

## Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities

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Collaborative Law (CL) is a unique settlement process increasingly used by family lawyers. In this article, the authors examine the potential of CL to alleviate the impact of gendered differences in bargaining power between family clients. Proponents suggest that the more extensive involvement of lawyers in the CL process can prove more effective in dealing with vulnerable clients than either litigation or family mediation in their current forms. Drawing on the available literature on CL, their own empirical research, and the extensive literature on gender imbalances in mediation, the authors examine the likely impact of both the background norms and unique structural features of CL on the experience of female clients. They argue that CL's potential impact will depend largely on how sensitive lawyers are to the existence of gendered power imbalances, on whether they screen effectively, provide timely and specific legal advice, and work at more effective communication with their clients. Serious concerns are raised regarding the use of the standard clause disqualifying lawyers from acting in subsequent litigation. These concerns heighten the importance of adequate screening into the process.

Le droit familial collaboratif (DFC) est un processus particulier de règlement auquel les avocats spécialisés en droit de la famille recourent de plus en plus souvent. Dans cet article, les auteurs analysent le potentiel que présente le DFC de réduire l'impact des différences liées au sexe sur le plan du pouvoir de négociation entre les familles clientes. Pour les partisans, lorsque l'on s'occupe de clients vulnérables, la participation plus étendue des avocats au processus DFC peut se révéler plus efficace que le contentieux ou la médiation familiale dans leurs formes actuelles. Partant de la documentation disponible concernant le DFC, de leur propre recherche empirique, ainsi que de l'abondante documentation qui traite des déséquilibres liés au sexe pendant les médiations, les auteurs examinent l'impact vraisemblable qu'exercent les normes contextuelles et les aspects structurels particuliers du DFC sur l'expérience des clientes. Ils avancent que l'impact potentiel du DFC dépendra grandement de plusieurs facteurs : la sensibilité des avocats à

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l'existence de déséquilibres liés au sexe, s'ils examinent efficacement les cas, s'ils fournissent des conseils juridiques opportuns et spécifiques, et s'ils s'efforcent d'établir une communication plus efficace avec leurs clients. Les auteurs soulèvent des doutes sérieux concernant l'usage de la clause standard qui interdit aux avocats d'intervenir au cours du contentieux ultérieur. Ces doutes mettent en relief l'importance d'un examen adéquat des cas avant l'entrée dans le processus.

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**THE VAST MAJORITY OF FAMILY LAW DISPUTES** in Canada are settled rather than adjudicated.<sup>1</sup> Restricted legal aid coverage, high litigation costs, and mounting institutional pressures<sup>2</sup> combine to render settlement the most viable option for most family law clients.<sup>3</sup> In negotiating these settlements, the stakes are high since agreements negotiated with legal counsel are difficult to overturn and are likely to affect clients in profound ways long into the future.<sup>4</sup> Against this backdrop, lawyers and clients continue to search for more effective ways to enhance the settlement process. Dissatisfied with both litigation and mediation, many lawyers have recently turned to Collaborative Law (CL) as their process of choice.<sup>5</sup>

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1. Only four per cent of family law disputes in Canada end in contested adjudication. See Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 2d ed. (Toronto: Irwin Law, 2006) at 137, 143.
  2. Lawyers are legally obligated to advise their clients of the possibility of mediation. See *e.g.* *Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3, s. 9(2); *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 11(1)(b). Additionally, pilot mandatory parent education courses strongly encourage settlement for the sake of the children, and judges have been empowered to order mediation. See *e.g.* *The Children's Law Act, 1997*, s. 10; *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, s. 15(1). Pre-trial conferences provide a final pressure point for settlement.
  3. See Lisa Addario, *Getting a Foot in the Door: Women, Legal Aid and Access to Justice* (Ottawa: Status of Women Canada, 1998).
  4. See *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550; *Miglin v. Miglin*, [2003] 1 S.C.R. 303.
  5. For analysis on the emergence of CL, see Julie Macfarlane, "Experiences of Collaborative

In this article, we examine whether and how the distinctive features of CL affect the impact and salience of gender inequalities in the negotiation of family law disputes. First developed by lawyers in the United States, the emergence of CL has been described as a “paradigm shift” in legal practice.<sup>6</sup> One of the key distinguishing features of CL is the role lawyers play in the settlement process. CL seeks to realize the benefits of client participation and interest-based negotiation through the active involvement of lawyers as both facilitators and advocates. Unlike in traditional negotiation or litigation, CL lawyers commit to a set of transparent values that emphasizes the importance of the emotional and participatory needs of their clients, the possibility of creative outcomes, and the interdependence of the parties.<sup>7</sup> In another departure from most settlement processes, CL requires that both lawyers and clients work together in open four-way sessions toward the resolution of their dispute.

The CL process is also typically structured according to rules of engagement and disengagement that are set out in agreements entered into by both clients and their lawyers. The content of these agreements varies between provinces and/or regions, but generally these agreements require open disclosure of all material information within the four-way session and demand that lawyers cease representing their clients if the process fails to generate a settlement. To date, the CL process, in both Canada and the United States, has been restricted largely to the family law area.<sup>8</sup>

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Law: Preliminary Results from the Collaborative Lawyering Research Project” (2004) 1 J. Disp. Resol. 179 [Macfarlane, “Experiences”]; Department of Justice, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* by Julie Macfarlane (Ottawa: Minister of Justice and Attorney General of Canada, 2005), online: <[http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005\\_1/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf)> [Macfarlane, *Emerging Phenomenon*]; William H. Schwab, “Collaborative Lawyering: A Closer Look at an Emerging Practice” (2004) 4 Pepp. Disp. Resol. L.J. 351; Brad Hunter, “The Future of Collaborative Law” [on file with the authors] [Hunter, “Future”]; and John Lande, “Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering” (2003) 64 Ohio St. L.J. 1315.

6. Richard W. Shields, Judith P. Ryan & Victoria L. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* (Toronto: Thomson Carswell, 2003) at 27.
7. For a review of the CL process model, see *ibid.* See also Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (Chicago: American Bar Association, 2001); Barbara Landau, Lorne Wolfson & Niki Landau, *Family Mediation & Collaborative Practice Handbook*, 4th ed. (Toronto: Butterworths, 2005).
8. Lande, *supra* note 5 at 1380, 1317, n. 3.

The impact of CL on gendered inequalities in bargaining power in family disputes has, as of yet, been largely unexplored. In an earlier article, we documented the results of a small-scale qualitative study that examined the experience of eight clients and twelve lawyers in CL.<sup>9</sup> We explored variables affecting client engagement inside the process and identified gendered power imbalances as one factor that led to varying, and often problematic, results. Given the small sample size of this study, our results could not be generalized to the client population at large. In the present article, we undertake a more comprehensive analysis of CL's potential to alleviate gendered differences in bargaining power between family law clients. We focus specifically on gender inequalities and draw to a greater extent on our lawyer interviews<sup>10</sup> to shed further light on the role of the lawyer in CL and on the effect of various procedural norms or constraints unique to the CL process. We also draw more broadly on the academic literature in the dispute resolution field, to the extent that this literature provides a critical lens into the potential risks and dangers of CL for the client population as a whole.

The results of our qualitative study are consistent with established correlations between gender inequalities and well-recognized sources of unequal bargaining power in the context of separation.<sup>11</sup> Much higher rates of spousal abuse have been reported in past or previous relationships than in subsisting ones.<sup>12</sup> In intimate relationships generally, women are more likely than men to

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9. See Michaela Keet, Wanda Wieggers & Melanie Morrison, "Client Engagement Inside Collaborative Law" (2008) 24 Can. J. Fam. L. 145.
  10. We informed all lawyer members of the Association of Collaborative Lawyers of Saskatchewan of our study and then randomly approached members, ensuring equal representation of male and female lawyers from both urban and non-urban practices. We developed interview guidelines based on two interviews with key informants involved in CL in the province. See *ibid.*, where the Interpretative Phenomenological Analysis (IPA) approach that was used to conduct, transcribe, and analyze in-depth telephone interviews is outlined. The following codes are used to identify the transcripts of interviewees: UM1-3 (urban males 1 to 3); UF1-3 (urban females 1 to 3); RM1-3 (rural males 1 to 3); and RF1-3 (rural females 1 to 3).
  11. See *e.g.* Robert H. Mnookin, "Divorce Bargaining: The Limits on Private Ordering" in John M. Eekelaar & Sanford N. Katz, eds., *The Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Butterworth & Co., 1984) 364 at 367-76.
  12. See Maggie Charmant *et al.*, "Women and the Criminal Justice System" in Statistics Canada, *Women in Canada 2005: A Gender-Based Statistical Report*, 5th ed. (Ottawa: Ministry of Industry, 2006) 159 at 160, 165 [*Women in Canada*]. Estimates of domestic violence in some studies of couples mandated to attend mediation in the United States are as high as 80

experience repeated incidents and more serious forms of physical violence<sup>13</sup>—including a higher risk of lethal violence after separation<sup>14</sup>—and are more likely to confront a climate of coercive control.<sup>15</sup>

Women's disproportionate responsibility for childcare<sup>16</sup> and lower earning potential also function as sources of power imbalance. Women are more likely to have both a stronger preference for custody and a greater need for support than men. Economically, women are more likely than men to have lower and often untested earning power<sup>17</sup> and less access to income-generating assets of the marriage. They may also have less accurate information regarding assets and future earning potential, and be more concerned about the cost of prolonged negotiation and litigation.<sup>18</sup>

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per cent of all separating couples. Jennifer P. Maxwell, "Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators" (1999) 37 *Fam. Ct. Rev.* 335 at 337.

13. Karen Mihorean, "Trends in Self-reported Spousal Violence" in Statistics Canada, *Family Violence in Canada: A Statistical Profile 2005* by Kathy AuCoin, ed. (Ottawa: Ministry of Industry, 2005) 13 at 15-17; Melanie Kowalski, "Spousal Homicides" in Statistics Canada, *Family Violence in Canada: A Statistical Profile 2006* by Lucie Ogrodnik, ed. (Ottawa: Ministry of Industry, 2006) 52.
14. Margo Wilson & Martin Daly, "Spousal Homicide" in Statistics Canada, *Juristat*, vol. 14, no. 8 (Ottawa: Ministry of Industry, 1994). In the 2004 General Social Survey, 34 per cent of all women who acknowledged incidents of violence during their relationships reported an increase in the severity or frequency of violence after separation. Mihorean, *ibid.* at 16.
15. M.P. Johnson & J.M. Leone, "The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence against Women Survey" (2005) 26 *J. Fam. Issues* 322 at 325; Evan Stark, "Commentary on Johnson's 'Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence'" (2006) 12 *Violence Against Women* 1019.
16. Katherine Marshall notes that time spent on childcare by fathers with children under nineteen years of age has increased on average since 1986, but it has increased more for mothers (from 1.4 to 2 hours per day) than for fathers (from 0.6 to 1 hour per day) as of 2005. Marshall also indicates that women account for 89 per cent of stay-at-home parents. See Katherine Marshall, "Converging Gender Roles" in Statistics Canada, *Perspectives on Labour and Income*, vol. 7, no. 7 (Ottawa: Ministry of Industry, 2006) 5 at 11. Women part-time workers, as well as women in dual-earner families, are likely to miss more days of paid work for family reasons than men. See Colin Lindsay & Marcia Almey, "Paid and Unpaid Work" in *Women in Canada*, *supra* note 12, 103 at 109-10.
17. Women are still paid less than men on average and remain concentrated in traditional female-dominated fields of employment. See Lindsay & Almey, *ibid.* at 113; Colin Lindsay & Marcia Almey, "Income and Earnings" in *Women in Canada*, *supra* note 12, 133 at 133, 139.
18. For studies in other jurisdictions, see Howard S. Erlanger, Elizabeth Chambliss & Marygold

Gender role socialization further suggests that women might perceive themselves, or be perceived by others, as having less credibility or status in asserting their needs or interests,<sup>19</sup> might tend to prefer cooperation to conflict or strategic negotiation, and might compromise their claims to obtain better interpersonal relations in the longer run.<sup>20</sup> Finally, men are more likely than women to benefit from the difficulty of reliably predicting or quantifying legal entitlements in the area of family or divorce law.<sup>21</sup> These sources of power imbalance can render women in heterosexual relationships particularly vulnerable to settlement pressures and may not be fully offset or muted by other individualized variables.<sup>22</sup>

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S. Melli, "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context" (1987) 21 *Law & Soc'y Rev.* 585. Erlanger, Chambliss, and Melli find that most of the informal settlements in the twenty-five US divorce cases they examined were the product of threats, intimidation, unequal financial resources, emotional fatigue, or external pressure imposed by both judges and lawyers. "The observation that informal processes mirror preexisting power relations between the disputants is highly relevant; in some cases informal settlement simply structures the capitulation of the weaker party" (at 603). For an extensive study of over fifty family law cases in the United Kingdom, see Gwynn Davis, Stephen Cretney & Jean Collins, *Simple Quarrels: Negotiations and Adjudication in Divorce* (New York: Oxford University Press, 1994).

19. Psychological research shows that women are likely to achieve less favourable outcomes in negotiations for reasons that include gendered expectations, implicit stereotype threats, and different measures of personal entitlement. See Tess Wilkinson-Ryan & Deborah Small, "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 *Law & Inequality* 109 at 116-20, 125-26.
20. *Ibid.* at 115-16. A review of empirical studies suggests that the association between women and a co-operative negotiating style is probably not inherent but rather reflects differences in power and status. See Carol Watson, "Gender Differences in Negotiating Behavior and Outcomes: Fact or Artifact?" in Anita Taylor & Judi Bernstein Miller, eds., *Conflict and Gender* (Cresskill: Hampton Press, 1994) 191 at 203, 206. See also Loreleigh Keashly, "Gender and Conflict: What Does Psychological Research Tell Us?" in *Conflict and Gender*, 167 at 176. For discussion on the impact of gender differences in salary and wage negotiations, see Alice F. Stuhlmacher & Amy E. Walters, "Gender Differences in Negotiation Outcome: A Meta-Analysis" (1999) 52 *Personnel Psyc.* 653; Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton: Princeton University Press, 2003).
21. Wilkinson-Ryan & Small, *supra* note 19 at 121-28. Applying negotiation theory, Craig Martin argues that claimants are disadvantaged because of legal indeterminacy in relation to spousal support. See Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56 *U.T. Fac. L. Rev.* 135.
22. See Desmond Ellis & Laurie Wight, "Theorizing Power in Divorce Negotiations: Implica-

There are inevitable limits on the extent to which any dispute resolution process can address inequalities in bargaining power that are rooted in social structures and relations external to the bargaining process. In the private dispute resolution context, critics worry that processes such as mediation will both obscure inequitable outcomes<sup>23</sup> and legitimize them as a product of voluntary consent.<sup>24</sup> Adjudication, however, can similarly reinforce social inequalities. Adjudication can provide a public record, provide a check on the quality of legal representation, and has the potential to generate new substantive norms, but it is also highly constrained in its ability to address poverty and inequality.<sup>25</sup> Not only is litigation dependent on the resources of the disputants, but many judges also remain insensitive to the impact of systemic inequalities<sup>26</sup> and to a host of process-based shortcomings that plague female litigants. These limita-

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tions for Practice” (1998) 15 *Mediation Q.* 227 at 231-32. See also Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks: Sage, 1996) at 64-65 [Ellis & Stuckless, *Mediating*]. Ellis and Stuckless suggest that offsetting factors in individual cases may include differences in commitment to the relationship, one’s youth or attractiveness to other mates, or a personal commitment to gender equality.

23. See Martha Shaffer, “Divorce Mediation: A Feminist Perspective” (1988) 46 *U.T. Fac. L. Rev.* 162; Sandra A. Goundry, Yvonne Peters & Rosalind Currie, *Family Mediation in Canada: Implications for Women’s Equality: A Review of the Literature and Analysis of Data from Four Publicly Funded Canadian Mediation Programs* (Ottawa: Status of Women Canada, 1998) at 39-41.
24. See Wanda Wiegers, “Economic Analysis of Law and ‘Private Ordering’: A Feminist Critique” (1990) 42 *U.T.L.J.* 170; Allison Diduck, *Law’s Families* (London: LexisNexis UK, 2003) at 103-130.
25. On the limits of privatized remedies in family law, see *e.g.* Mary Jane Mossman, “Child Support or Support for Children? Re-Thinking ‘Public’ and ‘Private’ in Family Law” (1997) 46 *U.N.B.L.J.* 63; Margrit Eichler, “The Limits of Family Law Reform, or The Privatization of Female and Child Poverty” (1990) 7 *Can. Fam. L.Q.* 59.
26. Martha Shaffer, “Domestic Contracts, Part II: The Supreme Court’s Decision in *Hartshorne v. Hartshorne*” (2004) 20 *Can. J. Fam. L.* 261; Carol Rogerson, “*Miglin v. Miglin*: They are Agreements Nonetheless,” Case Comment, (2003) 20 *Can. J. Fam. L.* 197 at 225; and Susan B. Boyd, *Child Custody, Law, and Women’s Work* (Toronto: Oxford University Press, 2003). For concerns regarding the failure to account for the impact of abuse in custody and access contexts, see *e.g.* Linda Neilson, “Partner Abuse, Children and Statutory Change: Cautionary Comments on Women’s Access to Justice” (2000) 18 *Windsor Y.B. Access Just.* 115 [Neilson, “Partner Abuse”]; Lorraine Greaves *et al.*, *A Motherhood Issue: Discourses on Mothering under Duress* (Ottawa: Status of Women Canada, 2002); and Martha Shaffer, “The Impact of Wife Abuse on Child Custody and Access Decisions” (2004) 22 *Can. Fam. L.Q.* 85.

tions include litigation's tendency to escalate hostilities and delay a resolution, clients' lack of control or understanding of the proceedings, high financial costs, and use of the process to harass and control.<sup>27</sup>

No dispute resolution method will provide a panacea, but processes may well differ in their potential to mitigate the impact of inequalities and offer other benefits to clients. Advocates of CL have argued that the more extensive involvement of lawyers, among other features, has the potential to deal more effectively with vulnerable clients than current forms of either litigation or family mediation.<sup>28</sup> We agree that CL's potential in managing gender inequalities flows largely from the integration of lawyers in the process because counsel can facilitate the provision of more thorough legal advice and more individualized

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27. Sandra A. Goundry, *Final Report on Court-Related Harassment and Family Law "Justice": A Review of the Literature & Analysis of Case Law* (Ottawa: National Association of Women and the Law, 1998); Goundry, Peters & Currie, *supra* note 23 at 32. Linda Neilson's New Brunswick study documented high rates of continuing litigation in partner abuse cases and also found a pattern of practice in which lawyers, judges, and mediators pressured clients to agree to generic settlements. Neilson attributes this practice to limited resources in the system, particularly where family legal aid is farmed out on a tariff basis. See Linda 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, 2001), online: <<http://www.unbf.ca/arts/CFVR/documents/spousal-abuse.pdf>> [Neilson, *Spousal Abuse*]. A study recently completed at the University of British Columbia reveals that one-third of divorce litigants felt pressured to agree to unfair compromises. Parties who feel disadvantaged are less satisfied with the overall results, and one-quarter of litigants with children felt that custody or access was used to pressure settlement. See Kari Boyle, "Resolving Family Law Disputes – From the Inside Out" (Lecture delivered at *Come Back to the Core*, National Conference of the Conflict Resolution Network Canada, Kitchener, Ontario, 2 June 2004) [unpublished, on file with authors]. For a discussion of the effects of mothers' fears of losing custody on negotiations, see Penelope Eileen Bryan, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999) 47 Buff. L. Rev. 1153 at 1201. Davis, Cretney, and Collins found that women appeared more satisfied with adjudicated outcomes (relative to conventional lawyer-led settlements) in the United Kingdom, but also found that both the settlement and adjudicative processes favoured "whichever party [had] the greater capacity to withhold information and tolerate delay." Davis, Cretney & Collins, *supra* note 18 at 262, 224-27; see also Erlanger, Chambliss & Melli, *supra* note 18.
28. See e.g. Nancy J. Cameron, *Collaborative Practice: Deepening the Dialogue* (Vancouver: The Continuing Legal Education Society of British Columbia, 2004) at 156; Tesler, *supra* note 7 at 9. Shields, Ryan, and Smith tie the deficiencies of mediation to the absence of lawyers from the process. Shields, Ryan & Smith, *supra* note 6 at 30.

negotiating support. This potential, however, will not be fully realized unless lawyers demonstrate high levels of sensitivity to imbalances, utilize effective screening strategies, provide timely and specific legal advice, and work at achieving deeper and more effective client-lawyer communication. In particular, we raise serious concerns regarding the risks arising from the use of the standard disqualification provision (DP), which heightens the importance of building adequate screening into the process.

Given the limitations in current research on the specific impact of CL, the analysis we provide is by necessity speculative or exploratory in nature and is limited to the variables we identify. In Part I, we examine the common goals and background norms of mediation and CL, and provide a summary of the extensive literature on gender imbalances in the context of mediation. In Part II, the potential risks we identify are evaluated in light of the unique structural features of the CL process.

## I. EVIDENCE OF OUTCOMES AND BACKGROUND NORMS

Although CL agreements vary across communities of practice, the background norms and goals of CL closely mirror those of family mediation.<sup>29</sup> Both processes follow the basic stages of an interest-based model: identifying issues, exploring interests, generating options, and reaching agreement.<sup>30</sup> Both CL and family mediation strive to return ownership of the problem—and the solution—to the clients and, through future-oriented, co-operative frameworks, seek to avoid strategic positional bargaining, improve communication, and facilitate emotional healing.<sup>31</sup> Proponents of both processes claim similar benefits: psychological empowerment, emotional healing, durable agreements, and, in the best of cases, personal transformation.<sup>32</sup>

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29. For sample agreements, see Tesler, *ibid.* at 143; Shields, Ryan & Smith, *ibid.* at Appendix E; and Landau, Wolfson & Landau, *supra* note 7 at 406.

30. Roger Fisher, William Ury & Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin, 1991). See also Tesler, *ibid.*; Shields, Ryan & Smith, *ibid.* at 127; and Landau, Wolfson & Landau, *ibid.*

31. See references *supra* note 7.

32. While there is currently insufficient evidence regarding the substantive outcomes of the CL process (see below, notes 112-113 and accompanying text), collaborative lawyers in our study believed that CL generated such benefits. For an analysis of the benefits of mediation, see Joan B. Kelly, “Family Mediation Research: Is There Empirical Support for the Field?” (2004)

Researchers have had more opportunity to evaluate the outcomes of mediation given its long-established use in the family law field; yet, even in this context, alleged benefits have not been conclusively established or universally acknowledged. Connie Beck and Bruce Sales, for example, question the extent to which existing studies of mediation use sound methodologies<sup>33</sup> and point out that, when separated by gender, the results of empirical studies of satisfaction rates are mixed.<sup>34</sup> Empirical assessments of substantive outcomes are sparse, likely due to the difficulty of controlling for all salient variables—and again the results are mixed.<sup>35</sup> Research also overlooks the effect of mediation on distinctive groups of women, such as racialized women or homosexual women.<sup>36</sup>

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- 22 Conflict Resol. Q. 3; Marsha Kline Pruett & Tamara D. Jackson, "Perspectives on the Divorce Process: Parental Perceptions of the Legal System and its Impact on Family Relations" (2000) 29 J. Am. Acad. Psyc. & L. 18; and Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994). For critiques of this perspective, see Carrie Menkel-Meadow, "The Many Ways of Mediation" (1995) 11 Negotiation J. 217; Michael Williams, "Can't I Get No Satisfaction? Thoughts on *The Promise of Mediation*" (1997) 15 Mediation Q. 143.
33. Studies do not consistently define rates of satisfaction or control for important differences between groups such as the timing of comparisons, the type of issues settled, and variations in mediation programs and approaches. See Connie J.A. Beck & Bruce D. Sales, *Family Mediation: Facts, Myths, and Future Prospects* (Washington: American Psychological Association, 2001) at 78, 82-90. Much of the empirical research on family mediation relates to court-connected mediation programs both in the United States and Canada. See e.g. Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada* (Edmonton: Alberta Law Reform Institute, 1994), online: <<http://www.law.ualberta.ca/alri/docs/rp020.pdf>>.
34. A California study on custody disputes found that fathers were more likely to feel that mothers had an unfair advantage in mediation as opposed to litigation. In contrast, a Virginia study found that fathers felt that their rights were more likely to be protected in mediation as opposed to litigation, and that mothers reported less satisfaction in mediation. See Beck & Sales, *ibid.* at 88-90. Kelly suggests that these differences likely reflect different legal rules related to custody in the two jurisdictions. Kelly, *supra* note 32. In Neilson's qualitative study of publicly-funded mediation and lawyer negotiation services, clients who had experienced abuse complained of both processes in much the same terms, particularly in relation to the non-recognition of abuse and the pressure to abandon claims and accept generic settlements. Neilson, "Partner Abuse," *supra* note 26.
35. For a discussion of outcome patterns, see Kelly, *ibid.* In terms of financial outcomes, see Jessica Pearson, "The Equity of Mediated Divorce Agreements" (1991) 9 Mediation Q. 179. Despite recognizing that more research was needed, Pearson found that mediated outcomes generated results similar to adjudicated outcomes.
36. See Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale

Drawing on the largest longitudinal study of mediation conducted in Canada, Desmond Ellis and Noreen Stuckless found that women in a voluntary, publicly-funded mediation sample were more likely to be satisfied with child support alone, but women in the lawyer negotiation sample, funded through legal aid tariffs, more often obtained sole legal custody.<sup>37</sup> They also found that differences in income, or the experience of abuse, did not significantly correlate with outcomes, which considered access, custody or property division, and levels of child support among wives in both samples.<sup>38</sup> It is important to note that couples with “power imbalances great enough to adversely influence the bargaining capacity of the partners” were screened out of the mediation sample at intake and that abusive behavior was consistently monitored by trained mediators throughout the process.<sup>39</sup> Ellis and Stuckless also did not assess the impact of either process on spousal support. It is unclear with what specificity they examined property division because the economic differences between parties did not appear to have been great in either sample. In a subsequent article, Desmond Ellis and Laurie Wight note that available evidence “strongly suggests” that “[economic] resources ought to be included in a theory of interpersonal power in divorce mediation.”<sup>40</sup>

In its findings on the question of custody, the Ellis and Stuckless study is consistent with others that suggest a tendency among mediators to favour joint custody or shared parenting.<sup>41</sup> Critics have complained that this tendency re-

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L.J. 1545 at 1579-81 (discussing its impact on black women). See also William Manson Emnett, “Queer Conflicts: Mediating Parenting Disputes within the Gay Community” (1997) 86 *Geo. L.J.* 433; Hilary Astor, “Mediation of Intra-Lesbian Disputes” (1996) 20 *Melbourne U.L. Rev.* 953.

37. Ellis & Stuckless, *Mediating*, *supra* note 22 at 85-86.

38. *Ibid.* at 69, 71.

39. *Ibid.* at 77. It is not clear whether these couples were eventually screened out; however, the authors note that the mediators consciously attempted to expand the support services available to weaker parties. More women in the lawyer negotiation sample also experienced abuse within six months of separation, but this was not found to be statistically significant in explaining the differences between the samples. Ellis and Stuckless did find a higher incidence of post-processing abuse in the legal negotiation sample, an outcome they attributed largely to the impact of hurtful affidavits.

40. Ellis & Wight, *supra* note 22 at 228.

41. A disproportionate number of mediators in the United States favour joint custody in principle. See Jessica Pearson, “Mediating When Domestic Violence is a Factor: Policies and

flects a bias on the part of mediators who present their primary concerns as emotional healing, equal participation, and minimal conflict, and are insensitive both to the impact of the primary care role performed disproportionately by women and to issues of abuse.<sup>42</sup> In 1988, Martha Fineman argued that the use of family mediation and the growing influence of social workers and psychologists had precipitated a shift in substantive norms toward shared parenting and had dramatically reallocated power between mothers and fathers.<sup>43</sup> While this emphasis on contact and joint custody has since become increasingly evident in all legal modes of dispute resolution, including lawyer-to-lawyer negotiations, pre-trial conferences, and adjudicated outcomes, it is likely intensified through the collaborative frame of mediation.

Early research into CL has shown high settlement rates<sup>44</sup> but has also raised red flags about a similar “harmony agenda”<sup>45</sup> that is linked to a specific conception of what “healthy family transitions” entail.<sup>46</sup> Prominent CL authors, such as Nancy Cameron and Pauline Tesler, emphasize the importance of de-escalating conflict and acrimony for the sake of the children, promote the importance of contact with each parent through the restructuring of the post-

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Practices in Court-Based Divorce Mediation Programs” (1997) 14 *Mediation Q.* 319 at 320.

42. See *e.g.* Grillo, *supra* note 36 at 1568, 1572-81, 1594; Goundry, *supra* note 27 at 48-49; and Penelope E. Bryan, “Killing Us Softly: Divorce Mediation and the Politics of Power” (1992) 40 *Buff. L. Rev.* 441 at 492. This preference can reinforce the husband’s control over important decisions without changing the day-to-day responsibility for children and undermine both the mother’s bargaining power in relation to financial issues and her legitimate concerns about parenting matters. See Boyd, *supra* note 26 at 123, 223. The pro-contact preference relies heavily on selected empirical studies on child development that have been the subject of critical commentary. See Neilson, “Partner Abuse,” *supra* note 26 at 122-24; Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26 *C.F.L.Q.* 285; and Carol Bruch, “Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law” (2006) 40 *Fam. L.Q.* 281.
43. Martha Fineman, “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking” (1988) 101 *Harv. L. Rev.* 727. For a critique of the move towards privately negotiated collaborative parenting in the United Kingdom, see Bren Neale & Carol Smart, “‘Good’ and ‘bad’ lawyers? Struggling in the shadow of the new law” (1997) *J. Soc. Welfare & Fam. L.* 377.
44. Schwab, *supra* note 5 at 375. It was found that 87.4 per cent of clients settled in his sample.
45. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 35, 80.
46. *Ibid.* at 26, 49, 71-85.

divorce family, and portray the adversarial system largely as a catalyst for increased hostilities.<sup>47</sup> Within such a normative vision, the parties' interests are focused on maintaining a good relationship between parents, promoting future cooperation, and settling promptly without protracted debate.<sup>48</sup>

In some respects, CL goes further than mediation to de-emphasize adversarial tendencies and defuse conflict. In addition to the DP, which intensifies the commitment to settlement, CL requires a more overt commitment to the concept of teamwork: "the lawyers and clients work together as a team of equals, all pulling together on the same side of the problem."<sup>49</sup> The commitment of each party's lawyer to these ideals has the potential to reinforce the collaborative framework to a greater extent than typically occurs in mediation.

This "harmony agenda" can also affect women differently than men. On the one hand, CL's value orientation may strongly validate negotiation behaviour or an "ethic of care" that, some argue, is more common to women, both as clients and lawyers.<sup>50</sup> To the extent that they do prefer collaborative negotiation, CL might provide some comfort to women and simultaneously influence or put pressure on men to adopt a more co-operative, conciliatory style.<sup>51</sup> Ultimately, the magnitude of this benefit depends on how successful the CL process is in encouraging men to abandon strategic, adversarial bargaining. While CL's formalized collaborative approach may be more successful in this respect than

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47. Cameron, *supra* note 28 at 71-85; Tesler, *supra* note 7 at 12, 19, 33-34, 74-75. See also Shields, Ryan & Smith, *supra* note 6 at 159-69.

48. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 34, 49.

49. Shields, Ryan & Smith, *supra* note 6 at 39.

50. See Carrie Menkel-Meadow, "What's Gender Got to Do with it? The Politics and Morality of an Ethic of Care" (1996-97) 22 N.Y.U. Rev. L. & Soc. Change 265. A Canadian study revealed that female lawyers in family law were more likely to describe their styles as more conciliatory than their male counterparts. See Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001). For further discussion on the relationship between gender and lawyering styles, see *e.g.* Lynn Mather, "Gender in Context: Women in Family Law" in Ulrike Schultz & Gisela Shaw, eds., *Women in the World's Legal Professions* (Portland: Hart, 2003) 33; Deborah L. Rhode, "Gender and Professional Roles" (1994-95) 63 Fordham L. Rev. 39; and Carrie Menkel-Meadow, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" (1989) 14 Law & Soc. Inquiry 289.

51. See *e.g.* Keet, Wiegiers & Morrison, *supra* note 9 at 169-71, 174-76, where Mary's story suggests that the process did have a transformative effect.

mediation, if unsuccessful, the process may simply induce a false sense of security in women. As Trina Grillo indicates in relation to mediation: “[i]f she is easily persuaded to be co-operative, but her partner is not, she can only lose.”<sup>52</sup>

The emphasis on familial welfare can also pressure weaker parties, typically mothers, to abandon legitimate claims to reduce conflict and obtain closure.<sup>53</sup> The emphasis on harmony may be particularly problematic for victims in abusive relationships since it can compound an abused spouse’s reluctance or impaired ability to communicate.<sup>54</sup> Linda Neilson’s New Brunswick study<sup>55</sup> found evidence that both mediators and lawyers failed to recognize abuse and pressured clients to accept generic settlements. Case studies of mediation in England also suggest that allegations of violence, even if identified through screening instruments, can often be sidelined, marginalized, and eventually discounted.<sup>56</sup> In her study of CL, Julie Macfarlane notes one instance where a client could not admit, in the joint four-way meeting, that she was afraid to go home that night because the parties were cohabiting.<sup>57</sup>

As is common in mediation, the Collaborative Law Contract in Saskatchewan specifies that “unnecessary discussions of past events are to be avoided.”<sup>58</sup>

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52. Grillo, *supra* note 36 at 1603.

53. For discussion of the role of familial ideology in child custody disputes, see Boyd, *supra* note 26.

54. Beck & Sales, *supra* note 33 at 28-31; Rosemary Hunter, “Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law” (2003) 30 *J.L. & Soc’y* 156 at 172 [Hunter, “Adversarial Mythologies”]. See also Jessica Pearson, “Ten Myths about Family Law” (1993) 27 *Fam. L.Q.* 279 at 288.

55. Clients also complained about the use of mediation to perpetuate abuse and the lack of investigation regarding the best interests of the children. See Neilson, *Spousal Abuse*, *supra* note 27 at 151. In Neilson’s study of 147 court cases involving alleged spousal abuse, mothers failed to contest access in 58 per cent and custody in 8 per cent of the cases. See Neilson, “Partner Abuse,” *supra* note 26 at 141-49.

56. See David Greatbatch & Robert Dingwall, “The Marginalization of Domestic Violence in Divorce Mediation” (1999) 13 *Int’l J.L. Pol’y & Fam.* 174. Greatbatch and Dingwall examined audio-recordings of 121 divorce mediation sessions and found that “[t]he process of marginalization we have identified is a very general phenomenon” (at 185). See also Sara Cobb, “The Domestication of Violence in Mediation” (1997) 31 *Law & Soc’y Rev.* 397, who examined thirty mediation sessions and concluded that “violence appears with significant frequency ... [and] when it does appear, it is domesticated with significant regularity” (at 436).

57. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 35.

58. Article 4.3, Model Saskatchewan Collaborative Law Contract (Adopted by Collaborative Lawyers of Saskatchewan, Inc.) [Saskatchewan Contract].

This exclusive orientation toward the future can suppress not only the disclosure of past domestic violence or abuse,<sup>59</sup> but also the expression of negative feelings that may be necessary for empowerment or healing.<sup>60</sup> Although collaborative strategies typically acknowledge emotions, critics argue that they can discourage the expression of anger, which, in the context of abuse or violence, can silence a spouse who should otherwise be speaking out.<sup>61</sup> Tesler, a leading proponent of CL, suggests that lawyers should help clients avoid their “shadow states,” which are described as “the temporary upwelling(s) of intense and primitive emotions such as fear, rage, grief, or shame.”<sup>62</sup> In an effort to preserve the ideal of the “higher self,” CL lawyers may thus inadvertently suppress their clients’ anger and other intense emotions that can legitimately arise from abuse.

Given these substantive and co-operative norms, CL can be expected to generate concerns regarding gender-based power imbalances that are similar to those cited in the mediation context. The question, to be examined in the next part of this article, is how effectively the unique procedural framework of CL can address or moderate the impact of such power imbalances.

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59. Even where allegations of violence do surface, they may be discounted largely because they cannot be substantiated within informal dispute resolution processes, as they would be in an expedited investigatory and adjudicative process. See Hunter, “Adversarial Mythologies,” *supra* note 54 at 165-66. This turn away from fact finding is also described as a retreat from justice. See *e.g.* Ronalda Murphy, “Is the Turn toward Collaborative Law a Turn Away from Justice?” (2004) 42 Fam. Ct. Rev. 460. See also Cobb, *supra* note 56.
60. In our exploratory research, for example, two clients had not explicitly disclosed emotional abuse to their lawyers. In another case, a client attended a stand-alone, four-way meeting despite not having signed onto the entire CL process. The client discussed her concerns about the relationship’s abusive dynamic with her lawyer but still felt the pressure to suppress her honest reactions during the process in the interest of maintaining civility. She did not feel permitted to “stand up” for herself and experienced pressure to continue old patterns, where she had to “eat a lot of stuff and not respond.” Keet, Wiegiers & Morrison, *supra* note 9 at 172, 186-87, 182-83, 198. Shelley Day Sclater argues that all clients have a need to make sense of the past—a psychological need for resolution that may necessitate the expression of negative feelings and the attribution of blame. Shelley Day Sclater, “Narratives of Divorce” (1997) 19 J. Soc. Welfare & Fam. L. 423.
61. This can be identified as a risk in mediation. See Grillo, *supra* note 36 at 1572-81; Lydia Belzer, “Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process” (2003) 5 Loy. J. Pub. Int. L. 37 at 48.
62. Tesler, *supra* note 7 at 80.

## II. STRUCTURAL FEATURES OF COLLABORATIVE LAW

### A. ENTRENCHMENT OF LAWYERS INTO THE PROCESS

In family mediation, clients typically consult lawyers only on a periodic basis, outside sessions or after a tentative agreement has been reached.<sup>63</sup> In CL, by contrast, the lawyers of each client are actively involved and jointly part of the process from the outset. One of the principal arguments advanced by scholars,<sup>64</sup> lawyers,<sup>65</sup> and clients<sup>66</sup> who favour CL is that the ongoing involvement of lawyers can effectively address power imbalances. In the mediation context, Jane Murphy and Robert Rubinson similarly argue that legal advocates can act as “power enhancers and equalizers,” as “they can speak on behalf of clients, evaluate proposed solutions in light of applicable legal norms and the specific experiences of the client, and, if necessary, suggest opting out of the mediation itself if it is not serving the interests of the client.”<sup>67</sup>

It is not entirely clear why family mediation has developed without the continuous presence of legal advocates. The emphasis on therapeutic interven-

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63. Macfarlane, “Experiences,” *supra* note 5 at 182; Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 72; Tesler, *ibid.* at 97; D. Todd Sholar, “Collaborative Law – A Method for the Madness” (1993) 23 Mem. St. U. L. Rev. 667 at 674; and John Lande & Gregg Herman, “Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law or Cooperative Law for Negotiating Divorce Cases” (2004) 42 Fam. Ct. Rev. 280 (highlighting this distinction between process options). Note that the non-involvement of lawyers appears to be a convention unique to family law.
64. Sholar, *ibid.*; Tesler, *ibid.* at 9, 225, 674-75; Hunter, “Future,” *supra* note 5; Cameron, *supra* note 28 at 156; and Shields, Ryan & Smith, *supra* note 6 at 30 (tying the deficiencies of mediation to the absence of lawyers from the process).
65. Brett Raymond Degoldi, *Lawyers’ Experiences of Collaborative Family Law* (LL.M. thesis, University of British Columbia, 2007) at 123-24 [unpublished, on file with authors]. Many lawyers in Degoldi’s study argued that mediators were limited in their ability to manage power imbalances without being perceived as biased.
66. A group of clients in the Macfarlane study deliberately chose CL over mediation because they believed CL would reduce the risk of poor and unequal outcomes. See Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 71-72. One of the clients in our study, Barbara, expressed similar hopes. See Keet, Wieggers & Morrison, *supra* note 9.
67. Jane C. Murphy & Robert Rubinson, “Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens” (2005) 39 Fam. L.Q. 53 at 66. See also Beck & Sales, *supra* note 33 at 53, 63 (noting that according to one qualitative study, mediation with a lawyer provided the best scenario).

tion in the divorce context<sup>68</sup> and the lack of a functional role for lawyers inside the mediation process may have had some impact.<sup>69</sup> From a practical standpoint, family mediators may not have encouraged lawyer participation since lawyers who lack significant training in dispute resolution and have not internalized co-operative norms can critically undermine the possibility of collaboration. Perhaps one of the most influential factors weighing against lawyer participation has been the cost to clients.

CL can also increase costs relative to the cost of a single mediator. William Schwab's survey in the United States produced a profile for CL clients that was largely "white, middle-aged, well-educated and affluent."<sup>70</sup> Surveys conducted by collaborative organizations also suggest that CL is significantly more costly than mediation.<sup>71</sup> These studies, however, do not indicate whether the costs of legal advice have been factored into the mediation tab, nor do they control for factors such as degrees of conflict or complexity.

The recruitment of lawyers into the heart of the dispute resolution process in CL would appear to increase protection for vulnerable clients. However, a number of assumptions underlie this conclusion: that lawyers can effectively determine whether and how clients ought to participate in collaborative processes, that lawyer involvement increases the client's access to legal information, and that lawyers can provide clients with the right balance of self-determination and negotiation support. The following discussion explores the extent to which these assumptions are likely to be true in the CL context.

#### 1. SCREENING FOR POWER IMBALANCES AND ABUSE

Despite the development of protocols and screening tools, there are still no clear criteria among mediators for determining "what a power difference is and

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68. See Fineman, *supra* note 43.

69. Douglas H. Yarn, "The Attorney as Duelist's Friend: Lessons from the Code Duello" (2000) 51 Case W. Res. L. Rev. 69 at 70.

70. Schwab, *supra* note 5 at 373.

71. A Boston Law Collaborative group analyzed 199 of their own divorce cases and found the average cost of mediation to be \$6,600 as compared to \$19,723 for CL. See David Crary, "Keen Interest in Gentler Ways to Divorce" *Associated Press* (18 December 2007), online: <<http://www.collaborativelawdirectory.com/detail/14/keen-interest-in-gentler-ways-to-divorce-guardian-unlimited.html>>. In qualitative studies, clients have also complained that the CL process has proven to be longer and more expensive than they anticipated. See Macfarlane, *Emerging Phenomenon*, *supra* note 5 at *Postscript*; Keet, Wiegers & Morrison, *supra* note 9.

when it is occurring.<sup>72</sup> Mediation literature addresses power differentials caused by abuse and individual incapacity but does not adequately acknowledge inequalities arising from socialized gender roles, differences in earning power, and contributions to domestic labour that affect the bargaining process.<sup>73</sup> Mediators largely agree that allegations of domestic violence require “special treatment”<sup>74</sup> and support the screening out of cases involving systematic patterns of control—physical, emotional, or economic abuse—particularly where women victims are fearful or abusive partners seek to hide, deny, or minimize abuse.<sup>75</sup> Although academic discussion suggests that mediators have a fairly high level of consciousness of domestic violence, empirical research suggests that mediators in practice often fail to screen for it.<sup>76</sup> Critics argue that mediators

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72. Beck & Sales, *supra* note 33 at 48. See also Goundry, Peters & Currie, *supra* note 23.

73. See Grillo, *supra* note 36; Bryan, *supra* note 42; and Goundry, *supra* note 27 at 40-41.

74. Murphy & Rubinson, *supra* note 67 at 54.

75. *Ibid.* at 58; Greatbatch & Dingwall, *supra* note 56 at 187. For examples of situations where there is a history of serious injury or use or threat of weapons, evidence of fear on part of victims, or prioritizing the abuser’s needs, see Ann L. Milne, “Mediation and Domestic Abuse” in Jay Folberg, Anne L. Milne & Peter Salem, eds., *Divorce and Family Mediation* (New York: Guilford Press, 2004) 304 at 324. Desmond Ellis and Noreen Stuckless note that there is no evidence that abused women in mediation are more likely to suffer violence post-separation than abused women in other processes. They propose a risk management instrument to screen for safety risks (but not apparently for the risk of unfair outcomes). See Desmond Ellis & Noreen Stuckless, “Separation, Domestic Violence and Divorce Mediation” (2006) 23 Conflict Resol. Q. 461 [Ellis & Stuckless, “Separation”]. For strategies for dealing with abuse inside mediation, see Beck & Sales, *supra* note 33 at 50.

76. This appears to be particularly true of court-mandated mediation. See Nancy E. Johnson, Dennis P. Saccuzzo & Wendy J. Koen, “Child Custody Mediation in Cases of Domestic Violence” (2005) 11 Violence Against Women 1022. See also Neilson, *Spousal Abuse*, *supra* note 27; Alexandria Zylstra, “Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators” (2001) J. Disp. Resol. 253; and Beck & Sales, *ibid.* at 52. Research in England revealed the following false assumptions about domestic violence on the part of some mediators: that domestic violence was mutual or “as likely to be from women to men as from men to women,” and that the violence would stop as a result of separation, or was not of concern to children of the relationship. See M. Hester, C. Pearson & L. Radford, *Domestic Violence, A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (Bristol: Policy Press, 1997), cited in Felicity Kaganas & Christine Piper, “Divorce and Domestic Violence” in Shelley Day Sclater & Christine Piper, eds., *Undercurrents of Divorce* (Aldershot: Dartmouth Publishing, 1999) at 198. See also Greatbatch & Dingwall, *ibid.* at 185.

underestimate the frequency and impact of power imbalances and rely too heavily on “quick-fix power balancing techniques.”<sup>77</sup>

Available research suggests that lawyers are not necessarily more conscious of unequal power or more prepared to deal with screening than mediators. Neilson’s extensive research of case law, court files, and interview data in New Brunswick in 2001 revealed that evidence of abuse was siphoned off continuously throughout the legal process, possibly because lawyers either failed to detect abuse or underestimated or discounted its existence.<sup>78</sup>

In the CL literature, issues of power and abuse are only beginning to be acknowledged. *Collaborative Family Law* includes only a few paragraphs on power issues;<sup>79</sup> *Collaborative Practice: Deepening the Dialogue* devotes more attention to these issues but acknowledges that the comments offer only a “starting point.”<sup>80</sup> Basic CL training sessions may also pay little attention to screening issues, providing no template or systematic screening checklist and no training on how to conduct a screening interview.<sup>81</sup>

Most of the twelve lawyers we interviewed in 2006 offered CL as a matter of course, leaving it up to their clients to decide. Although some lawyers indicated that they would not recommend the process in limited circumstances, there was no consensus either on the range of relevant factors or on what would constitute a power imbalance<sup>82</sup> sufficient to trigger that advice. For example, in

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77. Goundry, Peters & Currie, *supra* note 23 at 45, 56, and 81.

78. Neilson, *Spousal Abuse*, *supra* note 27. Neilson also argues that lawyers and judges may be conceptualizing abuse in terms of discrete incidents and abuser intention, overlooking the history of the relationship, and the consequences of abuse. See Neilson, “Partner Abuse,” *supra* note 26 at 129-32, 140-46.

79. Shields, Ryan & Smith, *supra* note 6 at 56. For suggestions for a broader assessment of the suitability of CL, see Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 66. A number of the articles written for practitioners also address this briefly. See *e.g.* Landau, Wolfson & Landau, *supra* note 7.

80. Cameron, *supra* note 28 at 156. Cameron’s list of screening questions does not include the more specific questions on power and control dynamics or type, severity, and frequency of violence and abuse that are often needed to elicit disclosure.

81. See *e.g.* Janis M. Pritchard, *Collaborative Law Training Materials: Solving conflict with a collaborative process* (Medicine Hat: Palliser Conflict Resolution, 2002). A basic training session attended by the authors in December 2007 also did not address how to identify or screen out inappropriate cases.

82. Examples cited in the lawyer interviews included lack of trust or financial disclosure during

suggesting that everyone had “some power,” one lawyer who was trained in CL essentially denied the salience of systemic power differentials.<sup>83</sup>

In 2005, Brett Degoldi conducted extensive interviews with twenty CL lawyers in Vancouver.<sup>84</sup> Although most lawyers in both Degoldi’s and our study tended to acknowledge economic imbalances, they appeared to focus concern on constraints such as the lack of information or on obvious manifestations of incapacity.<sup>85</sup> On the one hand, such a focus makes sense. Lawyers cannot change their clients’ external resources, but they can attempt to influence their clients’ degree of participation, perceptions of the issues, and behaviour within the process. On the other hand, this individualized focus on capacity and process can desensitize lawyers over time to the more subtle impact of systemic inequalities which often arise from economic dependencies, entrenched gender roles, or the long-term corrosive impact of abuse, all of which may render the process unsuitable for individual clients.<sup>86</sup>

In both studies, lawyers who acknowledged the existence of power differentials seemed to believe that these could be remedied through strategies such as information sharing and joint management by the lawyers.<sup>87</sup> More than one

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the marriage, unwillingness or inability to communicate, emotional abuse and domestic violence, substance abuse, severe bargaining disadvantage, and an emergency (for example, child abduction).

83. RF1.

84. Degoldi, *supra* note 65.

85. One lawyer described it precisely in these terms: the important questions were how the parties functioned and whether one was scared or unable to process or reason (RF2). This approach appears similar to the emphasis on battered women’s syndrome in the context of criminal law in the sense that both approaches tend to identify the dominant issue as one of women’s psychological capacities rather than their objective constraints.

86. In other words, the focus on process can “naturalize” gender inequalities, an outcome that may be reinforced by the “hegemonic discourse of neutrality and equality” within family law. See Bryna Bogoch & Ruth Halperin-Kaddari, “Divorce Israeli Style: Professional Perceptions of Gender and Power in Mediated and Lawyer-Negotiated Divorces” (2006) 29 *Law & Pol’y* 137 at 154. See also Alison Diduck, “Dividing the Family Assets” in Sclater & Piper, *supra* note 76, 209 at 218-19.

87. Six lawyers in our study expressed this view, although one acknowledged the possibility that CL was being oversold. “There’s a desire ... to make all cases, or most cases, fit into the CL framework. ... In some cases, we may have been a little too eager” (UM1). One lawyer in Degoldi’s study indicated that he or she could not create a level playing field, only a safe one. See Degoldi, *supra* note 65 at 143, 128.

lawyer in Saskatchewan used the example of the “timid woman” who manifests more confidence and self-esteem by the end of the CL process—a change brought about by education, support, and vigilant enforcement of the ground rules by both lawyers.<sup>88</sup> Feedback from our client sample confirmed that a disempowered woman can find her voice and gain strength in the CL process, but this was not an inevitable or a common experience in our admittedly small sample.<sup>89</sup> Although all of the clients in our study entered the CL process voluntarily, several wished that their lawyers had taken a closer look at whether the process was actually appropriate in their circumstances and advised them accordingly.<sup>90</sup> This response suggests that some lawyers may be confusing a client’s voluntary entry into the process with the broader issue of suitability.<sup>91</sup>

Lawyers in our study also expressed a range of views on the import of domestic abuse; some screened for it and others did not.<sup>92</sup> It was not clear from our interviews how many lawyers specifically asked about the existence of types of abuse or what their purposes were in asking such questions.<sup>93</sup> According to one lawyer, domestic violence was seldom disclosed at the outset of the CL process and was something she would not know about in advance, suggesting again that screening may in practice occur only where a client’s negotiation

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88. UM2, UM3.

89. Client stories fell across a spectrum of experiences. For a detailed discussion, see Keet, Wiegiers & Morrison, *supra* note 9.

90. *Ibid.*

91. One lawyer described it as a philosophical tension between lawyer control (how she envisioned the screening function) and client control (the goal of CL), concluding that the exercise of screening was somehow incompatible with CL: “[Y]ou’re making a decision for your client, where your client hasn’t even had input yet. You are pre-determining what is right for this person, knowing them for an hour” (RF2).

92. Two CL lawyers recently argued in favour of the use of CL in cases of domestic violence in part because litigation tended to escalate the conflict. See Randi Arnot, “Collaborative Law: How to Best Keep Warm in the Winter” *CBA Bar Notes* 22:1 (Canadian Bar Association, Saskatchewan Branch, Fall 2007) at 7-10. Reported cases also confirm that CL has been attempted where wives, in subsequent litigation, have alleged physical abuse during the course of the marriage. See *e.g.* *Campbell v. Campbell* (2007), 162 A.C.W.S. (3d) 457 (Alta. Q.B.) [*Campbell*]; *S. (C.) v. S. (M.)* (2007), 155 A.C.W.S. (3d) 605 (Ont. Sup. Ct. J.); and *Cloutier v. Berg*, [2005] W.D.F.L. 2234 (B.C.S.C.)

93. For observations about the failure of family lawyers to screen for domestic violence, see Zylstra, *supra* note 76. For an example of a recent approach to screening, see Landau, Wolfson & Landau, *supra* note 7 at 177.

capabilities are visibly or obviously affected.<sup>94</sup> By contrast, although at least one of the Vancouver lawyers from Degoldi's study indicated that there was always some element of abuse in every relationship, several others acknowledged that they were not sufficiently trained to recognize or deal with emotional and physical abuse.<sup>95</sup> According to one, "lawyers generally overreach their skill levels" when cases involve abuse.<sup>96</sup> A point of difference between our study and Degoldi's is that the Vancouver lawyers from the latter appeared more concerned about the limits of their own skills—limits that were possibly more visible given the prevalence of the interdisciplinary form of CL practised in Vancouver.

The task of screening for domestic violence or emotional abuse—whether in mediation or in CL—is inherently difficult and requires specialized knowledge of the nature and dynamics of spousal abuse and its long-term effects on children and victims. Women may raise allegations in indirect and tentative ways, often to test whether it is safe to provide more extensive disclosure.<sup>97</sup> Lesbian, immigrant, and Aboriginal women are less apt to report violence to authorities for fear of child protection proceedings, deportation, or loss of status in their communities, and these fears may inhibit disclosure even in more private negotiations.<sup>98</sup> After establishing a basis for trust, lawyers need to screen using specific questions while also paying attention to behavioural cues, such as unexplained injuries, absences from work, unusual fear, and avoidance of conflict.<sup>99</sup> Faced with ambiguity, lawyers, like mediators, may tend too often to reformulate the victim's story to conform to the presumptions of equality that underpin collaborative processes.<sup>100</sup>

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94. RF1.

95. Degoldi, *supra* note 65 at 123.

96. *Ibid.* at 135.

97. Greatbatch & Dingwall, *supra* note 56.

98. For a review of authorities, see Jennifer Koshan & Wanda Wiegers, "Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces" (2007) 19 C.J.W.L. 145 at 167-68.

99. Wendy J. Koen, Dennis P. Saccuzzo & Nancy E. Johnson, "Custody Mediation in Violent and Nonviolent Families: Pitfalls and Perils" (2006) 19 Am. J. Fam. L. 253 at 260. See also Milne, *supra* note 75 at 323; Deborah Lynn Zutter, "Mediation in the Shadow of Abuse – An Update" (2002) 20 Can. Fam. L.Q. 65 at 86-93.

100. See Zylstra, *supra* note 76. Such evidence raises the theoretical question of whether screening can balance out deeply embedded collaborative norms. See the discussion of the impact of

The potential for abuse or violence to remain hidden suggests that lawyers require specific training not only to identify its existence, but also to assess the type of violence and the magnitude of risks clients may face.<sup>101</sup> Standard screening protocols should be used to help lawyers recognize the continuum of abuse and respond in different ways, such as by declining to proceed, recommending against the process, or proceeding with safety or other supportive measures clearly in place. Abusive spouses may contest allegations of abuse, and they may be highly skilled in presenting themselves. To identify spousal abuse and distinguish it from claims of mutual abuse, a lawyer must examine the history of the relationship and consider both the context in which the violence or abuse occurs and its consequences. Third party verification of claims and counter-claims may also need to be explored.<sup>102</sup>

Relationships involving a history of escalating acts or threats of harm against spouses or children (or threats of, or attempted suicide), along with a pattern of domination, control, or obsessive jealousy can particularly pose a serious risk to the well-being of victims and children, and to the possibility of an agreement that meets the parties' needs.<sup>103</sup> In such circumstances, conven-

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mediator neutrality in Goundry, Peters & Currie, *supra* note 23 at 55; Rachel Field, "Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution" (2005) 5 Queensland U. Tech. L. & Jus. J. 28 at 33.

101. Risk factors include the severity, frequency, and recentness of violence, control-instigated emotional abuse or violence, substance abuse, mental illness, and a prior criminal record. See *e.g.* Wanda Wiegiers & Fiona Douglas, *Civil Domestic Violence Legislation in Saskatchewan: An assessment of the first decade* (Regina: Canadian Plains Research Centre, 2007) at 7-13; Nicholas Bala, Peter G. Jaffe & Claire V. Crooks, "Spousal Violence and Child-Related Cases: Challenging Cases Requiring Differentiated Responses" (2007) 27 Can. Fam. L.Q. 1 at 32-33.
102. See Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks: Sage, 2002) at 3-19; Linda C. Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases" (2004) 42 Fam. Ct. Rev. 411. In Degoldi, *supra* note 65 at 138, one Vancouver lawyer believed that the CL process provided an important way of holding the abuser to account and preventing exaggeration on the part of the victim. This response reflected both skepticism towards allegations of abuse and undue confidence that the truth of the allegations can be identified in CL without undermining the co-operative framework.
103. For a discussion of screening variables, see Neilson, *Spousal Abuse*, *supra* note 27 at Appendix; Zutter, *supra* note 99; and Ellis & Stuckless, "Separation," *supra* note 75.

tional advocacy, rather than CL or mediation, could result in more ready access to restraining or protective orders, less direct exposure to the abusive party, and less risk that the victim's substantive claims will be devalued.

Assumptions that power imbalances can be easily managed, even through the joint action of lawyers, belies the complexity of these issues. While screening is essential for mediation, it is even more important in CL, given the heightened costs of terminating the process and the inevitability of face-to-face encounters through the use of four-way meetings.<sup>104</sup>

## 2. AMBIGUITY OVER THE INFLUENCE OF LEGAL NORMS

To the extent that legal entitlements provide a defence against the impact of power imbalances, the ongoing presence of lawyers in the CL process could render legal advice more accessible and help to ensure that a client's legal entitlements are respected. Studies to date, however, find significant variations between CL lawyers in how much legal advice they give, when they give it, and how specific it is to the client's situation.<sup>105</sup> These differences in practice reflect differences in the weight lawyers themselves place on legal entitlements relative to the "interests" identified by clients in the negotiation process. As with mediation, CL acknowledges that both parties' interests can be fully met outside the bounds of legal norms.<sup>106</sup> Indeed, proponents of CL argue that legal positions easily get in the way of creative problem solving. Instead, clients should feel "free to compromise and substitute their own standards of acceptability and reasonableness for the legal standard,"<sup>107</sup> and lawyers should avoid "premature advice-giving [that] may put a chill on the negotiations."<sup>108</sup>

Lawyers in our study emphasized to varying degrees their obligation to provide specific legal advice. On one end of the spectrum, some resisted giving

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104. See Neilson, *Spousal Abuse*, *ibid.* at 164, where she encourages the use of shuttle rather than face-to-face mediation in cases involving domestic violence or patterns of control or psychological abuse. See text accompanying *infra* notes 133-72.

105. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 36-38; Keet, Wieggers & Morrison, *supra* note 9; and Lande, *supra* note 5. As well as varying from lawyer to lawyer, practices vary across different communities of practice or jurisdictions—a reality that is acknowledged in CL training sessions.

106. The Honourable James C. MacDonald, "Introduction" in Shields, Ryan & Smith, *supra* note 6, i.

107. *Ibid.* See also Tesler, *supra* note 7.

108. MacDonald, *ibid.*

legal norms a significant role in the process, fearing that a sense of one's entitlements runs counter to the interest-based orientation of CL.<sup>109</sup> They may provide information to clients, usually in the four-way meetings, about "what the law says," but they avoid characterizing it as an entitlement or obligation, or otherwise "shading" it in their client's favour.<sup>110</sup> This approach raises questions as to whether the fiduciary obligation of lawyers to provide specific advice to their clients is being met. Other lawyers were influenced by a more traditional sense of their role. One lawyer explained that "[o]ur assessment of legal entitlement is the guideline, and a very important guideline, in determining if the process is successful or not."<sup>111</sup>

While the extent to which clients in our study understood and attempted to fully obtain their legal entitlements also varied, we did not attempt to assess outcomes, and the potential for bargaining pressures to result in imbalanced agreements remains largely unmeasured. Macfarlane's analysis of sixteen cases suggests that, from the perspective of the lawyers involved, CL outcomes were not significantly different than their litigated outcomes would have been.<sup>112</sup> Nonetheless, her call for "extreme vigilance" acknowledges the risk to weaker parties.<sup>113</sup>

Unfortunately, our lawyer and client interviews suggest that some CL lawyers are divesting themselves of the protective role advocated by Murphy and Robinson in mediation.<sup>114</sup> This is problematic because less powerful clients may be losing access to legal standards that have evolved over time precisely to protect their interests. These standards are especially significant in family cases, given the social devaluation of women's domestic labour and the prevalence of

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109. For example, RF2. See also Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 37.

110. UM2. See also RF2; RM3.

111. RM1. Some lawyers may give legal advice from the outset for pragmatic reasons, fearing that clients will get advice elsewhere in a distorted form or feeling the need to shift a client's position before the four-way if that position is wholly incompatible with legal norms or otherwise not sustainable (Training Session 2007).

112. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 59.

113. *Ibid.* at xii, 57, 78. The author noted that more research is needed to test her tentative conclusion.

114. See Neilson, *Spousal Abuse*, *supra* note 27 at 168-69, who argues that mediation and adversarial processes should be kept separate because vulnerable clients value partisan support and advocacy. For some CL lawyers, the retreat from legal norms is not only logically driven by the ideological frame of CL, but also proves to be uncomfortable for some participants. RF2 observed: "that's one of the balances we're struggling with."

abuse. In this context, legal norms remain an important benchmark against which a client can assess her interests.

### 3. TRADITIONAL ADVOCACY AND EMOTIONAL SUPPORT

In its emphasis on client self-determination and control as a central norm of the process,<sup>115</sup> CL calls for a reformulation of the lawyer-client relationship and a redefinition of lawyer advocacy. In line with this objective, CL agreements typically provide that each client is expected to assert his or her own interests, and lawyers attempt to avoid reinforcing feelings of dependency or treating the client as simply a passive recipient of terms or entitlements. However, feedback from our study suggests that vulnerable clients may still depend heavily on their lawyers as a source of emotional support.<sup>116</sup> Clients who complained of abuse in their relationships objected to their lawyers' "hands-off" approach; they felt they needed an advocate to "back [them] up,"<sup>117</sup> to respond to harassment and put-downs, and to help them "stand up to"<sup>118</sup> their spouse. CL lawyers must therefore navigate not only a tension between "zealous advocacy" and "peacemaking,"<sup>119</sup> but also a tension between client autonomy and protective support and representation.

Are lawyers adequately equipped to fulfill these complex expectations given the emotional intensity of such negotiations, the manipulative dynamics of longstanding abusive relationships, and the limits of conventional legal training?<sup>120</sup> For economically privileged clients, many of these concerns may be

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115. Larry R. Spain, "Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law" (2004) 56 *Baylor L. Rev.* 141 at 143; Sandra S. Beckwith & Sherri Goren Slovin, "The Collaborative Lawyer as Advocate: A Response" (2003) 18 *Ohio St. J. Disp. Resol.* 497 at 499.

116. See Keet, Wieggers & Morrison, *supra* note 9.

117. See Barbara's account, *ibid.* at 186.

118. See Julia's and Cynthia's accounts, *ibid.* at 187. Lande notes that "[p]arties who feel weaker than their spouses ... may hire lawyers precisely to give them a sense of control in an adverse situation." Lande, *supra* note 5 at 1363.

119. It is argued that CL requires a different conception of "zealous advocacy" but is not inherently inconsistent with it. Lande, *ibid.* at 1331. See also Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 44.

120. Legal training and methodology have tended to dismiss the relevance of emotional influences for both clients and lawyers in the resolution of legal disputes. See Marjorie A. Silver, "Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship" in Dennis P.

mitigated by the involvement of other counsellors, such as mental health professionals who work separately with clients; however, this Cadillac version of CL is not widely accessible.

Managing these issues requires intensive lawyer-client communication such as open, ongoing feedback from the client to the lawyer through initial screening and preparatory interviews. Relative to a single mediator, CL lawyers are in a position to provide more individualized negotiating support. Lawyers can also try to work as a team in order to challenge rather than reinforce power imbalances between the parties.<sup>121</sup> While engaging the efforts of both lawyers is a creative and no doubt helpful response, there are also limits to this strategy. In the context of longstanding abusive relationships, these strategies may simply be unable to alter the dynamics.<sup>122</sup> Lawyers for an abusive spouse can only go so far to contain the abuse because of their professional duty to represent their individual client. Without adequate support, professional teamwork can leave the abused client feeling isolated, unprotected, or abandoned.<sup>123</sup> These limitations again underline the importance of careful screening.

In summary, the integration of lawyers into CL can provide a number of significant potential benefits for clients through the integration of legal advice, the opportunity to develop deeper, more supportive solicitor-client relationships, and the opportunity to work jointly with other counsel to facilitate and preserve respectful communication on the part of both parties. However, as with screening, these potential benefits are also subject to limitations, such as insensitivity to the existence of power differentials and their implications for the bargaining process, formal rules discouraging lawyers from providing legal advice at appropriate stages of the process, and limited skill sets in dealing with problems of abuse.

#### B. DISCLOSURE, GOOD FAITH BARGAINING, AND LIMITS ON COMMUNICATION

In addition to the extent to which it integrates lawyers into the problem-solving process, CL differs from mediation in its allegiance to particular rules of en-

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Stolle, David B. Wexler & Bruce J. Winick, eds., *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham: Carolina Academic Press, 2000) 357 at 380-81.

121. The stronger party's lawyer can, for example, reproach his own client for put-downs or can present the law where the other party is prepared to accept less than her legal entitlement.

122. See *e.g.* Julia's account from the CL study in Keet, Wiegers & Morrison, *supra* note 9 at 173-74.

123. *Ibid.*

gagement—its “choreography.”<sup>124</sup> Both mediation and CL agreements include a range of commitments that require the parties to negotiate with openness, cooperation, integrity, and in good faith. Since lawyers are signatories to the CL agreement and are, relative to mediation, more actively involved in the process, these commitments can come to life in a more meaningful way in CL. Whereas the mediation process is flexible and is designed in accordance with the guidance and preferences of the mediator,<sup>125</sup> the CL process imposes unique procedural norms and limitations on communications between lawyers and clients.

First, CL lawyers are active participants in the commitments to full disclosure of all relevant information and rectification of any mistakes,<sup>126</sup> and they must typically withdraw from the process if they know such commitments are not being fulfilled.<sup>127</sup> In mediation, only the parties themselves agree to disclosure and lawyers are not usually witness to the exchange of information. Through the lawyers’ contractual commitments and their ability to monitor disclosure, the promise of openness can be enforced more consistently in CL than in mediation.

Nonetheless, CL lawyers, like mediators, must ultimately depend on their clients’ veracity and good faith and on assumptions that may be ill-founded.<sup>128</sup>

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124. Sherri Goren Slovin, “The Basics of Collaborative Family Law: A Divorce Paradigm Shift” (2004) 18 Am. J. Fam. L. 74 at 76.

125. For a discussion of the wide range of theories and skills commonly employed by mediators, see George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian, 2003) at c. 5; Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflicts*, 2d ed. (San Francisco: Jossey-Bass, 1996); and C. Menkel-Meadow, “The Many Ways of Mediation” (1995) 11 Negotiation J. 217.

126. In the Saskatchewan contract involving children, for example, participants agree in Article 3.1 to “give complete, honest and open disclosure of all information whether requested or not.” Saskatchewan Contract, *supra* note 58. The Vancouver Agreement included in Degoldi’s study requires disclosure of “all necessary and reasonable information requested.” Degoldi, *supra* note 65 at 176.

127. Statutory provisions or professional codes of conduct may also mandate full and accurate disclosure of relevant and material information. See *e.g.* *Family Law Act*, R.S.O. 1990, c. F-3, s. 56(4)(a). Shortly before going to print, the Supreme Court of Canada determined in *Rick v. Brandsema*, [2009] S.C.J. No. 10 (QL) that a husband’s failure to disclose all of his assets can render a separation agreement unconscionable at common law, even in the presence of professional legal advice, depending on the extent of the misinformation, the nature of the omission, and the degree of variance from the goals of the relevant legislation.

128. Degoldi, *supra* note 65 at 116. Macfarlane also notes concerns with the scope of some

While any settlement may be explicitly premised on full disclosure, redress for the failure to disclose will also generally require court action. Clients may request that statements making full and final disclosure be sworn; however, not all lawyers use or recommend sworn statements.<sup>129</sup> Whether such assumptions of honesty are warranted is questionable and, in part, depends on whether lawyers have adequately screened for basic levels of trust, prior levels of financial disclosure, and the particular dynamics of the parties' relationship.

The CL process imposes additional constraints through the inclusion of a DP that prohibits lawyers from acting for their clients in any contested court proceeding.<sup>130</sup> Unless clients specifically agree in advance to formal discovery procedures, they give up their right to access formal discovery procedures during CL. As well, where a client takes "unfair advantage" of the process by non-disclosure or bad faith bargaining to the knowledge of his or her lawyer, the lawyer must withdraw, bringing the CL process to an end.<sup>131</sup> In effect, the party acting in bad faith is able to force the discharge of the other party's lawyer, increasing the costs for that party.<sup>132</sup>

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provisions in terms of client privacy and safety. See Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 48.

129. One lawyer in Degoldi's study exchanged statements in only 60 per cent of cases and these statements were usually not sworn. Others created Tables of Assets in open sessions. One lawyer went for "disclosure to the satisfaction of the parties." See Degoldi, *ibid.* at 116. Two lawyers felt that requests for sworn statements should not be made as they were "very positional and it entrench[ed] distrust" (at 117). The Vancouver Agreement calls for the provision of sworn statements if requested (at 176), whereas the Saskatchewan Contract does not address the issue.
130. See text accompanying *infra* notes 138-72.
131. See Saskatchewan Contract, *supra* note 58, art. 11.1. For a similar provision, see art. 13 of the Vancouver Agreement in Degoldi, *supra* note 65 at 178.
132. See *e.g.* *Campbell*, *supra* note 92. In this case, the collaborative process collapsed because the husband had failed to provide adequate disclosure, a problem that persisted into the litigation arena. It is not clear from the decision whether the parties had thereafter changed lawyers. Depending on the language of the agreement, one might argue that the husband should not be able to insist on the disqualification of his wife's counsel where he himself had breached the agreement by failing to provide disclosure or to negotiate in good faith. This may constitute a breach that releases the wife and her counsel from their contractual obligations. One might also argue that the husband should be responsible in damages for the increased costs incurred by the wife in hiring other counsel. An extensive analysis of the contractual framework for the Participation Agreement is beyond the scope of this article, as

The requirement that information exchange and negotiation occur primarily in four-way open sessions with both lawyers and clients<sup>133</sup> can also be of mixed benefit to clients affected by power imbalances. Four-way meetings are intended to help achieve openness and transparency, and avoid the strategic positioning or tactical maneuvering that can accompany traditional advocacy. Collaborative law proponents believe that these goals are more easily achieved if “all important conversations are ... experienced directly by each participant.”<sup>134</sup> Lawyers and clients are encouraged to debrief between CL sessions,<sup>135</sup> but according to some agreements, full discussion of the substantive issues and exchange of information about the law should occur only in the four-way and not in private lawyer-client meetings.<sup>136</sup> These explicit constraints represent a significant change from both lawyer-led negotiations, where most communication would occur in two-way meetings between the lawyer and client and be subject to solicitor-client privilege, with follow up negotiation between the two lawyers—and from family mediation, where most mediators would ask the parties to seek information about their legal rights and obligations outside of the sessions.

This emphasis on four-way communication can negatively affect spouses in abusive situations by discouraging lawyers from caucusing separately with their clients and fully discussing the matters in dispute. Private dialogue between lawyer and client may often be necessary to effectively manage the process, to ensure that the client fully understands his or her legal position, and to support his or her participation in the process. Providing information or advice privately is not per se being adversarial or positional. Where there are power imbalances and, particularly, patterns of control and abuse, open disclosure of concerns to the other party can in some circumstances impede the recovery process, undermine the client’s coping strategies, or even put her in

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is an extensive analysis of the ethical issues surrounding privilege, confidentiality, and conflict of interest that CL raises.

133. See Tesler, *supra* note 7 at 78.

134. *Ibid.*

135. Shields, Ryan & Smith, *supra* note 6 at 291, 299.

136. Saskatchewan Contract, *supra* note 58, art. 4.6. The Vancouver Agreement does not contain a similar provision. See Shields, Ryan and Smith, *ibid.* at 147, where the authors suggest caucuses for certain purposes but caution that they should be used “sparingly.” See also Connie den Hollander, *Collaborative Law: A New Paradigm of Advocacy* (Saskatoon: Collaborative Lawyers of Saskatchewan, 2003) at 9.

danger. While separate caucusing with the client may produce tension, under abusive or unequal conditions it may in fact work to advance the goals of openness and transparency. In our exploratory study, the four clients dealing with abuse or power imbalances all indicated a need for more intensive management and support beyond the four-way meetings.<sup>137</sup>

Thus, while the CL structure may encourage more open and transparent communication between the parties, it can also disadvantage parties in unequal or abusive relationships. An undue emphasis on the four-way model as a primary mode of negotiation can restrict access to the verification tools of the discovery process, and restrict the advice and independent support for vulnerable clients. Where an abusive party bargains in bad faith or does not fully disclose, the DP will operate to penalize the innocent spouse through the loss of his or her counsel.

### C. DISQUALIFICATION PROVISION (DP)

The DP is the key distinguishing feature in CL, and many lawyers<sup>138</sup> view it as essential.<sup>139</sup> Most CL agreements require the parties not to threaten or commence court action during the process and to compromise if necessary to reach a settlement. The DP further provides that contracting lawyers are disqualified from representing their clients in any contested court proceeding involving the parties.<sup>140</sup> This clause is broad enough to be triggered by a number of events leading to court action, including the failure to reach an agreement; the need for a restraining order to protect a client; the reliance on formal discovery methods in order to obtain full disclosure; or the need for an order to prohibit

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137. Some also suggested that communication between clients themselves should be restricted—an expectation that, although endorsed by contract was often violated. See *e.g.* Saskatchewan Contract, *supra* note 58, art. 4.6.

138. See *e.g.* Degoldi, *supra* note 65 at 108, 112. One Vancouver lawyer questioned the wisdom of such a provision “at a time where trust was at an all time low.”

139. Lawyers interviewed in our study generally supported this view, but most also revealed that they had used the process without this provision. See Lande, *supra* note 5 at 1324. See also Macfarlane, “Experiences,” *supra* note 5.

140. See art. 10 in the Vancouver Agreement in Degoldi, *supra* note 65 at 177. See also Saskatchewan Contract, *supra* note 58, art. 13.2, 13.3, for the comparable provision. In Saskatchewan, if either client goes to court, both lawyers are disqualified as witnesses or from representing either party.

the disposition of family property, to compel enforcement after reaching a settlement, or to vary the terms of the initial agreement.<sup>141</sup>

Under the Saskatchewan Contract, CL lawyers are also bound not to release any portion of their file or discuss any aspect of the case with a new lawyer, unless both clients jointly agree in writing. In most agreements, related provisions prevent the work or testimony of any experts or collaborative professionals, such as divorce coaches or child or financial specialists, from being used or subpoenaed in any court action without the written consent of both parties.<sup>142</sup>

Most negotiation models presume and rely on access to litigation to both frame and measure progress through the negotiation.<sup>143</sup> In mediation, the option to terminate at any point is used as security for genuine and voluntary participation and as a defensive “out” for those who experience the process as coercive.<sup>144</sup> While all costly processes likely involve some element of entrapment over time,<sup>145</sup> the DP in CL deliberately increases the potential level of entrapment in an effort to raise the stakes that both lawyers and clients have in the process.<sup>146</sup> The underlying behavioural assumption is that increasing the costs of defection will reduce the temptation to become adversarial or to otherwise take advantage of the other side. The CL model encourages early settlement by removing uncertainty over the durability and strength of the parties’ commitment to cooperation that often accompanies collaborative negotiation.<sup>147</sup>

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141. One can opt into CL from litigation by undertaking not to proceed or by filing a joint petition. See Cameron, *supra* note 28 at 152. In some provinces, limitation periods or valuation dates in family property legislation may require court applications to preserve future rights. See *e.g.* *G.M.(1) v. G.M.(2)*, [2005] B.C.W.L.D. 951 (S.C.); *Summers v. Summers*, [2004] S.J. No. 450 (Sask. Q.B.).

142. See *e.g.* Vancouver Agreement, art.14. A.2, in Degoldi, *supra* note 65 at 178; Saskatchewan Contract, *supra* note 58, art. 13.4.

143. See Fisher, Ury & Patton, *supra* note 30 at c. III, 6. The authors’ early conceptualization of the interest-based model encouraged negotiators to use knowledge of, and access to, their “best and worst alternatives to a negotiated agreement” (which would include litigation) as a way to increase investment in the process and to secure wise and durable agreements.

144. The Ontario Association for Family Mediation’s Policy on Abuse affirms that “the issue of voluntariness is critical when it comes to creating a safe place for couples to meet and negotiate.” Landau, Wolfson & Landau, *supra* note 7 at 446.

145. Macfarlane, *Emerging Phenomenon*, *supra* note 5 at 60.

146. James K.L. Lawrence, “Collaborative Lawyering: A New Development in Conflict Resolution” (2002) 17 Ohio St. J. Disp. Resol. 431 at 432-34.

147. For a discussion of the prisoner’s dilemma problem, see Ronald J. Gilson & Robert H.

There is significant academic controversy in the United States as to whether the DP is consistent with ethical rules of professional conduct.<sup>148</sup> Nine state ethics committees have considered collaborative agreements in relation to their professional codes of conduct and all but one have upheld their use.<sup>149</sup> Three states have passed statutes authorizing the use of CL. Although DPs might be seen as analogous to agreements allowing for the withdrawal of one's lawyer—and which are enforceable in Canada<sup>150</sup>—there is a key difference in that the loss of one's lawyer under the DP can be triggered by the conduct of either party, and not only the lawyer's own client. Some writers have argued that parties might be better served by a different process, especially where the parties' economic resources and the merits of their legal positions differ significantly.<sup>151</sup> An alternative process is Co-operative Law, which includes a Co-operative Agreement that incorporates the co-operative norms of CL but excludes the DP.<sup>152</sup> According to Hilary Linton, in circumstances of financial and legal inequality, the DP will unfairly compromise the power of the party with the superior legal claim and deny a legitimate source of leverage.<sup>153</sup>

Although the DP is gender neutral in form, it is likely to have a disparate impact on female clients and place them at greater risk of relative disadvantage. Since women are most often the claimants in family disputes, legal entitlements are more apt to operate as a source of power for them.<sup>154</sup> Upon separation, it is

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Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509. See generally Yarn, *supra* note 69; Macfarlane, "Experiences," *supra* note 5 at 186.

148. Lande, *supra* note 5.

149. See IACP Ethics Task Force, "The Ethics of the Collaborative Participation Agreement: A Critique of Colorado's Maverick Ethics Opinion" (2007) 9 Collaborative Rev. 8 at 8. The American Bar Association recently found that the DP did not create an inherent conflict of interest for practitioners, provided clients were fully informed regarding the provisions. See Eileen Libby, "Putting a Kinder Face on Litigation: ABA Opinion Gives Collaborative Law Practice an Ethics Thumbs-up" (2008) 94 A.B.A. J. 22 at 22.

150. See Lande, *supra* note 5 at 1348 and his discussion of *Boughton Peterson Yang Anderson v. Elliott*, [1999] 6 W.W.R. 619 (B.C.S.C.).

151. Hilary A. Linton, "Collaborative Law: Thinking About the Alternatives" (2008) 311 Can. Fam. L. Matters 1.

152. For example, Lande and Herman suggest that in cases of deliberate stalling, one might need to threaten litigation to move on. See Lande & Herman, *supra* note 63 at 286-87.

153. *Ibid.* at 5.

154. Note, however, that the degree of this power will depend on the strength of the legal claim

women who more often lack access to an adequate income stream or marital assets or who may have superior claims to custody through their disproportionate role as primary caregivers.<sup>155</sup> To the extent that the DP raises the financial and emotional costs of litigation, it can increase the pressure to accept agreements that meet neither womens' identified interests nor their legal entitlements.

Because both parties must share the eventual cost of litigation, the risk of being undermined in this way is most significant where trust is lacking, economic resources are unequal, and clients are affected by abusive and controlling dynamics. By increasing the cost of litigation as an alternative, the DP affords one more lever for manipulation and control.<sup>156</sup> Unequal, abusive, and controlling dynamics can also have a far more negative emotional impact where clients have high expectations and are encouraged to engage, from the outset, in cooperative rather than adversarial negotiation.<sup>157</sup>

The commitment to settlement in CL may also impede a lawyer's ability to advise his or her client to withdraw in a timely way. In mediation, withdrawal from the process is the ultimate response to abuse. CL increases the costs of withdrawal for both lawyers and clients, and can thereby complicate the ability to monitor power dynamics throughout the process. Moreover, if an abused client's safety is threatened during the course of negotiations, he or she may be unable to obtain a restraining order without simultaneously losing the services of his or her lawyer.

There is, to date, little empirical research analyzing the impact of DPs on clients. In our small exploratory study, clients all knew about the DP, although they may not have fully understood the potential consequences of the clause.<sup>158</sup> Interviews did, however, reveal the potential for harm. One client's story sug-

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and the predictability of the outcome and on the client's economic ability to advance litigation. See Martin, *supra* note 21.

155. Linton, *supra* note 151 (using the example of a primary caregiver in a custody dispute to make her point—although in some jurisdictions, primary caregiving may not clearly provide a superior claim to sole custody).

156. See *e.g.* Neilson, *Spousal Abuse*, *supra* note 27; Goundry, *supra* note 27. We recognize that recourse to litigation can also be used as an abusive tactic in some circumstances.

157. See Keet, Wieggers & Morrison, *supra* note 9 at 189 (citing Jane's comment that: "I think I would have had my guard up higher if I knew it was going to be so polarized"). See also Lande, *supra* note 5 at 1367.

158. See Keet, Wieggers & Morrison, *ibid.*

gested that her husband had used the process as one more arena for manipulation and control in what had been a long-term abusive relationship.<sup>159</sup> Although he eventually signed an agreement, he did not comply with it, and she was forced to obtain another lawyer for the purpose of enforcement. Three other clients who also identified themselves as abused or weaker in bargaining power worried about the potential loss of their lawyers if the other party failed to negotiate or settle. The loss of counsel was perceived not only as an added financial cost but also a loss of critical emotional support, particularly where the dynamics between the parties were subtle. Two of the twelve lawyers interviewed in our study further noted the potential for one client to abuse the process for his or her own benefit, for example, through deliberate delay.<sup>160</sup>

The significant risks of DP underscore the importance of appropriate screening mechanisms and raise questions as to whether the DP is really necessary to achieve its ostensible purposes. Unlike the lawyers, most of the clients interviewed in our study did not view the DP as essential, and many were confused about its rationale. Given the concerns clients have consistently expressed about the cost of litigation and the cost of legal representation in CL,<sup>161</sup> cost alone could reasonably motivate a commitment to settle and avoid litigation in most cases.

While the DP may occasionally be useful in controlling an angry, impulsive client,<sup>162</sup> one of the clients we interviewed suggested that the DP was more about keeping the lawyers' boundaries clear rather than working in the best interests of clients. Lawyers frequently noted the difficulty they had in trying to remain interest-based and avoiding the temptation to fall back into an adversar-

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159. For Julia's account and related discussion, see *ibid.* at 163, 173-74.

160. UM2 and RF2. UM2 stated: "I have definitely had clients that have used the process to try and present a sweet face and drag things out to the detriment of the other party." Another lawyer described how the CL process collapsed when the husband discovered that he could not control his wife through the process.

161. See *e.g.* Macfarlane, *Emerging Phenomenon*, *supra* note 5.

162. Admittedly, if one party refuses to sign onto the DP, the other may be highly suspicious and refuse to negotiate. In this sense, the prominence of the DP can set the stage for distrust if there is no immediate buy-in. However, many lawyers do appear to be using the CL process informally, without the DP. Moreover, concerns about the DP may signal a screening issue and raise questions as to whether there is sufficient trust between the parties for the process to be successful.

ial, positional mindset.<sup>163</sup> According to one lawyer, you cannot give yourself “any other way of thinking.”<sup>164</sup> A very tight set of commitments to counteract the pull of litigation may help to prevent genuine attempts at collaboration from being undermined. However, in the face of the risks arising from significant power imbalances, including additional costs and the loss of one’s choice of counsel, this blanket justification for the DP is not enough.

The withdrawal of lawyers has also been described as “important to preserve the confidentiality and integrity of the collaborative process.”<sup>165</sup> CL contracts, as in mediation, typically provide that disclosures made by either party, either lawyer, or any consultants during the process cannot be used in any court process and that all communications are confidential and without prejudice.<sup>166</sup> Such provisions flow in part from the privileged nature of settlement negotiations generally.<sup>167</sup> Their technical purpose is to ensure that concessions made during the negotiation process cannot be used in later litigation, either as admissions or to establish facts, but they are limited in scope. Such clauses cannot protect against the use of objective evidence disclosed during the process, which may have been previously unknown but cannot be proven through other means. Although there is also some question about the

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163. UF1, UF2. Research on the impact of court-connected mediation programs confirms the degree to which adversarial norms have continued to pervade the mediation process. See Michaela Keet, “The Evolution of Lawyers’ Roles in Mandatory Mediation: A Condition of Systemic Transformation” (2005) 68 Sask. L. Rev. 313; Julie Macfarlane, “Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation” (2002) J. Disp. Resol. 241.

164. UF3. The DP has been seen as useful in avoiding an escalating spiral of retaliatory responses that may begin with misperceptions and be otherwise difficult to stop. See Lande, *supra* note 5 at 1380.

165. Collaborative Lawyers of Saskatchewan, Brochure, “Collaborative Law,” online: <[http://www.collabsask.com/documents/collaborative\\_law.pdf](http://www.collabsask.com/documents/collaborative_law.pdf)>.

166. Saskatchewan Contract, *supra* note 58, Arts. 4.5, 13.6. Note that interim agreements reached during the CL process have been admitted into evidence in subsequent litigation. See *e.g.* *Fox v. Fox* (2007), 319 N.B.R. (2d) 97 (Q.B.); *Froese v. Froese* (2005), 138 A.C.W.S. (3d) 521 (Man. Q.B.) (promise by H to pay legal costs of CL); and *Clavelle v. Clavelle* (2004), 130 A.C.W.S. (3d) 1148 (Sask. Q.B.). According to the Saskatchewan Contract, art. 12.1, interim agreements are not binding on the parties unless reduced to writing and signed by both clients and lawyers.

167. Legislative confidentiality protections may also apply. See *e.g.* *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, s. 15(3).

extent to which courts actually enforce confidentiality provisions,<sup>168</sup> these limitations affect the exchange of information in all collaborative negotiations,<sup>169</sup> and they are not avoided in any meaningful way by the DP.

The DP may provide a marginal advantage in that the lawyer who has witnessed the information exchange is typically not the same lawyer who will be advancing the case through litigation. This advantage would generally, however, be outweighed by the reality that almost all information potentially disclosed during a negotiation would also be “discoverable” during the examination and exchange of documents in litigation, with the significant exception of strong client preferences or priorities.<sup>170</sup> Concerns over the strategic use of these types of disclosure are not fully addressed by the DP because the clients themselves remain free to disclose this information to successive counsel. The significant risks posed by the DP in relation to its benefits raise questions as to why such a provision would be invoked and why its use would be concentrated in family law—an area where instances of abuse and power imbalances are relatively high.<sup>171</sup>

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168. Some courts have made fine distinctions in admitting such evidence. See *e.g. Re Springdale Farms Ltd.* (1991), 79 D.L.R. (4th) 88 (Sask. C.A.); *Sharp v. Edsam Holdings Ltd.* (1999), 176 Sask. R. 248 (Q.B.) at paras. 15-21.
169. W.B. Leahy & K.E. Rubin, “Keeping the ‘R’ in ADR: How Olam Treats Confidentiality” (1999) 17 Alt. J. 187; R.A. Baruch Bush, “Mediator’s Dilemma: The Legal Requirements Exception to Confidentiality under the Texas ADR Statute” (1995) 36 S. Tex. L. Rev. 579; V. Vann, “Confidentiality in Court-Sponsored Mediation: Disclose at Your Own Risk?” (1999) 10 Austl. Disp. Resol. J. 195; O.V. Gray, “Protecting the Confidentiality of Communication in Mediation” (1998) 36 Osgoode Hall L.J. 667; and Jonnette Watson-Hamilton, “Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan” (1998-1999) 24 Queen’s L.J. 561. No one has argued that lawyers attending mediation sessions or involved in co-operative proceedings should be barred from subsequent litigation on grounds of confidentiality.
170. Lande, *supra* note 5 at 1342 (noting that the potential for CL negotiations to require disclosure about “personal concerns” or “settlement facts” may not normally be discoverable at the examinations stages). For a discussion of the differences in the nature of information which may arise in interest-based processes as opposed to litigation, see Carrie Menkel-Meadow, “Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities” (1997) 38 S. Tex. L. Rev. 407 at 423.
171. See Lande, *ibid.* at 1316 (identifying factors that might have led to CL’s concentration in family law, such as the tendency for family law cases to be one-shot occasions and to involve more practitioners, less polarized fields, and more clarity about legal standards and outcomes—not all of which are convincing). Lande also notes that business people are wary

Effective management of the risks posed by the DP would entail full and detailed explanations of the varied concerns; conscientious screening, including a presumption against the DP that might force lawyers to attend more scrupulously to this task; active monitoring; and early termination of the process to minimize costs upon withdrawal. Lawyers should consider variations or alternatives to the CL process, such as Co-operative Law, which retains the interest-based framework but allows litigation.<sup>172</sup> Macfarlane's suggestion of an agreed time-limited period of negotiation before litigation would help keep lawyers' boundaries clearer, but it would not on its own assist in managing abuse within the sessions. Collaborative contracts could also be revised to provide explicitly for remedies that might deter opportunistic behaviour, including a right to increased legal costs or release from the DP in cases of bad faith bargaining.

### III. CONCLUSION

Access to justice has been identified as a key concern in family law.<sup>173</sup> The future significance of collaborative family law for women will depend on the extent to which it addresses existing barriers to access to justice, including its accessibility and cost-effectiveness, and its response to underlying inequalities in the bargaining process. The intense involvement of legal advocates in CL provides an opportunity not only to enhance the problem-solving experience for women in the family law system but also to contribute, through a re-socialization of lawyers, to more lasting systemic change. CL has given lawyers, both male and female, permission to talk about negative aspects of the image of

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of CL and the DP (at 1318), citing John Lande, "Evading Evasion: How Protocols Can Improve Civil Case Results" (2003) 21 *Alt. to High Cost Litig.* 149 at 163-65. See *contra* David Hoffman, "Collaborative Law in the World of Business" (2004) 6 *The Collaborative Rev.* 1. Some literature also suggests that family law clients are susceptible to pressures and direction from their lawyers, likely due in part to emotional stress. See *e.g.* Austin Sarat & William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1995).

172. See *e.g.* Lande & Herman, *supra* note 63 at 284. It is recommended that Co-operative Law be used where either the threat is needed to motivate settlement or where, according to Lande and Herman: "[t]here may be a significant risk that one party would take advantage of another" (at 187).

173. See Addario, *supra* note 3. See also Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney General of Ontario, 2008), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/>> at 54-55, 109.

the litigious lawyer.<sup>174</sup> Although many such accounts still rely on “simplistic dichotomous images” and a “generic horror story,”<sup>175</sup> the obvious passion, commitment, and “ethic of care”<sup>176</sup> that many CL lawyers bring to their work highlight what may be too often missing in the adversarial system. In this sense, the turn to CL from mediation is more than an appropriation of similar rhetoric or a power grab in a professional turf war.

CL could ultimately do more than mediation to change the legal culture.<sup>177</sup> Although mediation has been institutionalized to a greater degree and extended to other areas of law, its impact has been limited by the peripheral and uncertain role lawyers have played in its development. The excitement that many lawyers have for CL likely flows precisely from the discovery of a “functional role model” within an alternative dispute resolution process—accompanied by a new, still rule-oriented, procedural structure and ethical framework. The fact that many lawyers practising CL continue to include litigation in their family practice also suggests that rather than polarizing the practice of family law, the co-operative norms and values of CL may “spill over” into traditional negotiations and litigation.

CL may also have a unique capacity to raise lawyers’ sensitivity to power differentials through the organizational structures the movement has spawned among practising lawyers. Whereas mediation practice groups and policy debates tend to exclude lawyers who are not also professional mediators, CL can draw on professional associations and community groups that have formed across the country to provide information to the public as well as training and

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174. Many lawyers cite reasons, including their own mental, physical, and emotional health, as motivations for turning to CL. Lawyers in our study, for example, identified reduced levels of anxiety (RF2), stress (UM3), animosity (RM2), confrontation (UM2), and client bashing (RM2) as advantages that would increase their enjoyment of their work. Such reasons are commonly offered as motives for the use of CL.

175. Fineman, *supra* note 43 at 754, 756. Lawyers in our research somewhat predictably described the adversarial system in highly negative and aggressive language but empirical research suggests that family lawyers desire and strongly encourage settlement. See *e.g.* Hunter, “Future,” *supra* note 5; Lande, *supra* note 5 at 1334; and Neilson, *Spousal Abuse*, *supra* note 27 at iii.

176. Carla Hotel & Joan Brockman, “The Conciliatory-Adversarial Continuum in Family Law Practice” (1994) 12 Can. J. Fam. L. 11 at 20-21.

177. See Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) (documenting and encouraging the development of a new model of legal advocacy).

support for lawyers.<sup>178</sup> Through training and collective discussion, these groups have the potential to increase sensitivities and work through new approaches.

Under current social conditions, the fundamental conflict of interest between the men and women who ultimately finance the provision of CL will inevitably limit the extent of this influence. Gendered inequalities are also difficult issues for a movement still struggling for legitimacy in a conservative profession to confront, particularly in times of political reaction and resistance to feminist discourse and initiatives.<sup>179</sup> However, heightened attention to the existence of gendered power differentials, the exploration of variations in the “meaning of cooperation” by screening clients into different processes,<sup>180</sup> timely and specific legal advice, and deeper and more effective lawyer-client communication could provide meaningful ways of improving the experience of female clients in the family law justice system. While not a radical challenge to systemic inequality, the adoption of such measures could at least mitigate the damage that can otherwise result when power differentials are obscured for the sake of family harmony.

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178. Collaborative lawyers tend to express support for advanced training. See Degoldi, *supra* note 65 at 163. There was also evidence of this in our lawyer interviews.

179. See Dorothy E. Chunn, Susan B. Boyd & Hester Lessard, eds., *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007).

180. Gilson & Mnookin, *supra* note 147 at 563. See also Lande & Herman, *supra* note 63.