

2012

Collaboration and Coercion: Domestic Violence Meets Collaborative Law

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Recommended Citation

Margaret B. Drew, *Collaboration and Coercion: Domestic Violence Meets Collaborative Law*, 1 *Irish L. J.* 27 (2012).

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*Margaret B. Drew**

‘Collaboration and Coercion’ addresses the systemic and individual concerns that arise when family members that have experienced abuse enter into the collaborative law process. A form of alternative dispute resolution, collaborative law is a method of resolving disputes without engagement of the legal system. The author addresses the structural and cultural difficulties that survivors of abuse encounter throughout the process as well as the ethical concerns that are raised when collaborative practitioners accept cases where the parties have a history of coercion within the intimate relationship.

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I. INTRODUCTION

Like other courts, family courts focus much effort on the pre-trial resolution of cases.¹ A common perspective of family court judges is that it is easier for shattered families to repair and thrive if the parties reach agreement outside of the trial process.² Many also theorise that when parties reach resolution in a respectful and reasonable manner, client satisfaction with the resulting agreement is likely.³

Most family courts have offered alternative methods of dispute resolution for several decades.⁴ Mediation, as well as court-provided negotiation assistance, are staple examples of some mechanisms used to reach settlement in family law cases.

Collaborative law is an alternative method of dispute resolution that has added a different approach to settlement. While the method can be applicable in all types of litigation, the process is implemented primarily with family law cases.⁵

'Collaboration and Coercion' discusses the dynamics of abuse. This article is intended to be a primer on the dynamics of intimate partner violence as well as an introduction to the concerns of domestic violence practitioners when those who have experienced abuse are drawn into the collaborative process. The dynamics discussion is comprehensive because those who advocate on behalf of clients who have been abused are most alarmed about systems actors⁶ who do not understand intimate partner abuse. This leaves those systems actors unqualified to assess whether abuse exists in an intimate partner relationship. The role of professionals involved in the collaborative process and their response to the parties who have lived in abusive partnerships is explored along with the dangers of using alternative dispute resolu-

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1. Christy L Hendricks, 'The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview' (1993-1994) 32 *University of Louisville Journal of Family Law* 491, 492-93.

2. cf Joan S Meier, 'Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions' (2003) 11 *American University Journal of Gender, Social Policy & the Law* 657, 693 (noting one judge's advocacy for settlement and desire to de-escalate tensions between conflicting parties).

3. See example, Pauline H Tesler, 'Collaborative Family Law' (2004) 4 *Pepperdine Dispute Resolution Law Journal* 317, 325.

4. Mediation for family law cases has been offered in some jurisdictions since the 1970s. Ann Milne, 'Mediation - A Promising Alternative for Family Courts' (1991) 42(2) *Juvenile and Family Court Journal* 61, 62.

tion processes in the context of abusive relationships. The history of challenges to using the mediation process to resolve disputes between an abuser and the target of the abuse is included in order to provide historical context as well as guidance to those new to the collaborative dispute resolution process.

II. COLLABORATIVE LAW THEORY AND PROCESS

The collaborative method of resolving family law conflicts is a rational and appealing one. During the collaborative process, disputing parties and their attorneys participate in frequent negotiation sessions. With narrow exceptions, counsel works outside of the litigation process. The parties and counsel may work with a shared 'team' of professionals, ranging from therapists to financial planners. The collaborative team assists the parties by offering advice and information with the hope that an amicable settlement will be reached. One desired outcome of the collaborative process is to reduce hostility between the separating partners. This can be accomplished in many ways, but one key method is having each party feel meaningfully 'heard' by the other side. Once reasonable communication is established, the ideal outcome is for the parties to reach a mutually beneficial agreement assisted by coaches, legal and financial advisors, and other professionals whose input assists the couple in making informed decisions.⁷ The parties accomplish resolution in large part by meeting face-to-face in a series of negotiations. The parties are given ample opportunity to consult with their separate legal advisors, who in turn consult with other members of the collaborative team. In this regard, the team, ideally trained in the 'psychodynamics of divorce and healthy family restructuring',⁸ is invited to consider the best interests of not only the individual parties but of the family as a unit as well.⁹ While some collaborative practices might differ in structure, most utilise much of the process described above, and all incorporate face-to-face meetings into the basic process.

While many family law practitioners champion the collaborative process as unique and innovative, the use of frequent face-to-face meetings in accomplishing a result in which all parties will be invested is not unique to collaborative lawyering. A comparable process was promoted in the early

5. See generally, Gary L Voegele, Linda K Wray, and Ronald D Ousky, 'Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes' (2007) 33 William Mitchell Law Review 971, 974-75 (discussing the inception and prevalence of collaborative law in family law).

6. The term 'systems actors' refers to those involved in legal processes and institutions. This includes lawyers, judges, and those who support them, such as court personnel, mental health advisors, and other advisors.

7. Tesler, 'Collaborative Family Law' (n 3) 331.

8. *ibid.*

9. *ibid.*

1980s by Phillip Harter for negotiations with government agencies. That process is known as regulation by negotiation.¹⁰ ‘Early and continuous negotiations among ... affected interests ... and unanimous consent to the final negotiated rule proposal’ have been identified as key process characteristics of regulation by negotiation.¹¹ In addition, like the collaborative process, alternative resolution methods are available for those not participating in the negotiation process.¹²

However, collaborative law practice imposes a burden not proscribed in the regulation by negotiation process. Should the collaborative process fail, the parties must engage successor counsel if they desire ongoing representation. Collaborative practice dictates that counsel’s contract with the client states that, other than in emergency situations, the collaborative attorney will not file an appearance on behalf of the client in any ensuing, related litigation.¹³ Some maintain that this provision is neither necessary nor desirable.¹⁴

Numerous sources discuss the varied ingredients of the collaborative process.¹⁵ Authors agree, however, that a primary underlying assumption in the collaborative approach is that the parties will be transparent in their discussions and disclosures.¹⁶ Good faith is a necessity in the collaborative law process because collaborative lawyers do not engage in the court’s formal discovery process and, therefore, neither the lawyers nor the clients are subject to the attendant sanctions for non-disclosure.

Without an understanding of domestic violence dynamics, the risks created by the collaborative process may not be apparent.

10. Andrew P Morriss, Bruce Yandle, and Andrew Dorchak, *Regulation By Litigation* (Yale University Press 2009) 43-44. This process was developed at approximately the same time that Stuart Webb introduced the collaborative model as a method of resolving private legal disputes. See generally, Stu Webb, ‘Collaborative Law: A Practitioner’s Perspective on its History and Current Practice’ (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155, 155-57 (both authors advocating models of dispute resolution that would encourage reasonable discussion and avoid entrenchment of positions).

11. Andrew P Morriss, Bruce Yandle, and Andrew Dorchak, *Regulation By Litigation* (Yale University Press 2009) 44.

12. *ibid.*

13. Ted Schneyer, ‘The Organized Bar and the Collaborative Law Movement: A Study in Professional Change’ (2008) 50 *Arizona Law Review* 289, 290-91.

14. Cooperative law is a similar process but permits counsel to continue to represent the client in any subsequent related litigation. John Lande, ‘Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law’ [2007] <<http://law.missouri.edu/lande/publications/lande%20cooperative%20law%20policy.pdf>> accessed 13 June 2012.

15. See examples: Nancy Ver Steegh, ‘The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non- Collaborative) Lawyers’ (2009) 38 *Hofstra Law Review* 699; Uniform Collaborative Law Act [2010] <<http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act>> accessed 13 June 2012.

16. Forthright disclosure is a fundamental tenet of collaborative practice. Sheila M Gutterman, ‘Collaborative Family Law—Part II’ (2001) 30(12) *The Colorado Lawyer* 57, 57.

III. UNDERSTANDING THE DYNAMICS OF DOMESTIC ABUSE

A. *The Origin and Differing Applications of the Phrase ‘Domestic Violence’*

In using ‘violence’ as a defining term, the phrase ‘domestic violence’ is misleading. The listener might believe that physical violence is a necessary component of abuse since, in our legal culture, violence is so often associated with physical acts. In reality, a coercive partner’s acts of control over an intimate partner expand far beyond those that are merely physical.

During the 1960s and 1970s, the phrase was popularised in order to both define what was seen as the worse abuses of women and to promote change in the laws that defined violent criminal acts. During the decades that preceded the 1970s, virtually no legal protections for targets¹⁷ of intimate partner violence existed.¹⁸

Those statutes, like assault and battery, that could have formed the basis for arrest, were not enforced in the context of marriage or dating relationships.¹⁹ However, from the inception of the domestic violence movement, the overarching goal of targets and their lawyers has been the target’s safety.

Early in the domestic violence movement, particular focus was given to the lack of any meaningful law enforcement response. Battered women who called the police often received no assistance.²⁰ When police were dispatched to the scene, the women were mostly told that theirs was a private dispute and that the police could not intervene.²¹ When police did take action, often it was only to tell the coercive partner ‘to “take a walk around the block”’.²²

Yet violence outside of the intimate relationship context was a concept that both the police and the criminal court actors did understand. With a focus on state intervention, particularly in the criminal context, the term

17. The term ‘target’ is used by the author to identify the individual who in other writings may be referred to as the ‘survivor’ or the ‘victim’. The author prefers the term ‘target’ as it draws attention to the exclusive focus of abuse that many partners bring to their coercive actions. Often it is difficult for those unfamiliar with domestic violence to understand that the abusive partner may not exhibit any signs of violence other than when he is alone with the intimate partner. Others have found the term ‘target’ useful as part of the discussion of the dynamics of abuse. See further, Mary Ann Dutton and Lisa A Goodman, ‘Coercion in Intimate Partner Violence: Toward a New Conceptualization’ (2005) 52 *Sex Roles: A Journal of Research* 743.

18. Nina W Tarr, ‘Civil Orders for Protection: Freedom or Entrapment?’ (2003) 11 *Washington University Journal of Law and Policy* 157, 160-63.

19. For example, in *Bradley v State*, a ruling that stood for almost seventy years, the Court held that a husband should be permitted to exercise the right to chastise his wife without being subjected to ‘vexatious prosecution’. *Bradley v State* 1 Miss 156, 158 (1824).

20. Leslye E Orloff and others, ‘Battered Immigrant Women’s Willingness to Call for Help and Police Response’ (2003) 13 *UCLA Women’s Law Journal* 43, 52.

21. *ibid*; Sally F Goldfarb, ‘Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?’ (2008) 29 *Cardozo Law Review* 1487, 1494.

22. Cheryl Hanna, ‘No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions’ (1996) 109 *Harvard Law Review* 1849, 1857.

‘domestic violence’ proved effective in expanding the recognition of violence against women. By incorporating reference to violent behaviour, the term ‘domestic violence’ used language easily understood and adopted by those with the authority to arrest and prosecute. Given the many resulting criminal statutes and practices that have been enacted, including enhanced penalties for domestic violence and mandatory or preferred arrest policies,²³ the domestic violence movement unarguably effected change.

Unfortunately, focusing on the criminal justice system and the language of violence misled those unfamiliar with the dynamics of abuse to assume that only those situations involving criminally defined physical violence were credible domestic violence cases. Indeed, many civil protection order statutes continue to require physical violence or a serious threat of physical violence as elements to be proved before a petition can be granted.²⁴

Even more problematic are statutes that incorporate the criminal definition of domestic violence into their civil protection order scheme.²⁵ Such laws uniformly require serious physical harm or the threat of serious physical harm as a prerequisite to the issuance of an emergency order of protection.²⁶ The imminent harm or immediate harm standard that is needed to obtain an emergency order often focuses on recent acts of serious physical harm or threats of serious physical harm.²⁷ What domestic violence lawyers and researchers recognise, and which may not be readily apparent to others, is that non-physical acts of control are often the precursors, and in some cases predictors, of serious physical harm or death. A leading group of researchers, led by Jackie Campbell, reported that in a study of women killed by an intimate partner, only 70% overall had reported prior physical violence by that partner.²⁸ Traditional criminal standards of violence do not accommodate the coercive dynamics of domestic violence that extend far beyond acts of physical harm.

Financial, emotional, verbal, mental, and sexual control are broadly incorporated into contemporary definitions of domestic violence. Coercive control is a comprehensive and more appropriate term for what has tradition-

23. Examples include California Penal Code § 243(e)(1) (West 2008), which sets a higher maximum sentence for battery in a domestic context and Massachusetts General Laws Annotated ch 209A § 6 (West 2007), which establishes mandatory and preferred arrest policies for domestic disputes. Emily J Sack, however, discusses the criticism of mandatory arrest policies and how they might negatively affect domestic violence targets. Emily J Sack, ‘Battered Women and the State: The Struggle for the Future of Domestic Violence Policy’ [2004] *Wisconsin Law Review* 1657, 1676-80.

24. See example, Ohio Revised Code Annotated § 3113.31 (West 2005).

25. See example, Alaska Statutes § 18.66.100 (2008).

26. See example, North Dakota Century Code § 14.07.1-03 (2009).

27. See example, *ibid*; See also, Massachusetts General Laws Sec. 209A(4).

28. Jacquelyn Campbell and others, ‘Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study’ (1993) 93 *American Journal of Public Health* 1089, 1091.

ally been called domestic violence.²⁹ Judges, prosecutors, and domestic violence lawyers can have vastly differing definitions of domestic violence as a term of art, perpetuating the frustrations that erupt when targets that have not been physically abused are denied legal protections. It is not surprising then when, for example, a petitioner is denied protection after she argues that non-physical forms of control, such as isolation from friends and family, have escalated and that she fears some impending serious injury will occur next. Judges, police, and other members of the justice system do not always understand that there is an increased level of risk to a target when coercive tactics escalate, whether the tactics are physically violent or not. Indeed, a court might not recognise a valid domestic violence claim because the judge does not perceive a claim without allegations of physical abuse as authentic, let alone dangerous. When domestic violence lawyers use the phrase 'domestic violence', they include in that definition any behaviour that is designed to control the intimate partner. Often those lawyers fail to adequately explain to the court why their expanded definition of abuse includes non-physically violent acts. If judges understood that physical violence is just one of many coercive tools in the abuser's satchel, outcomes could be vastly different. Some maintain that domestic abuse does not arise from physical violence, but rather that 'physical violence is a manifestation of oppressive power and control dynamics within the abusive relationship'.³⁰ Consequently, a judge who does not understand the nature of intimate partner abuse, who reads a protection order petition that is devoid of allegations of physical abuse, may see the petitioner not only as not credible but also as 'abusing the system'.³¹

This misunderstanding of what places abused partners at risk permeates all who enter into the lives of abused women and men. Lawyers, therapists, friends, and family all have a role in perpetuating the myth that a woman's risk is tied to physical abuse. This misunderstanding leads to negative consequences in any setting where battered women must interact with those who remain uneducated on the dynamics of abuse.

29. See generally, Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007) 276-77 (explaining the dynamics of coercive control).

30. Jeffrey R Baker, 'Enjoining Coercion: Squaring the Civil Protection Orders with the Reality of Domestic Abuse' (2008) 11 *Journal of Law & Family Studies* 35, 65.

31. See example, Stacy Moore, 'Family say courts shut down restraining orders' *Hi-Desert Star* (California, 3 February 2010) <<http://www.hidesertstar.com/articles/2010/02/03/news/doc4b69381ed5e05699313614.txt>> accessed 13 June 2012.

B. Dynamics of Coercive Control

Many women have been killed where there was no known history of prior physical violence.³² While best practice would be for civil protection order statutes to be amended to include non-physical forms of control,³³ many statutes would be effective as drafted if civil lawyers and judges understood that the non-coercive tactics are inherently threats of serious physical harm.

Coercive partners³⁴ typically use only as many coercive tactics as are necessary to control the target;³⁵ if limiting the at-risk partner's access to financial resources or preventing her from working outside of the home have been successful in controlling her behaviour, then there may be no need to escalate tactics to other forms of control.³⁶ Similarly, one act of physical violence early in the relationship gives credibility to future threats,³⁷ such that threats alone may be sufficient from that day forward in maintaining control over the targeted partner.³⁸

The collaborative practitioner may be unaware of the dynamics of coercive control. Historically, neither law schools nor social work schools have required domestic violence study as part of the curriculum for those intending to practice in the family arena. Bar examinations rarely test on the subject matter, even when family law is one of the examined topics.³⁹ Even jurisdictions that endow specialty certificates on family law practitioners regularly fail to test the practitioner's understanding of coercive control.

In both therapeutic and legal counselling, one may counsel those in abusive relationships without any formal training in coercive control. While

32. See generally, Campbell (n 28) 1089-97 (outlining research findings showing cases where abusers with no prior history of spousal violence had killed their wife).

33. Jeffrey R Baker suggests a definition that would incorporate the use of coercion intended to control the behaviour of an intimate partner as grounds for relief under the protection order scheme. Baker (n 30) 59. Missouri recently amended its statute to incorporate coercive behaviour as abuse: "[c]oercion", compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage'. Missouri Revised Statutes, Chapter 455.010(c) (2011).

34. Those who harm in intimate partner relationships are referred to in many ways. Common terms are abuser, batterer, or abusive partner. Likewise, the partner who suffers harm is referenced in various ways, such as survivor, victim, or target.

35. See generally, Stark, *Coercive Control: How Men Entrap Women in Personal Life* (n 29) 214-16 (enumerating the various control tactics that coercive partners may employ to assert control over the target); See also, Dutton (n 17) 743.

36. Dutton (n 17) 749.

37. *ibid* 748.

38. *ibid*.

39. cf Sara M Buel, 'The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class' (2003) 11 *American University Journal of Gender, Social Policy & the Law* 309, 311-12 (noting that some states were starting to add domestic violence questions on the bar exam, but identified the new trend as only in 'several states').

lack of formal academic study does not preclude the delivery of effective services, the lack of such training is obviously not optimal nor in the best interests of the clients. Since the behaviour of domestic violence targets is often described as counter-intuitive,⁴⁰ a lack of appreciation of the fundamental dynamics of violence can create misunderstanding between practitioners and their target-clients. Any resulting increase in the client's safety risk can further frustrate and disempower the abused partner.

Safety is the lens through which competent domestic violence services are provided. The target's counter-intuitive behaviour may seem unusual or bizarre to the untrained practitioner. Yet the behaviour may be effective safety planning for the target and her children. For example, the untrained observer might see an abused woman as 'weak' when she returns to her sexually coercive partner after obtaining an emergency civil protection order. However, if the coercive partner threatens to focus future abuse on the parties' daughter instead of the mother should the mother proceed with a no-contact order, the mother's decision becomes understandable. Return to the coercive partner is particularly understandable in a jurisdiction where the coercive parent is likely to be awarded unrestricted access to the daughter if the mother cannot prove in court that the coercive father has directly abused the child.⁴¹ By returning home and terminating the protection order, the mother has executed what she believes is the best safety plan for the child. An outside observer might see only that the mother has failed to follow through on the 'protections' offered by the court system. Targets make what they believe to be reasonable choices in their circumstances. These choices can be appreciated only when safety is understood as the primary decision-making influence.

Only familiarity with the dynamics of coercion and the range of target responses to that coercion can prepare collaborative and other professionals for effective assessment of abuse cases.⁴²

40. Jennifer Gentile Long, 'Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases' (2006) 1(4) *The Voice* <http://www.ndaa.org/pdf/the_voice_vol_1_no_4_2006.pdf> accessed 30 June 2012.

41. See further, Lundy Bancroft and Jay G Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage Publications 2002) 115-16.

42. Many screening tools are available. For example, the American Bar Association Commission on Domestic and Sexual Violence published a screening tool for attorneys that can be downloaded from its website <http://www.americanbar.org/content/dam/aba/migrated/domviol/screening_toolcdv.authcheckdam.pdf>; See generally, Ver Steegh, 'The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers' (n 15) 712-13 (providing an expanded discussion of the types of violence that attorneys must be familiar with).

C. Abuser Manipulation

The coercive partner will employ any tool available to enhance control over the target.⁴³ This includes manipulation of systems and professionals. Family systems therapy provides an example of professional settings that unwittingly support the abusive intimate partner's coercive behaviour.⁴⁴ Family systems therapy encourages participants to explore and adjust whatever roles each family member plays in contributing to the problems in the presenting relationship.⁴⁵ Therapy sessions may include partners, children, and other family members as well. However, since disclosure of abuse can place the target at greater risk, neither abused women nor abused children are likely to disclose the coercive behaviour in the presence of the coercive partner. Disclosure is especially unlikely in any professional setting where the abuser has access to the target's information. Likewise, accountability is discouraged in a setting where resolution is the priority. The lack of accountability for coercive behaviour that resulted in great harm to the family undermines the target's ability to achieve safety. This scenario is played out time and again where professionals prioritise conflict resolution over safety.

D. Understanding the Target's Response

There is no uniform, predictable response to trauma.⁴⁶ Some targets will be angry, verbally aggressive, and demanding. Some may have fought back, while others are passive and quiet. While many people believe that they can identify who is an abuser and who is a target, no psychological test can assess who abuses or diagnose who is being abused.⁴⁷ Individuals as well as systems frequently judge target credibility by whether she responds to abuse in their expected way.⁴⁸ For example, observers might expect a 'true victim' or target to be fearful and grateful.⁴⁹ The woman who is assertive and who has fought back may be judged as not credible.⁵⁰ Lawyers and other professionals may

43. Dutton (n 17) 743.

44. Lynn Scoresby, 'Family Systems Therapy' (1979) 5 *Journal of the Association of Mormon Counselors and Psychotherapists* 24, 27.

45. *ibid.*

46. See generally, Judith Lewis Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (Basic Books 2001) 86-95 (providing an overview of the various responses to trauma that survivors may experience).

47. Clare Dalton, Leslie M Drozd, and Frances QF Wong, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (Bench Guide, National Council of Juvenile and Family Court Judges, 2006) 19-21.

48. Gentile Long (n 40).

49. Leigh Goodmark, 'When Is a Battered Woman Not a Battered Woman? When She Fights Back' (2008) 20 *Yale Journal of Law and Feminism* 75, 82-83.

make similar judgements. Once this judgement is made, the target may be seen as resistant, obstructionist, or alienating when in fact her behaviour is a rational response to abuse and the resulting concern for her and her children's safety.⁵¹ In a recent study, some mediators noted that 'the intractable position of one party may be justified by reasonable fears'.⁵² Unfortunately, in the same study mediators noted only cases involving physical abuse as inappropriate for mediation.

E. Abuser Accountability

The known method of reducing or eliminating abusive behaviour is for the coercive partner to take accountability of his actions and receive appropriate re-education.⁵³ Accountability is the essential goal of successful batterer intervention programmes.⁵⁴ Unsurprisingly, taking responsibility is also the part of treatment that a coercive partner resists most.⁵⁵ Coercive partners routinely normalise their own behaviour and the impact of their abuse on others.⁵⁶ Crying and saying 'I'm sorry' come easily to many coercive partners,⁵⁷ while sincerity and a commitment to change do not. While professionals acknowledge the power of apology, a coercive partner's apology without treatment and change is no apology at all: it is manipulation.⁵⁸

When third parties persuade a target to 'forgive' the apologetic but abusive intimate partner, they place the target in greater jeopardy.⁵⁹ From the target's perspective, the coercive partner has manipulated third parties into supporting his position and making himself the focus of their sympathy.⁶⁰ These well-meaning individuals may believe that they are encouraging family healing, but the result is that the targeted partner feels pressured into resuming a relationship with the coercive partner. The accomplishment of 'forgiveness' or reconciliation results in the untreated coercive partner regaining unfettered access to the target.⁶¹ The target's 'lesson learned' is that even

50. *ibid* 94-95.

51. See further, Meier (n 2) 711-12.

52. Sandra J Perry, Tanya M Marcum, and Charles R Stoner, 'Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation' (2011) 11 *Pepperdine Dispute Resolution Law Journal* 441, 460.

53. Amanda Dekki, 'Punishment or Rehabilitation? The Case for State-Mandated Guidelines for Batterer Intervention Programs in Domestic Violence Cases' (2004) 18 *St John's Journal of Legal Commentary* 549, 568-72.

54. *ibid*.

55. Jane H Wolf-Smith and Ralph LaRossa, 'After He Hits Her' (1992) 41 *Family Relations* 324, 325.

56. *ibid* 324.

57. *ibid* 326.

58. *ibid* 327.

59. *ibid* 328.

60. David Island and Patrick Letellier, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* (The Haworth Press 1991) 256.

those that she turned to for help and understanding have been co-opted by the coercive partner.⁶² This scenario plays out in the collaborative process when the target is expected to set aside abuse concerns in order to conduct ‘respectful’ negotiations.

What many Alternative Dispute Resolution (‘ADR’) practitioners fail to accept is that the decision to abuse is deeply engrained in the essence of the coercive partner’s belief system.⁶³ The coercive partner feels entitled and privileged.⁶⁴ While control tactics might change, once the coercive partner locks onto a target, his abusive behaviour is unlikely to diminish without appropriate intervention or his voluntary re-shifting of focus to a new partner.⁶⁵

Given coercive partners’ resistance to change and to treatment, inviting couples that have experienced abuse into the collaborative process is dangerous.

IV. THE DOMESTIC VIOLENCE PRACTITIONER’S CONCERNS REGARDING THE COLLABORATIVE PRACTICE

A. The Domestic Violence Practitioner’s View

Because of their understanding of the dynamics of abuse, competent domestic violence lawyers⁶⁶ approach alternative dispute processes with great caution. Generally, targets’ lawyers oppose any process that places the parties in close physical proximity, specifically in situations where there is either fear or a power imbalance present. Domestic violence lawyers appreciate that any process can become a tool of a coercive partner in maintaining control over a target. Those lawyers have particular concerns regarding ADR in the domestic violence context because the target may be left without the protections available through the courts.⁶⁷ As with mediation, domestic violence lawyers fear that the collaborative process will permit a coercive partner

61. *ibid.*

62. Kara Bellew, ‘Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities’ (2005) 26 *Women’s Rights Law Reporter* 39, 47-48.

63. *Island* (n 60) 67, 73.

64. *ibid* 76-77.

65. *ibid* 77.

66. In the context of this article, ‘domestic violence’ lawyers are those experienced in handling cases involving coercive control and who understand the dynamics of abusive relationships.

67. Throughout this paper, the target is referred to as ‘she’ and the coercive partner as ‘he’. This is as statistically, in heterosexual relationships, the male is the predominate aggressor and the female is the target and the at-risk partner, but this pattern is sometimes inverse. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (n 29) 91. The same dynamics of abuse can be present in same sex-relationships. *Island* (n 60) 16. Abuse in same-sex relationships is a serious concern and there is evidence that intimate partner coercion occurs at the same rate in same-sex relationships as in different-sex relationships. Joanna Bunker Rohrbaugh, ‘Domestic Violence In Same-Gender Relationships’ (2006) 44 *Family Court Review* 287, 287-88.

to manipulate the professional participants into allying with his position to the detriment of the partner who was abused.⁶⁸ Not only do the collaborative and mediation processes presume that the parties will participate in good faith and be transparent,⁶⁹ both processes further assume that the participants are fundamentally reasonable people who can reach agreement if properly guided.⁷⁰

Lawyers who represent targets of intimate partner abuse appreciate that in most instances the abusive party holds deeply ingrained negative views of women based on gender stereotypes, and that these views are a significant part of the coercive partner's psyche and belief system.⁷¹ These lawyers view collaborative law professionals as naïve in their belief that the process itself will somehow rectify any power imbalance or change a coercive partner's women-diminishing beliefs. Such naivety might lead to frustration on the part of the collaborative practitioner who does not understand the inflexibility of one or both of the parties. This misguided interpretation of client behaviour can result in target blaming, which ultimately empowers the coercive partner and places the target at even greater risk. By attempting to employ the collaborative process in resolving disputes that originate in coercive relationships, professionals can manufacture outcomes for clients far worse than any simple failure of the collaborative process itself might have produced in non-abuse cases. Collaborative practice is the shoe that does not quite fit when cases involving intimate partner coercion are forced into the model.

B. Lessons from the Mediation Experience

Collaborative law proponents readily point out the differences between the collaborative process and mediation. The collaborative process has many client protections incorporated into the practice that are not routine in mediation.⁷² For example, the parties have their lawyers present during the collaborative meetings.⁷³ Not all mediation models permit or require active participation by counsel.⁷⁴

68. See generally, Joan Zorza, 'What is Wrong with Mediation' (2004) 9 Domestic Violence Report 81, 94 (describing the various ways in which the coercive partner manipulates the mediation process).

69. Douglas C Reynolds and Doris F Tennant, 'Collaborative Law—An Emerging Practice' (2001) 45(5) Boston Bar Journal 12, 12.

70. See further, Pauline H Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association 2003) 16; See also, Susan L Pollet, 'Mediating Domestic Violence: A Potentially Dangerous Tool' (2005) 77 New York State Bar Association 42, 43.

71. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (n 29) 213-14.

72. Tesler, 'Collaborative Family Law' (n 3) 329-30.

73. *ibid* 328.

74. See example, Sarah E Cole, *Mediation: Law, Policy & Practice* (3rd edn, West 2011) para 12:2 (noting that lawyers do not often participate in divorce mediation programs).

Regular and persistent meetings are required as part of the collaborative process, with the goal being to continue meeting until the parties have resolved their differences.⁷⁵ While mediation can require frequent meetings as well, mediators sometimes do not permit third parties to be in the room during sessions; nor are teams of interdisciplinary professionals part of mediation models.⁷⁶ For participants who already feel less powerful than the other party, the lack of counsel or some other support system within mediation can result in further disempowerment, mitigated only by the sensitivity and skill of the mediator.⁷⁷

The enhancement of the imbalance of power to the detriment of the target in mediation and in other settings has been the primary concern of domestic violence lawyers in opposing ADR schemes. Both the American Bar Association (‘ABA’) and the American National Council of Juvenile and Family Court Judges have voiced concerns about the use of mediation in cases involving abuse.⁷⁸ For this reason, ABA policy recommends an ‘opt out’ provision from court-ordered mediation for those who have experienced abuse.⁷⁹ The National Council of Juvenile and Family Court Judges suggest safety guidelines for courts that require or recommend mediation in family law cases where abuse may be present.⁸⁰

Professional mediators and others often cite only the risks to the target’s physical safety during a session as a matter of concern. The risk of on-going physical abuse is certainly not to be discounted. However, many mediators do not employ any effective safety measures. Simple steps such as having the target arrive fifteen minutes after the coercive partner or leave fifteen minutes earlier can enhance her physical safety. That said, there is no doubt that access to the target during mediation sessions, at child visitation exchanges, and at other times, increase the target’s risk of further abuse: physical and/or otherwise.⁸¹

75. Tesler, ‘Collaborative Family Law’ (n 3) 328, 330.

76. *ibid* 318.

77. See generally, Nancy Thoennes, Peter Salem, and Jessica Pearson, ‘Mediation & Domestic Violence’ (2005) 33 *Family Court Review* 6, 9 (noting the importance of ensuring that the mediation process protects the safety of abused women).

78. Linda K Girdner, ‘Mediation’ in Deborah M Goelman, Fredrica L Lehman, and Roberta L Valente (eds), *The Impact of Mediation on Your Legal Practice* (2nd edn, American Bar Association 1996) 4-17.

79. Jane C Murphy and Robert Rubinson, ‘Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens’ (2005) 39 *Family Law Quarterly* 53, 60 fn 45 (quoting the following ABA resolution: ‘[t]hat the American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party’).

80. Girdner (n 78) 4-17.

81. See generally, Joan Zorza, ‘Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women’ (1995) 29 *Family Law Quarterly* 273, 274-75 (noting that the safety risk of the target often increases after the target has left the coercive partner).

Collaborative lawyers cite the presence of others in the room during negotiations as resolving the safety issue for the target.⁸² While the presence of others can be protective, the possibility of physical attack is not at the heart of the domestic violence lawyer's objections to either mediation or to the collaborative process. Concerns centre on the emotional and mental vulnerability of a target that can result from direct communication with her abuser.⁸³

Some neutrals⁸⁴ believe that any agreement is preferable to a litigated result. When agreement is the exclusive goal, ADR professionals might unknowingly exert pressure on the less powerful party to make more and more concessions.⁸⁵ Since coercive partners can be rigid in both their views and decision-making,⁸⁶ it is then the target that is perceived as more susceptible to the professional's demands for concessions. Conceding to systemic pressure typically results in the removal of settlement terms that could reasonably accommodate the target's needs. Exhausted, targets often agree to unsatisfactory or unrealistic settlement terms in part to end the process of face-to-face meetings with the coercive partner.⁸⁷

Domestic violence lawyers are most concerned that the collaborative setting promotes the continuation of the power imbalance and provides the coercive partner with greater opportunities to exercise non-physical forms of control.⁸⁸ Any contact with the target provides the opportunity to continue the abuse and resume control.⁸⁹ For example, a target might respond to her abuser's 'look' or 'word' that is intended to control her. That 'look' or other signal can have many consequences, intimidating the target into making concessions not favourable to her. The 'look' can cause a reaction in the target that seems irrational to the mediator or other observer. Meanwhile, the abusing party will appear reasonable and well organised, while the target struggles during the session or behaves inappropriately. The abused party may be either non-responsive or excessively compliant during the media-

82. Pauline H Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association 2003) 48.

83. See further, Connie JA Beck and Chitra Raghavan, 'Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control' (2010) 48 *Family Court Review* 555, 556-57; See also, Susan L Pollet, 'Mediating Domestic Violence: A Potentially Dangerous Tool' (2005) 77 *New York State Bar Association* 42, 43.

84. The term 'neutrals' is used here to describe those who are involved in the process but are not advocates for either party or the children.

85. Lydia Belzer, 'Domestic Abuse and Divorce Mediation: Suggestions for A Safer Process' (2003) 5 *Loyola Journal of Public International Law* 37, 47.

86. See further, *ibid* 49-50.

87. See further, Susan L Pollet, 'Mediating Domestic Violence: A Potentially Dangerous Tool' (2005) 77 *New York State Bar Association* 42, 43.

88. *ibid*.

89. Marika Ramos, 'Advice for abuse victims' (*Helium*, 8 March 2007) <<http://www.helium.com/items/203088-advice-for-abuse-victims>> accessed 25 March 2010.

tion.⁹⁰ Few mediators properly respond to this type of behaviour within the context of coercion.⁹¹ In fact, if the mediator's goal is settlement rather than equity, the target's compliance enhances that goal. And should that third party view the target's behaviour as interfering with the settlement process, the target might then be labelled obstructionist.⁹²

After over twenty years of domestic violence advocacy against the use of mediation, some progress has been made. Many jurisdictions have improved domestic abuse education requirements for mediators. Some jurisdictions require mediators to complete training in domestic violence if they are to be appointed mediators through the family court.⁹³ A well-trained mediator can recognise that power and control tactics may be in play. Mediators sensitive to this dynamic will terminate the mediation process if the control tactics continue or they will refer the target to counsel for representation after an apparently imbalanced agreement is reached. Despite initial resistance, experienced domestic violence lawyers have come to appreciate that certain cases may be appropriate for mediation.⁹⁴ While these cases may be a clear minority, lawyers now concede that in some cases, mediation might be a valuable alternative — particularly where a client believes that ADR will enhance her safety. Mediation is also used in domestic violence cases where the mediated results are likely preferable to what a particular trier of fact might order. With appropriate support that ensures physical safety as well as safety from intimidation, a recovering trauma target can feel empowered during the process.⁹⁵ While this scenario might be unusual, it can happen, and may be largely dependent upon how safe the target feels before and during the process and how sophisticated the mediator is in handling cases involving domestic abuse. A confluence of events would have to occur for

90. See generally, Aimee Davis, 'Mediating Cases Involving Domestic Violence: Solution or Setback?' (2006) 8 *Cardozo Journal of Conflict Resolution* 253, 275 fn 146 (describing the various restrictions felt by victims).

91. See further, Megan G Thompson, 'Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard' (2007) 86 *Oregon Law Review* 599, 616-18.

92. This seems quite plausible in mediation given that targets are not brought to the table as equal participants and therefore seemingly counter-intuitive to the mediation process. See further, Davis (n 90) 270.

93. Some examples include: Georgia (<http://www2.state.ga.us/courts/adr/adrrules.htm>), Kansas (<http://www.kscourts.org/ctruls/adrrules.htm>), Michigan (<http://www.supremecourt.state.mi.us/programs/cdrp>), Minnesota (http://www.courts.state.mn.us/adr/adr_info.htm), Nevada (Nevada Revised Statutes Annotated 38.330 (2001)), New Hampshire (<http://www.state.nh.us/marital/>), North Dakota (<http://www.court.state.nd.us/Court/Rules/ndroc/Rule8.9.htm>), Oregon (<http://www.odrc.state.or.us/cdrc.htm>), and West Virginia (<http://www.state.wv.us/wvsca/familyct/cover.htm>).

94. Thompson (n 91) 600.

95. See generally, Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?' (2000) 40 *British Journal of Criminology* 14, 30 (discussing the ways in which targets can use the law as an empowerment resource).

an abuse-sensitive mediator to be effective,⁹⁶ including the drawing of clear behavioural boundaries around the coercive partner that are then enforced by the neutral, counsel, or other third parties involved with the mediation.⁹⁷

Mediation can be important to a target's safety plan. One client⁹⁸ felt that she would be unsafe if she did not agree to her husband's demand for mediation. Believing that her best safety plan was to proceed with mediation, she determined that after initial resistance on each item discussed, she would 'reluctantly' concede to the husband's demands permitting him to 'win' on each issue important to him. While the resulting agreement was lopsided in terms of asset distribution, everyone left the process satisfied. The husband felt that he had 'punished' the wife for leaving him by depriving her of assets that he believed she valued. The mediator, who was more concerned about a successful process than an equitable result, was pleased that an agreement was reached. The target obtained a divorce coupled with a feeling of enhanced safety.

The case is illustrative of the counter-intuitive nature of domestic violence for both litigants and attorneys. The client gave up rights to property that a court surely would have awarded her. The client's priority was on her safety instead of what the law would have considered a fair division of property. Ultimately, this result would not have been possible in the collaborative setting. With collaborative emphasis appropriately on the transparency of the process,⁹⁹ disclosure of the target's plan would have undermined the overall values and goals of collaborative practice. The disparity in asset division would be an obvious red flag to the experienced collaborative team, and team members would expect an explanation.¹⁰⁰ The explanation, however, is exactly what could jeopardise the target's safety. Preserving the integrity of the collaborative process would be an expected priority for the professional team in this instance, with the client's goal of safety being secondary.

C. Target Expectations

When newly out of an abusive situation, targets of intimate partner abuse report that they want the abusive behaviour to stop.¹⁰¹ Typically, they are seeking reasonable solutions, not retribution. At the same time, targets can have an unrealistic belief that the professionals whom the parties encounter will be able to make the offending partner behave reasonably. This is rarely

96. Pollet (n 87) 44.

97. See further, Thompson (n 91) 628-29.

98. This was a case in which the author represented the wife. The wife developed her mediation strategy as part of her safety planning.

99. Voegelé (n 5) 985.

100. This is because the collaborative team's goal is to incorporate both parties' interests in reaching an equitable resolution. *ibid* 1018.

101. See further, Hoyle (n 95) 21.

the case. Mediation and other forms of ADR can be an attractive alternative to a target because of her assumption that her voice will be respected and that tactics of control will be eliminated from the professional process. When that behavioural shift does not occur, the target becomes hopeless and more disempowered. Discouraged and further impoverished if she has been required to pay for the ADR sessions, the target may sign a marital agreement that does not meet her needs but accomplishes termination of the process.¹⁰²

D. Mutuality and Neutrality Theories that Arise During the Settlement Process

Those involved with ADR often eliminate accountability from the process. Moderating language to remove blame while focusing on each party's strengths can be an effective method of moving angry parties toward cooperation.¹⁰³ As in family systems therapy, part of the mediation process contains both an acknowledgement that neither party has a superior position to the other and that each has played a role in the deterioration of the relationship. The process then expects both to engage in the rebuilding of trust. This approach of mutuality can provide a valuable reflective lesson for those couples not experiencing abuse. However, in relationships that are abusive, the focus on mutual responsibility, in particular two-party participation in the deterioration of the relationship, undermines the benefits of the process for the target and makes her more unsafe.¹⁰⁴ In situations where a coercive partner's tactics of control can be contained only through accountability, focusing *any* blame on the target only serves to empower the coercive partner.¹⁰⁵ Not only is the coercive partner not held accountable for his actions, but focus is shifted to the target in a way that accommodates the coercive partner's position.

Mutuality, which diminishes the target's claims, is commonly employed throughout the family legal system. Family court implementation of the mutuality approach has been well documented.¹⁰⁶ The practice is even more consciously employed in mediation and other ADR practices. One theory of mediation is that neither party should be 'blamed' in the ADR setting.¹⁰⁷ This practice carries over to the collaborative setting and is appropriate in cases not involving domestic abuse. Once an accusation is made, the mediator achieves 'balance' through mutuality. In order to achieve mutuality in both

102. See further, Sarah Krieger, 'The Dangers of Mediation in Domestic Violence Cases' (2002) 8 *Cardozo Women's Law Journal* 235, 247-48.

103. Nancy Ver Steegh, 'Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence' (2003) 9 *William & Mary Journal of Women and the Law* (2003) 145, 186-88.

104. Davis (n 90) 270-71.

105. Pollet (n 87) 43.

106. Meier (n 2) 694-98.

107. *ibid* 693.

courtroom and ADR settings, the target's minor insult or other responsive behaviour is given parity with the coercive partner's beating, sexual abuse, and sustained verbal or emotional assault.¹⁰⁸

Targets often display behaviour in court that negatively affects their credibility.¹⁰⁹ Coercive partners do not. They actually deny or minimise the effect of their actions.¹¹⁰ Consequently, the mediator might hear only about the target's misbehaviour. If the target feels that it is not safe to disclose abuse, particularly sexual assault, the mediator will not be aware of prior traumatising events. This can lead to inaccurate conclusions, such that the couple is immature or simply in 'high conflict'.¹¹¹ In fact, domestic abuse cases are often confused with 'high conflict' cases, where mutuality of inappropriate behaviour is foundational.¹¹² Targets' claims can go unheard and unaddressed when the case is labelled as 'high conflict'. A careful review of 'high conflict' cases by those educated in domestic abuse reveals that many, if not most, are mislabelled. When professionals do not understand a target's response to abuse, her inappropriate behaviour is seen as 'mutual'.¹¹³ In actuality, many cases labelled 'high conflict' — because both parties are assessed with inappropriate behaviour — are actually abuse cases¹¹⁴ involving a predominate aggressor.

Under non-coercive circumstances, one benefit that the collaborative process offers is the opportunity for the participants and the larger family to heal. When practiced sensitively and empathetically, that goal may be accomplished for perhaps one, or even both, of the former intimate partners.¹¹⁵ In theory, the collaborative process could benefit a target since healing is sometimes best accomplished through public disclosure of the coercive partner's abuse.¹¹⁶ However, the potential for the collaborative process to provide this benefit for the target is limited. The lawyer or other professional who undertakes mediation or collaborative practice, knowing that a

108. *ibid* 690-92.

109. *ibid* 691.

110. *ibid* 690.

111. See further, Davis (n 90) 296-70 (noting that most mediation screeners are not trained to recognise abuse).

112. See further, Clare Dalton, Judge Susan Carbon, and Nancy Oleson, 'High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions' (2003) 54(4) *Juvenile and Family Court Journal* 11, 13-14. The term 'high conflict' often refers to couples who seemingly agree on nothing and argue about everything. They may involve their children in their conflicts. This definition can mask abusive relationships and be problematic for those experiencing intimate partner abuse.

113. cf Goodmark (n 49) 107-08 (describing this theory in the context of abuse in lesbian relationships).

114. Dalton, 'High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions' (n 112) 23-24.

115. Voegelé (n 5) 999-1000.

116. Orloff (n 20) 65.

client will be discouraged from disclosing details of abuse, may interfere with and prevent the target's healing.¹¹⁷ Likewise, when the collaborative setting is promoted as 'safe',¹¹⁸ the target may assume that she will be free from coercion and retaliation. The ADR professional, however, will likely focus on physical safety and the target will not understand that the professional is unable to control the coercive behaviour that is likely to occur during and after the ADR sessions.

Collaborative and other ADR professionals often fail to acknowledge the coercive partner's harm to the target and the family. The process does not acknowledge that the target did not deserve what happened, let alone acknowledge that the target did not create the abusive situation. If focus is on avoiding blame, and witness is not given to the coercive conduct, the lack of voiced support could be devastating for a target. ADR practitioners may view the lack of their voiced support as maintaining 'neutrality'.¹¹⁹ But, the lack of acknowledgement that abuse occurred, combined with the lack of consequences for the coercive partner, can have devastating mental health consequences for the target, and can make her less safe.¹²⁰

On the other hand, if detailed disclosure is made, the professionals then must assess whether and how compensation will be made to the target, if compensation is sought. These are situations that may be uncomfortable for most family law practitioners, if not beyond their expertise. For these and additional reasons, abuse cases may not be appropriate for the collaborative process unless the legal team is expanded to include tort specialists who can assist in determining compensation, but that is not within the proper 'limited service engagement' contemplated in the collaborative law arena.¹²¹ Since the collaborative process focuses on the couple's moving forward, rather than compensation for suffering, the inclusion of tort compensation as part of the settlement discussion can be viewed as both hostile and detrimental to the process.

E. The Belief that Collaborative Practice is the Best Approach in All Family Law Cases

By the year 2000, collaborative practice was making an impact in many jurisdictions.¹²² Some proponents were convinced that litigation in family

117. Goodmark (n 49) 108-09 (referring to Barbara Hart, 'Lesbian Battering: An Examination' in Kerry Lobel (ed), *Naming the Violence: Speaking Out About Lesbian Battering* (Seal Press 1986) 173, 186).

118. Voegele (n 5) 980.

119. See further, Davis (n 90) 264.

120. In most settings, the target has some safety risks associated with disclosing abuse. A judicial finding that abuse did not occur can increase the target's safety risk. Any minimisation by a third party of abusive behaviour endangers the target by empowering the abuser.

121. Voegele (n 5) 1012.

law cases is never appropriate.¹²³ Promoters gave little regard to cases in which domestic violence was alleged.¹²⁴ As the practice expanded, the discussion became more inclusive and practitioners began recognising that some cases, like those involving addiction or abuse, were most likely not appropriate for collaborative law.¹²⁵ Others acknowledged safety concerns, but felt that the process could provide a physically safe space.¹²⁶ Nonetheless, many professionals still believe that most cases are appropriate for the collaborative process.¹²⁷

Rarely does one size fit all in any process. Even though the collaborative process can be an effective and holistic experience for many separated partners, it is not the best method for all situations. It is particularly helpful when practiced with empathy and a view toward the client's recovery from trauma.¹²⁸ But when the practitioner is of the belief that collaborative law is always the superior process in family law cases, the rigidity of that view can disregard the needs of abuse targets.

Even though collaborative practice is but one choice of methods that a client has in resolving intimate partner and other family disputes, the presentation of the choices might be skewed in favour of one process over another. For example, one leading proponent of collaborative law has greatly discounted litigation in family law matters so as to preclude any consideration of when litigation may be appropriate and necessary.¹²⁹ This presumption will lead to cases being forced into an inappropriate process. Neutral assessment of resolution options is important — particularly since no one system provides a significantly greater likelihood of settlement.¹³⁰

The many benefits of collaborative law can and should be explained by practitioners without unfairly discounting or disrespecting the benefits of other forms of resolution, including the litigation model. The legal process can add many layers of stress and frustration to the client's already disturbed existence. If the collaborative process fails, the legal system might be able

122. Tesler, 'Collaborative Family Law' (n 3) 317-18.

123. See further, Leah J Pollema, 'Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies' (2007) 75 *University of Missouri at Kansas City Law Review* 1107, 1113.

124. See generally, Voegle (n 5) 1012 (referring to Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (n 82) 94-95 and noting that abuse cases are likely not appropriate for the collaborative process).

125. *ibid*; See also, Susan M Buckholz, 'Two Views on Collaborative Law: Collaborative Dissolution' (2004) 30 *Vermont Bar Journal* 37, 37.

126. Voegle (n 5) 980.

127. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (n 82) 179.

128. Voegle (n 5) 1000-01.

129. Tesler, 'Collaborative Family Law' (n 3) 317.

130. See example, Carrie Menkel-Meadow, 'When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals' (2007) 44 *UCLA Law Review* 1871, 1923-25.

to provide protection and produce results that were not available during the collaborative process.¹³¹ Sometimes participants do not take settlement discussions seriously until trial is imminent and only then will they appreciate the weaknesses of their positions or the risk in leaving the decision in the hands of a third party. Other times, because of the extreme unreasonableness of one or both of the parties, negotiations on any level simply fail.

Holistic approaches to healing can be found in any resolution process. Litigation, mediation, and collaborative practice offer opportunities for professionals to assist clients in becoming stronger and more accepting of the outcome. The ability to help a client heal depends upon the quality of the professional and is not tied to the process. Of course, we all wish that every dispute could be resolved in an amicable and respectful manner. The reality is that this is simply not possible in every dispute. If a practitioner is tied to one form of resolution, particularly if that practitioner is unable to give a neutral assessment or description of the other processes, the integrity of whatever system the client selects has already been compromised.¹³²

When practitioners believe that the collaborative process is fundamentally superior and can be applied to all family law cases, they will have a natural resistance to terminating the process, even after it has become apparent that settlement is not likely. Commentators are fond of saying that the restriction on the collaborative lawyer from representing the client in any related litigation keeps the lawyers at the table longer and releases their creativity.¹³³ That may be so in some cases, but when the process is not functioning, the lawyers ought to leave the table. Staying creates further financial and other hardships for the parties. Even where one party is exhibiting controlling behaviour over the other that is unrecognised or inappropriately assessed by the professionals, the negotiations may continue because of the collaborative team's resistance to terminating the process.¹³⁴ In equating termination with 'failure', the team will continue with the process as long as possible. If one views the collaborative process simply as one possible method of resolution, and the professional ego is detached from judgement of litigation or mediation, then the collaborative process will terminate timely, freeing the parties to move on to the next method of possible resolution.

There are multiple reasons for professionals to promptly terminate a failing process. Of primary concern for the professionals is avoiding the appearance of extending the process solely to increase revenue. Profession-

131. See example, Ohio Revised Code Annotated § 3113.31 (n 24) (providing that 'the court may grant any protection order ... or approve any consent agreement to bring about a cessation of domestic violence against the family or household members').

132. See generally, Krieger (n 102) 253 (discussing the importance of screening for abuse in mediation settings).

133. Voegelé (n 5) 979-80.

134. *ibid* 980.

als who contractually agree not to participate in related litigation may be perceived as continuing the process for financial gain.¹³⁵

While collaborative law often provides a helpful and meaningful service, professionals must be mindful ‘not to oversell any given process, including Collaborative Law’.¹³⁶ Many collaborative lawyers are former family law litigators. Disenfranchised by increasing incivility and other difficulties encountered in family law litigation practice, many have chosen instead to embrace collaborative practice. The system is more comfortable for them to learn because the lawyers continue to represent clients in a somewhat traditional format. Unlike mediation where the lawyer must adjust practice from advocacy to neutrality, the collaborative lawyer must learn only to work as a ‘team’ member and modify language from a blaming vocabulary to a more holistic one. The support of other team members makes the transition easier because of the mentoring that more experienced team members provide. Once the transition is made, the collaborative lawyer fears reverting back to a full-time litigation practice. The impetus for the model to succeed at all costs can motivate the lawyer to continue the collaborative process even when the parties are no longer benefitting from the process. This fear contributes to the lawyer’s initial resistance to recommending litigation as a necessary process for appropriate cases.

V. THE RISKS OF APPLYING THE COLLABORATIVE MODEL TO ABUSE CASES

All of the concerns noted regarding cases involving intimate partner abuse entering into the mediation process are present in the collaborative law arena. In addition, several aspects of the collaborative model that make the process a rich experience in non-abusive situations can be the very aspects of the process that increase risk for the coercively controlled target.

A. Disclosure and Transparency

Coercive partners are rarely honest with their targets.¹³⁷ Financial control, secrecy, and fraud are generally present in abusive relationships.¹³⁸ Without safeguards or sanctions for failing to make accurate disclosures, there is little

135. Clients are often told that the collaborative process will be less expensive than litigation. However, the client will have separate fee agreements with each member of the collaborative team. Tesler, ‘Collaborative Family Law’ (n 3) 331. The same claim is often made of mediation. Pollet (n 87) 43. This has not proven true in abuse cases where subsequent litigation is likely because the controlling party has not obtained every term he feels entitled to. Often the coercive partner will not abide by the mediation and the parties will just keep returning to court, adding more costs to the target. Zorza, ‘What is Wrong with Mediation’ (n 68) 94.

136. Voegle (n 5) 1012.

137. See generally, Wolf-Smith (n 55) 325 (noting that coercive partners will often apologise and make empty promises of changed behaviour, only to continue abusive behaviour).

138. See generally, Bellew (n 62) (describing the various forms of abuse that can be employed).

incentive for coercive partners who have hidden assets to be honest during the collaborative process.¹³⁹ Without formal discovery procedures,¹⁴⁰ there is no subpoena process for verification of client-provided information.

In fact, some non-financial disclosures could be made that jeopardise the well-being of the targeted partner.¹⁴¹ For example, whether the target is in a new relationship is often irrelevant to settlement discussions. Obtaining this information can be a focus of coercive partners who use many tools, including litigation and settlement processes, to discover the whereabouts and activities of their partners.¹⁴² If there is to be transparency and full disclosure, the collaborative model requires that no information may be withheld.¹⁴³ Disclosure of a target's address, whereabouts, and status of any new relationship could place both the target and any new partner at serious risk of harm.¹⁴⁴ The types of information that can place a client at risk are particular to each individual situation. Transparency may be an achievable goal in situations where the couples have a history of good faith interactions. When couples have experienced abuse in an intimate relationship, it can be presumed that one or both parties will lack the good faith and/or respect components essential to successful collaboration.

B. Four-Way Meetings

An important part of the collaborative process is the use of frequent face-to-face meetings, often called 'four-way' meetings.¹⁴⁵ This contact with the coercive partner can be traumatising for targets, particularly during the early stages of separation and recovery. In fact, divorce and custody proceedings can be a conduit for prolonging the effects of traumatising events.¹⁴⁶ This trauma is compounded for those who have been sexually assaulted, stalked, and emotionally or verbally abused by the former partner. Post-traumatic stress disorder, depression, and other mental health concerns can be found in some individuals who have been abused.¹⁴⁷ Many family law lawyers

139. cf Bancroft (n 41) 179 (discussing how the batterer will often only be honest and upfront in negotiations when either threatened with losing contact with their children or as a means of trying to reconcile with the target).

140. See further, Reynolds (n 69) 12, 14.

141. Zorza, 'Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women' (n 81) 290-91.

142. Pollema (n 123) 1110.

143. Gutterman (n 16) 57.

144. Pauline Quirion, 'Representing Victims of Domestic Violence' in Phyllis E Federico and Peter F Zupcofska (eds), *Massachusetts Divorce Law Practice Manual* (2nd edn, Massachusetts Continuing Legal Education 2008) ch 25, para 25-9-11.

145. Voegelé (n 5) 984.

146. See generally, Pollema (n 123) 1110 (noting how coercive partners can use the legal system as an instrument to perpetuate abuse).

comprehend why a victim of stranger rape would be discouraged from frequent meetings with the perpetrator.¹⁴⁸ Yet when the assailant is an intimate partner, particularly where the parties have children, the target is often encouraged to participate in face-to-face meetings without regard for the impact those meetings may have on her sense of safety and her mental health.¹⁴⁹

Even those who have not been physically or sexually abused but have been otherwise coercively controlled are usually not prepared for the emotional impact of face-to-face meetings. While the meetings, at the right point in recovery, may have some therapeutic value, the lawyers, coaches, and others involved with the clients are not qualified to predict whether the meetings will be re-traumatising or assistive in recovery.

The most dangerous time for targets of domestic abuse is the time period during and after separation.¹⁵⁰ The coercive partner's concept of 'leaving' varies, and is defined by his perception of events.¹⁵¹ For example, the target obtaining a job or applying for school may be perceived by the coercive partner as an attempt to leave, even though the at-risk partner may have no such plans. The perceived loss of control and the coercive partner's interpretation of the target's actions are what trigger the heightened danger, not the intention of the controlled party.

The danger associated with leaving can continue for some time following separation.¹⁵² Any contact with the target during this period increases the opportunity for a coercive partner to inflict further harm, whether that harm is physical, emotional, or psychological.¹⁵³ This is why the 'no contact' or 'stay away' provisions of civil protection orders are the most important terms for ensuring target safety.

Similarly, threats can be delivered in ways not understood other than by the target. A settlement offer where the coercive partner insists on taking the family dog could be a threat known only to the partner. The coercive partner might have abused the family dog. Delivering this demand in a face-to-face meeting could have a powerful effect on the at-risk partner.

147. Ann Coker and others, 'Physical and Mental Health Effects of Intimate Partner Violence for Men and Women' (2002) 23 *American Journal of Preventive Medicine* 260, 265.

148. Zorza, 'Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women' (n 81) 295-96.

149. See further, Bancroft (n 41) 185-87.

150. Lorena Garcia, Catalina Soria, and Eric L Hurwitz, 'Homicides and Intimate Partner Violence: A Literature Review' (2007) 8 *Trauma, Violence, & Abuse* 370, 374-75.

151. Cathy Humphreys and Ravi K Thiara, 'Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25 *Journal of Social Welfare and Family Law* 195, 198.

152. *ibid* 199.

153. *ibid* 199-200.

VI. ETHICAL ISSUES

The ethical issues that are raised by involving abused partners in the collaborative process are both in addition to, and different from, the issues raised by collaborative law practice generally.¹⁵⁴ Among the ethical issues raised by collaborative law are the financial ability to hire successor counsel, the timing of the process, emotional exhaustion, and the handling of a target's often unrealistic expectation regarding the outcome of the process.

A. Finances and the Ability to Hire Counsel

Financial abuse is often present in coercive relationships.¹⁵⁵ Money is a powerful tool of control. Even if the family unit has substantial assets, the at-risk partner typically does not have access to those resources without the permission of the coercive partner.¹⁵⁶ Targets who are working professionals and earn a significant salary report that they cannot independently access funds. Asserting independent financial control could invite further abuse. When the target does have access to funds, she often must account to her coercive partner for each penny spent.¹⁵⁷

Consequently, targets rarely have sufficient resources to hire competent counsel during the divorce process, let alone enough money to engage in alternative processes that might not be successful.¹⁵⁸ When targets do have funds for a retainer, often those funds are limited.¹⁵⁹ Most targets will not have sufficient funds to hire successor counsel if the collaborative process is terminated before resolution.¹⁶⁰ This is a valid concern. The divorce process is expensive and if the collaborative process is terminated without resolution, targets may have substantial difficulty in hiring competent counsel to represent them during divorce and custody litigation. Many targets who find the collaborative process unsuccessful may need to proceed with divorce and custody litigation *pro se*.¹⁶¹ This is an especially dangerous practice for abused mothers.¹⁶²

154. Scott R Peppet, 'Ethical Issues of Collaborative Law' [2008] *Journal of Dispute Resolution* 131, 157.

155. Bellew (n 62) 42-43.

156. *ibid* 42.

157. *ibid*.

158. Lisa E Martin, 'Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel' (1999) 34 *Gonzaga Law Review* 329, 344.

159. See generally, Sarah M Buel, 'Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay' (1999) 28(10) *The Colorado Lawyer* 19, 20 (discussing the financial hardship faced by targets).

160. Martin (n 158) 344.

161. *ibid* 331.

162. See generally, Mary A Kernic and others, 'Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence' (2005) 11 *Violence Against Women* 991, 995 (describing how 'the psychological aftermath of abuse' could even 'lead to the appearance that the batterer will make a more fit parent than the victim').

Compounding this concern is the difficulty that targets have in finding counsel who understands the dynamics of domestic violence.¹⁶³ A target that enters the collaborative process in good faith might want the same lawyer to represent her during subsequent litigation. Indeed, collaborative counsel could be the most competent domestic violence lawyer in the client's geographic area. Ethically, before recommending the collaborative process, the professionals should ensure that clients have sufficient funds to hire competent successor counsel. Otherwise, clients may be left with little choice but to enter into an agreement with unfavourable terms because they cannot afford to engage other methods of resolution.

B. Timing and Expectations

Before taking part in any settlement process, the target may need significant time away from the controlling partner in order to recover self-confidence. Traumatized targets may have difficulty organising their thoughts and responding appropriately to inquiries.¹⁶⁴ Without sufficient time for recovery, the target may have unrealistic expectations for the outcome of the legal process. Those who have experienced abuse are eager for the abuse to stop¹⁶⁵ and will often feel that the professionals have the power to change the coercive partner's behaviour. This expectation is unrealistic because coercive partners rarely change behaviour post-separation.¹⁶⁶ Collaborative professionals are unable to enforce consequences for the controlling behaviour, other than termination of the collaborative process itself. Eager to begin the collaborative process early in the client's separation, the professionals are unable to enforce boundaries. There is no incentive for many coercive partners to contain or change behaviour.¹⁶⁷ The unreasonableness of the coercive partner's positions, and the continued use of controlling tactics, can bring a sense of reality to the target.¹⁶⁸ Only with sufficient recovery time, however, will the targeted partner be able to understand and accept the limitations of any ADR process in changing or controlling abusive behaviour.

When expectation of changed behaviour is no longer part of the client's decision-making process, the partner who has experienced abuse can make more detached decisions about her future and the terms of separation.

163. See generally, Martin (n 158) 354-55 (discussing the various daunting aspects of litigation for a target of domestic violence).

164. Lewis Herman (n 46) 93-95.

165. cf Hoyle (n 95) 155 (noting that targets who call the police are often times more interested in ending their abuse than in punishing their partners).

166. Quirion (n 144) para 25-7.

167. cf Bancroft (n 41) 185 (discussing other forms of motivation for batterers to change their behaviour, apart from sanctions).

168. *ibid* 5.

However, the collaborative process often commences shortly after the parties separate.¹⁶⁹ This is not only a very dangerous time for the target, but it is also a time when she may not be sufficiently separated from the coercive partner to appreciate the extent to which she was abused.¹⁷⁰ She may not realise how the abuse changed her personality and behaviour. While the client is in a traumatised state, she is not as likely to make appropriate decisions on issues that will affect her and her children for years into the future. In fact, the target may not even be able to recall details of traumatising events early after separation.

C. Emotional Exhaustion

Those who have been controlled in intimate relationships may come to the professionals in an exhausted state.¹⁷¹ The traumatised client needs support and empowerment to heal.¹⁷² If the collaborative team is not focused on supporting the traumatised client and postponing negotiations until the client has made substantial recovery, the collaborative process is not an appropriate remedy. If controlling tactics continue post-separation, which is the case in most coercive control situations, the process is not going to support healing for either party. The controlling partner will be empowered by the process to continue his control.¹⁷³ The coercive partner's controlling tactics may be difficult for the collaborative team to recognise as they may be peculiar to the particular target.¹⁷⁴ For example, pet abuse is a common tactic of control in abusive relationships. As mentioned earlier, in some cases, coercive partners insist on continued control of a pet as part of settlement in an effort to send a message to the abused partner that she had better do what the partner wants or the pet will be abused. The same tactic can be used for anything or anyone that the target values. This is why threats to take the children are particularly powerful.

If the target is exposed to threats throughout the collaborative process, she will give up on the process, disappointed that the coercive partner was not contained.¹⁷⁵ As previously noted, this attitude leads to settlement on unsatisfactory terms.¹⁷⁶ For those concerned about malpractice, the arrangement is fraught with possibilities of later claims.¹⁷⁷ Releases and waivers may be unenforceable when signed by someone who is in a traumatised state.¹⁷⁸

169. See further, Peppet (n 154) 133-34.

170. Lewis Herman (n 46) 158.

171. See generally, *ibid* 134-35 (enumerating the mental state of an abuse target when they enter into therapy).

172. *ibid* 133.

173. See further, Bancroft (n 41) 113-29.

174. *ibid* 79.

VII. CONCLUSION

While family law practitioners nobly search for ways to minimise the angst of separation and divorce, few acknowledge their role in exacerbating their clients' trauma. Collaborative practitioners must consider the risk to engaging abused partners in their practice. Collaboration works best with clients who can be respectful and honest with each other. Those characteristics are not compatible with abusive relationships.

175. See generally, Buel, 'Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay' (n 159) 22 (noting that mediation can also leave the target feeling disappointed that the coercive partner was not controlled).

176. Bancroft (n 41) 117, 125.

177. See generally, Margaret Drew, 'Lawyer Malpractice and Domestic Violence: Are We Revictimizing our Clients?' (2005) 39 Family Law Quarterly 7, 12-20 (identifying some of the possible claims that the client may later bring. For example, the client could claim that the lawyer recommended the collaborative process without appreciation of how traumatising it would be for the client to be exposed to her abuser).

178. For example, in an Ohio case the Court upheld a finding that a separation agreement was signed under duress where the husband made threats to his wife and there had been repeated acts of abuse during marriage. *Quebodeaux v Quebodeaux* 657 NE2d 539, 541 (Ohio Ct App 1995); In a South Carolina case, the Court upheld the trial court's finding that a separation agreement resulted from undue influence where the wife was beaten by her husband and subjected to constant mental abuse. *Jackson v Jackson* 310 SE2d 827, 828 (South Carolina Ct App 1983).