system responses could be provided in cases where there does exist ample evidence of battering in court files and other records.

The final set of issues raised by the prospect of screening relates to the court's access to the results. Even if the court's procedures do not involve the provision of the results to the bench, what law would keep it from being introduced by anyone who sought to use it? If the judge is able to routinely access the results, and many judges understandably seek just such information, will not the information be obtained *ex parte*? If so, does this not raise a number of ethical problems? Each party should have the right to challenge the screening information, its relevance, or its conclusions. Finally, if the court is routinely provided with the results of the screening process, how would that differ from the judge's own inquiry of the parties in the courtroom? No screening process, however otherwise valuable, should become a substitute for the acts of a responsible, engaged, domestic violence informed and aware bench which aims to do justice by finding facts in accordance with the law. The role of a judge as fact finder must remain intact even where that process is supplemented by information that may come from screening.

CONCLUSION

Increasing the safety of the victim and children must be the predominant purpose for, and outcome of, any screening, even over the interests of the court in identifying which cases are more complex than others or are in need of more resources. Therefore, screening processes must be primarily focused on assisting the victim, once identified, in assessing the risk she or he may face. The best tool would be one which is designed in part to inform the victim's decision-making and survival strategies. Finally, any screening processes must include referrals to *confidential* sources, such as advocates for information and conversation about risk, dangerousness and lethality, legal and other service options, as well as the

effect of the violence on children. The other issues raised by this article are numerous and must be carefully considered before implementation of any screening process.

NOTES

1. Ellen Pence & Shamita Das Dasgupta, Praxis International, Inc., *Re-Examining 'Battering': Are All Acts of Violence Against Intimate Partners the Same?* (June 20, 2006), available at http://data.ipharos.com/praxis/documents/FINAL_Article_Reexamining_Battering_082006.pdf (last visited Jan. 12, 2008).

2. See Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658 (2006) (example of screening instrument that identifies statistically significant predictors and links risk to specific mediation interventions).

3. *Domestic Violence in Court-Based Child Custody Mediation Cases in California*, RES. UPDATE (Judicial Council of California, Administrative Office of the Courts, San Francisco, Cal.), November 2002, at 9, available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/resupDV99.pdf> (last visited Feb. 26, 2008).

4. See Peter G. Jaffe, Claire V. Crooks, & Nick Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, available at <http://www.justice.gc.ca/en/ps/pad/reports/2005-FCY-3/index.html> (last visited Jan. 12, 2008).

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