

THE UNIFORM COLLABORATIVE LAW ACT AND  
INTIMATE PARTNER VIOLENCE:  
A ROADMAP FOR COLLABORATIVE  
(AND NON-COLLABORATIVE) LAWYERS

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## I. INTRODUCTION

When confronted with a thorny and intractable issue like intimate partner violence, it is easier, in the manner of Scarlett O’Hara, to say, “I can’t think about that right now. If I do, I’ll go crazy. I’ll think about that tomorrow.”<sup>1</sup> Well, “tomorrow” has arrived in the form of the Uniform Collaborative Law Act (“UCLA”), which expressly confronts the issue of intimate partner violence within the context of collaborative law practice.<sup>2</sup>

The UCLA breaks new ground by creating statutory obligations with respect to intimate partner violence that, if adopted by states, will apply specifically to collaborative lawyers. However, to the extent that the requirements embody current best practice expectations for competent family law representation, they are a model for all family lawyers and should receive broader attention.<sup>3</sup>

Although the level of accountability required of collaborative lawyers under the proposed Act should be expected of all family lawyers, there is special reason to impose initial consumer protections on collaborative lawyers. Collaborative law is a private process that functions almost entirely outside the purview of the court system, and the parties consequently have little or no contact with judges or court system personnel who might otherwise regulate the divorce process, screen for intimate partner violence, or make appropriate referrals.<sup>4</sup> Because collaborative lawyers are the gatekeepers and managers of this new process, they are the only professionals positioned to identify and effectively deal with intimate partner violence. Given the frequency with which intimate partner violence is alleged<sup>5</sup> and the consequent risk for

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1. GONE WITH THE WIND (MGM 1939).

2. UNIF. COLLABORATIVE LAW ACT, prefatory note (2009), *in* 38 HOFSTRA L. REV. 421, 459 (2010) [hereinafter UCLA].

3. See Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 9-10 (2005).

4. This does not mean that lawyers outside the collaborative process are in any way exonerated from the obligations discussed in this Article.

5. See JANET R. JOHNSTON ET AL., *IN THE NAME OF THE CHILD: A DEVELOPMENTAL*

families, the long-term viability and integrity of collaborative law practice depends, in part, on the willingness and ability of collaborative lawyers to adopt sound practices with respect to intimate partner violence.

The UCLA takes what might be termed a “tough love” approach to collaborative lawyers and intimate partner violence. Passage of the Act gives recognition to collaborative law and moves the process into the mainstream. However, the price of admission includes explicit intimate partner violence obligations that, if not complied with, could result in lawyer liability.<sup>6</sup> More is being asked of collaborative lawyers, and time will tell if they are prepared to lead the way for all family lawyers.

This Article examines the intimate partner violence provisions of the UCLA and provides an analytical roadmap for collaborative lawyers. The lack of required intimate partner violence training for collaborative lawyers presents a major roadblock for implementation of the Act. Consequently, states adopting the UCLA should take immediate steps to ensure that courts and bodies regulating lawyers require ongoing training. In the meantime, to gain valuable expertise and avoid potential liability, collaborative lawyers should voluntarily seek it.

Part II of the Article describes the collaborative law process and what is known about it from an empirical perspective. Part III provides an overview of the intimate partner violence provisions of the UCLA. Part IV explores recent research concerning coercive or violent relationships, while Part V analyzes the lawyer’s obligation to reasonably inquire and continuously assess whether there is a history of coercion or violence between the parties. Part VI clarifies the default outcome (no collaborative law) if there is a history of coercion or violence. Part VII explains informed consent and suggests eleven “appropriateness” factors related to coercive or violent relationships. Part VIII revisits the collaborative lawyer’s obligation to form a reasonable belief regarding safety, and Part IX features a summary roadmap or checklist for collaborative lawyers. Part X critiques the UCLA and makes recommendations regarding a major barrier to implementation of the Act—lack of training and support concerning intimate partner violence best practices.

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APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 308 (2009) (noting that domestic violence was alleged in two-thirds to three-fourths of the cases involving custody-litigating families studied by the authors).

6. UCLA § 15, at 484-85.

## II. THE COLLABORATIVE LAW PROCESS

The practice of collaborative law began in 1990 when Minnesota practitioner Stuart Webb became disillusioned by the toll taken on families and children who participated in adversarial litigation.<sup>7</sup> He sought to develop a form of practice where lawyers would be rewarded for helping clients resolve issues and not for exacerbating family conflict.<sup>8</sup> Over the past twenty years, Mr. Webb's dream has come to fruition as collaborative law is now practiced in at least thirty-five states as well as in the United Kingdom, Ireland, and Australia.<sup>9</sup> In addition to the promulgation of the UCLA; California, North Carolina, and Texas have adopted collaborative law statutes.<sup>10</sup> In 2007, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility issued an ethical opinion approving the collaborative law process, so long as potential clients are advised of the benefits and risks.<sup>11</sup>

### A. Common Features of Collaborative Law Practice

Collaborative law is essentially a contractual interest-based negotiation process in which parties and their lawyers use problem-solving techniques to build agreements tailored to meet their fundamental needs, as well as those of their children.<sup>12</sup> A central premise of the process is that participants can have the "best of both worlds," combining win-win problem solving with the protection inherent in individual representation.<sup>13</sup> The parties and their lawyers typically

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7. Susan A. Hansen & Gregory M. Hildebrand, *Collaborative Practice*, in INNOVATIONS IN FAMILY LAW PRACTICE 31 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008) [hereinafter INNOVATIONS].

8. *Id.*

9. PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION*, at xxx n.1 (2d ed. 2008) ("Nearly every major urban center in North America, the United Kingdom, Ireland, and Australia now has well-trained collaborative lawyers offering services to divorcing couples."); John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 689 (2007).

10. See Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings*, 30 CAMPBELL L. REV. 363, 365 (2008); see also CAL. FAM. CODE § 2013 (West Supp. 2010); N.C. GEN. STAT. § 50-70 (2009); TEX. FAM. CODE ANN. § 153.0072 (Vernon 2008); TEX. FAM. CODE ANN. § 6.603 (Vernon 2006).

11. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) [hereinafter Formal Op.].

12. See UCLA, prefatory note, at 426.

13. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282 (2004).

engage in confidential “four-way” meetings (meetings attended by both lawyers and both clients) that may also include neutral expert advisors, such as mental health and financial professionals.<sup>14</sup> The parties agree to communicate openly and share information without use of formal discovery techniques.<sup>15</sup>

The process is distinguished from other alternative dispute resolution (“ADR”) processes by the disqualification agreement—an agreement that the collaborative attorneys will withdraw and be replaced by litigation counsel if either party seeks court intervention before the case is settled in its entirety.<sup>16</sup> The process is described in the Prefatory Note to the UCLA as follows:

Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers (“collaborative lawyers”) during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement (“disqualification requirement”). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.<sup>17</sup>

The disqualification agreement adds teeth to the parties’ commitment to settle in that they will incur both expense and delay if either seeks court involvement and consequently triggers the withdrawal of the collaborative lawyers and the hiring of new litigation counsel. Disqualification also creates financial incentives for lawyers to focus solely on settlement rather than rewarding them for initiating adversarial court activity.<sup>18</sup>

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14. Hansen & Hildebrand, *supra* note 7, at 41-44, 51-55; Stu Webb, *Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 162-63 (2008).

15. TESLER, *supra* note 9, at 10-11; Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 79 (2005).

16. UCLA, prefatory note, at 426-27; Hansen & Hildebrand, *supra* note 7, at 29-30, 32-34; Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 290-91 (2008).

17. UCLA, prefatory note, at 425 (citation omitted).

18. Lande & Herman, *supra* note 13, at 283; Gary Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 979 (2007).

### B. Empirical Research on the Collaborative Law Process

Researchers have recently begun to investigate collaborative law practice. Most notably, Julie Macfarlane performed a three-year study (from 2001 to 2004) of collaborative law practice that included interviews with lawyers, clients, and other professionals at nine locations (four in more depth) in the United States and Canada.<sup>19</sup> At about the same time, William H. Schwab conducted a survey-by-mail study involving 367 collaborative lawyers and their clients.<sup>20</sup> Although at this point no firm conclusions can be drawn, contours of practice are emerging.

It appears that although collaborative practices share some common traits, there are varying models of practice. For example, practitioners have different views concerning the extent of legal advice provided, the desirability and ramifications of separate meetings with clients, expectations for disclosure of information, and involvement of coaches and other professionals.<sup>21</sup> Although collaborative practice groups have become more organized and assumed some gatekeeping functions (typically requiring continued training and experience levels for participation),<sup>22</sup> the existence of different practice models aligns with the UCLA's attempt to standardize essential features of collaborative

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19. JULIE MACFARLANE, DEP'T OF JUSTICE CAN., THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 13-14 (2005), available at [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005\\_1/pdf/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf).

20. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 367-69 (2004); see also Michaela Keet et al., *Client Engagement Inside Collaborative Law*, 24 CANADIAN J. FAM. L. 145, 148-49, 152-59 (2008) (describing a qualitative study concerning the experiences of eight collaborative law clients); John Lande, *Learning from "Cooperative" Negotiators in Wisconsin*, DISP. RESOL. MAG., Winter 2009, at 20, 22-23 (comparing views regarding collaborative law and cooperative law practice).

21. MACFARLANE, *supra* note 19, at 8-12 (describing three "ideal types" of collaborative lawyers: the "traditional legal advisor who commits to cooperation," the "lawyer as friend and healer," and the "team player"); Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 182-83 (identifying seven models of practice: (1) "Collaborative Attorney is Independent—Not Part of Collaborative Team"; (2) "Collaborative Attorney Represents Clients Alone, Adding Members of the Collaborative Team as Needed"; (3) "Collaborative Attorney is an Equal Member of a Full Collaborative Team From the Outset"; (4) "Cooperative Law Attorney is Not Willing to Sign a Four-Way Participation Agreement that Includes a Litigation Disqualification Clause but is Willing to Sign a Participation Agreement"; (5) "Non-Collaborative Good Faith Negotiation in Non-Court Setting Refraining from Threats of Litigation"; (6) "Non-Collaborative Good Faith Negotiation in Non-Court Setting with Actual Threats of Court Action"; and (7) "Non-Collaborative Negotiation by Other Side with Litigation Ongoing—Client Utilizes Collaborative Attorney Joined by Litigation Attorney for Client"); see also Schwab, *supra* note 20, at 380 (A majority of respondent attorneys disagreed with the statement "[o]nce a collaborative law agreement is in place, there is little need to meet privately with my client.").

22. MACFARLANE, *supra* note 19, at 6.

practice while allowing other aspects to be negotiated under the participation agreement.<sup>23</sup> However, because so much is negotiated, clients need to fully understand not only the collaborative law process, but also how it might change the lawyer-client relationship and alter the norms used as a basis for decision making.<sup>24</sup>

Lawyers and clients may be drawn to the process for different reasons. Collaborative lawyers believe that clients experience “better and less damaging outcomes.”<sup>25</sup> For the lawyers themselves, it may offer a welcome escape from pressure and stress associated with adversarial practice as well as a chance to more closely align work with personal values.<sup>26</sup> Clients express interest in achieving a less expensive, faster, and more child-friendly resolution.<sup>27</sup> Macfarlane cautions that because clients may take a more pragmatic approach to the use of collaborative law, attorneys should not assume that clients necessarily share their deeper “ideological” commitment to the process.<sup>28</sup>

Clients and lawyers are generally satisfied with the collaborative law process.<sup>29</sup> Although some positional bargaining may occur, there is evidence that negotiation during four-way meetings is, in fact, more cooperative and less likely to involve lawyer gamesmanship.<sup>30</sup> Negotiations are also more likely to be on a face-to-face basis with clients present.<sup>31</sup> In his study, Schwab reports an overall settlement rate of 87.4 percent,<sup>32</sup> with an average time to settlement of 6.3 months,<sup>33</sup> and indication of cost savings in comparison to traditional litigation.<sup>34</sup> Couples terminating the collaborative process were most likely to proceed to litigation.<sup>35</sup> Although based on a limited number of cases, Macfarlane found that the outcomes of collaborative law cases were very similar to those resulting from traditional processes.<sup>36</sup>

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23. UCLA, prefatory note, at 445-46.

24. See MACFARLANE, *supra* note 19, at 41-49, 79-80.

25. *Id.* at 19.

26. *Id.* at 17-18.

27. See *id.* at 22-24, 80; see also Schwab, *supra* note 20, at 378 (factors important to clients were impact on children, future ability to co-parent, lawyer recommendation, time-saving, and cost).

28. MACFARLANE, *supra* note 19, at 25-26, 80.

29. *Id.* at 77-78.

30. *Id.* at 77.

31. *Id.* at 29.

32. Schwab, *supra* note 20, at 375.

33. *Id.* at 377. *But see* MACFARLANE, *supra* note 19, at xii (noting lack of external time pressures imposed by courts).

34. Schwab, *supra* note 20, at 377. *But see* MACFARLANE, *supra* note 19, at xii (finding no clear evidence that collaborative law cases are less expensive than litigation or negotiation).

35. Schwab, *supra* note 20, at 378-79.

36. MACFARLANE, *supra* note 19, at 57 (arguing that similar outcomes are more likely in cases concerning predictable issues, such as child support, as this issue is generally resolved by statutory



### III. OVERVIEW OF UCLA PROVISIONS MOST RELEVANT TO CASES INVOLVING INTIMATE PARTNER VIOLENCE

#### A. “Appropriateness” of Collaborative Law

The UCLA emphasizes the duty of the collaborative lawyer to seek informed consent from prospective parties before entering into a participation agreement. Section 14(1) requires collaborative lawyers to “assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter.”<sup>37</sup> The prospective party must be provided with “information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives.”<sup>38</sup> In addition, the lawyer must advise the prospective party that the process will terminate if tribunal intervention is sought,<sup>39</sup> that either party can terminate the process without cause,<sup>40</sup> and that barring certain exceptions (including emergency orders), the lawyer may not represent a party in a tribunal concerning matters related to the collaborative case.<sup>41</sup>

#### B. Coercive or Violent Relationships

The Act places special obligations on collaborative lawyers with respect to coercive or violent relationships.<sup>42</sup> However, to avoid definitional complexities, the Act does not define the term “coercive or violent relationship.”<sup>43</sup> The Prefatory Note to the Act explains that the term

encapsulates the core characteristics of a relationship characterized by domestic violence: “[p]hysical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim.”<sup>44</sup>

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guidelines).

37. UCLA § 14(1), at 484.

38. *Id.* § 14(2), at 484.

39. *Id.* § 14(3)(A), at 484.

40. *Id.* § 14(3)(B), at 484.

41. *Id.* § 14(3)(C), at 484 (exceptions are those authorized in §§ 9(c), 10(b), or 11(b)).

42. *Id.* § 15, at 484-85.

43. *Id.* prefatory note, at 459.

44. *Id.* at 459-60 (quoting COMM’N ON DOMESTIC VIOLENCE, AM. BAR ASS’N, STANDARDS

Before a participation agreement is signed, the lawyer “must make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.”<sup>45</sup> Recognizing that screening is not a onetime event, the Act additionally requires the lawyer to “reasonably and continuously” assess for history of a coercive and violent relationship “throughout a collaborative law process.”<sup>46</sup>

If the lawyer “reasonably believes” that there is a history of a coercive or violent relationship, section 15(c) instructs the lawyer not to “begin or continue” a collaborative process unless requested to do so by the party, and then only if the lawyer “reasonably believes that the safety of the party or prospective party can be protected adequately during a process.”<sup>47</sup>

### C. No Mandated Participation

A party cannot be court ordered to participate in a collaborative law process over that party’s objection.<sup>48</sup> This is consistent with the informed consent model adopted by the Act.<sup>49</sup>

### D. Emergency Orders

Despite the collaborative law agreement not to use court processes, section 7 of the UCLA allows collaborative lawyers to seek or respond to emergency orders “to protect the health, safety, welfare, or interest” of parties or family and household members, as defined by the applicable state protective order statute.<sup>50</sup> This section clearly applies to situations involving intimate partner violence, and the language is sufficiently broad to encompass financial and reputational harm.<sup>51</sup>

Section 9(c)(2) expands on the emergency exception to disqualification, explaining that a collaborative lawyer may “seek or defend” an emergency order “if a successor lawyer is not immediately

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OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 1 (2007) [hereinafter STANDARDS OF PRACTICE]). “Physical violence or the threat thereof is an element of a coercive and violent relationship but the concept is broader, focusing on the perpetrator’s pattern or practice of intimidation.” *Id.*

45. UCLA § 15(a), at 484.

46. *Id.* § 15(b), at 485.

47. *Id.* § 15(c), at 485.

48. *Id.* § 5(b), at 476.

49. *See supra* notes 37-41 and accompanying text.

50. UCLA § 7, at 480.

51. *Id.* § 7 cmt., at 480-81.

available to represent the person.”<sup>52</sup> Once litigation counsel is obtained, the collaborative lawyer is disqualified under section 9(a).<sup>53</sup> Disqualification extends to “a proceeding related to the collaborative matter,”<sup>54</sup> which is defined in section 2 as “involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.”<sup>55</sup> Consequently, if the collaborative matter is divorce, domestic violence proceedings involving a protective order, a criminal case, or contempt, it may fall within the range of related proceedings from which the collaborative lawyer is disqualified.

### *E. Limits of Privilege*

Under the UCLA, collaborative law communications are privileged and are generally not subject to discovery or admissible in evidence.<sup>56</sup> However, section 19 provides exception for a collaborative law communication that is “a threat or statement of a plan to inflict bodily injury or commit a crime of violence”;<sup>57</sup> “intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity”;<sup>58</sup> or “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult.”<sup>59</sup>

### *F. Mandatory Reporting*

If professionals have a duty under state law to report “abuse or neglect, abandonment, or exploitation of a child or adult,” that duty is not changed by the UCLA.<sup>60</sup>

## IV. WHAT IS A COERCIVE OR VIOLENT RELATIONSHIP?

Although defining domestic or intimate partner violence might seem like a simple task, it is not. In fact, much confusion and disagreement exists among researchers, practitioners, and policy makers concerning these terms and their use.<sup>61</sup> For this reason, the text of the

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52. *Id.* § 9(c)(2), at 482.

53. *See id.*

54. *Id.* § 9(a), at 481.

55. *Id.* § 2(13), at 468.

56. *Id.* § 17(a), at 485.

57. *Id.* § 19(a)(2), at 488.

58. *Id.* § 19(a)(3), at 488.

59. *Id.* § 19(b)(2), at 488.

60. *Id.* § 13(2), at 484.

61. Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 455 (2008) (“At the most fundamental level,

UCLA refers to coercive or violent relationships without formally defining them.<sup>62</sup>

### A. Acts in Context

State civil definitions of intimate partner violence, typically found in protective order statutes, focus primarily on acts of physical violence (or fear thereof) between family and household members.<sup>63</sup> No one would argue that physical acts of violence are not important. However, to understand their impact they must be viewed in the context of a relationship—a relationship that may include an ongoing pattern of intimidation, sexual and emotional abuse, social isolation, and economic control.

When working with families, understanding the context of intimate partner violence (who is doing what to whom and with what effect) is critically important.<sup>64</sup> For example, consider three situations involving the same physical act—partner A forcibly pushes partner B into a wall. In the first situation, there has been no previous violence or history of abusive behavior between the parties. In the second situation, there has been no previous violence but partner A limits the ability of partner B to leave the home, restricts B's access to money, and has threatened B in front of their children. In the third situation, B previously sought medical attention as a result of A's violence and A previously threatened B and their children with a knife when B did not comply with A's wishes. The physical act of pushing a partner into the wall is the same in each case, but the impact, consequences, and dangerousness of the situations are different.<sup>65</sup>

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communication about domestic violence has been hindered by the fact that different professional constituencies use that term somewhat differently and use different language to identify and analyze the range of behaviors encompassed by their particular definitions.”).

62. See UCLA § 15, at 484-85.

63. Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 43 (2008) (“The legislative findings, policy statements, and the scope of domestic abuse definitions in the protection statutes demonstrate an intentional fixation on physical violence.”); see also Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1415-18 (2005) (noting that most legal definitions focus on violent acts and fear of violent acts rather than patterns of domination, coercion, and control).

64. LORETTA FREDERICK & JULIE TILLEY, EFFECTIVE INTERVENTIONS IN DOMESTIC VIOLENCE CASES: CONTEXT IS EVERYTHING (2001), [http://data.ipharos.com/bwjp/documents/effective\\_interventions.pdf](http://data.ipharos.com/bwjp/documents/effective_interventions.pdf).

65. MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 72 (2008) (“We have to make distinctions. It makes no sense to treat intimate partner violence as a unitary phenomenon. A slap from an intimate terrorist who has taken complete control of his partner's life is not the same as a slap from a generally noncontrolling partner in the heat of an argument, and of course neither of

Many civil state statutory definitions promote a one-size-fits-all approach to intimate partner violence by focusing on physical acts (in this case pushing) without adequately taking into account potential underlying dynamics, such as those involving coercion and control, which can dramatically alter the meaning of the violence.<sup>66</sup> Much of the confusion about intimate partner violence stems from the false assumption that it is all the same when, in fact, even the same acts have different implications depending on their context.<sup>67</sup> Because terms such as “domestic violence” and “intimate partner violence” mean different things to different people, it is imperative that family law professionals develop language and terminology to precisely communicate the dynamics they have in mind.

The Prefatory Note to the UCLA incorporates a definition of intimate partner violence, from a publication of the ABA Commission on Domestic Violence, that retains focus on physical acts but recognizes that the acts may occur “alone or in combination with” other coercive controlling tactics.<sup>68</sup> However, the plain language text of the UCLA departs from this definition by using the term “coercive or violent relationship,” which arguably encompasses relationships involving: (a) coercion with violent acts (discussed below as coercive controlling

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these is the same as the desperate use of violence by a woman who is being physically and emotionally terrorized by someone she loves.”); Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523, 524 (2008) (“As research and experience has shown, while there are some generally recognized groupings of perpetrators, such as ‘batterers’ who exhibit controlling and terrorizing behaviors in addition to physical violence, domestic violence can vary from relationship to relationship. The differences between perpetrators can be viewed as contextual (a primarily historical concept) in nature. There can be variation from case to case in: (1) the perpetrator’s intent in using violence and abuse against a partner, with implications for his or her approach to parenting; (2) the meaning which the victim and children take from the violence; and (3) the effect of the abuse on the adult victim and children, including the harm done and the risk of physical and other forms of violence. All cases are not the same and there are many potentially dangerous cases that come into the court system that require very careful intervention.” (citation omitted)).

66. Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 744 (2005). *But see* NEB. REV. STAT. § 43-2922(8) (2010) (“Domestic intimate partner abuse means an act of abuse as defined in section 42-903 and a pattern or history of abuse evidenced by one or more of the following acts: Physical or sexual assault, threats of physical assault or sexual assault, stalking, harassment, mental cruelty, emotional abuse, intimidation, isolation, economic abuse, or coercion against any current or past intimate partner, or an abuser using a child to establish or maintain power and control over any current or past intimate partner, and, when they contribute to the coercion or intimidation of an intimate partner, acts of child abuse or neglect or threats of such acts, cruel mistreatment or cruel neglect of an animal as defined in section 28-1008, or threats of such acts, and other acts of abuse, assault, or harassment, or threats of such acts against other family or household members.”).

67. *See* FREDERICK & TILLEY, *supra* note 64.

68. *See supra* note 44 and accompanying text.

violence and violent resistance);<sup>69</sup> (b) coercion without violent acts (discussed below as incipient or nonviolent coercive control);<sup>70</sup> and (c) violent acts without coercion (discussed below as conflict-instigated and other violence).<sup>71</sup>

*B. Using Research About Patterns of Intimate Partner Violence to Ask Questions About Context*

Practitioners and advocates who focus on the context of violence have observed that families experiencing intimate partner violence exhibit relationship dynamics that differentiate them from one another in terms of the purpose and impact of the violence.<sup>72</sup> Similarly, researchers who have struggled for years to reconcile contradictory empirical findings about intimate partner violence now entertain the hypothesis that they were, in fact, studying different kinds of intimate partner violence, and that this might account for at least some of the discrepancies.<sup>73</sup> This idea is consistent with intimate partner violence typologies proposed by some researchers over the last fifteen years.<sup>74</sup> Continuing this line of inquiry, Michael P. Johnson has analyzed secondary data sets collected by other researchers, to present compelling statistical evidence verifying the existence of different patterns of

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69. See *infra* notes 86-91, 127-28 and accompanying text.

70. See *infra* notes 105-07 and accompanying text.

71. See *infra* notes 133-47 and accompanying text.

72. Ver Steegh & Dalton, *supra* note 61, at 458-59; see also FREDERICK & TILLEY, *supra* note 64 (discussing the different contexts in which violence may occur).

73. JOHNSON, *supra* note 65, at 17-24; Sujata Desai & Linda E. Saltzman, *Measurement Issues for Violence Against Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 35, 35-37 (Claire M. Renzetti et al. eds., 2001); Nicola Graham-Kevan & John Archer, *Physical Aggression and Control in Heterosexual Relationships: The Effect of Sampling*, 18 VIOLENCE & VICTIMS 181, 181-83 (2003); Murray A. Straus, *Physical Assaults by Wives: A Major Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 67, 77-78 (Richard J. Gelles & Donileen R. Loseke eds., 1993) [hereinafter CURRENT CONTROVERSIES]; Murray A. Straus et al., *The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data*, 17 J. FAM. ISSUES 283, 285 (1996). See generally Murray A. Straus, *The Controversy Over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis*, in VIOLENCE IN INTIMATE RELATIONSHIPS 17 (Ximena B. Arriaga & Stuart Oskamp eds., 1999) (discussing the different forms of violence in domestic relationships).

74. DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 35, 38-39 (1996); Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476, 481-82 (1994); Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAM. 948, 949-52 (2000); Janet R. Johnston & Linda E. G. Campbell, *A Clinical Typology of Interparental Violence in Disputed-Custody Divorces*, 63 AM. J. ORTHOPSYCHIATRY 190, 191-98 (1993).

intimate partner violence.<sup>75</sup> He summarizes the current status of this work as follows:

Although we may not have all the details worked out yet, it is clear that the different types of intimate partner violence develop in different ways during the history of a relationship, and that they have quite different consequences. There is also evidence that they have different causes, and that they therefore require different interventions, both at the individual level and in the development of general social policy. The task ahead—developing a theoretical framework that recognizes these differences—will involve the complex scientific process of theory development and empirical testing, followed by theory revision and further testing. But we have enough of a start in this process to know that it is time to stop talking about domestic violence as if it were a unitary phenomenon and start talking about what we know about the different types of violence in intimate relationships.<sup>76</sup>

Each situation potentially involving intimate partner violence must be individually screened and assessed; discussion of patterns should inform, not short circuit that process. Because this work is in its infancy, care must be taken to avoid rigid categorization or mischaracterization of complex situations requiring skilled assessment.<sup>77</sup> Consideration of patterns is, at this point, primarily useful for the purpose of asking questions about context and generating hypotheses for investigation.<sup>78</sup> While collaborative lawyers should be aware of this theoretical framework, patterns are not diagnoses and families are easily mischaracterized in a misguided effort to compartmentalize them.<sup>79</sup>

Johnson and other researchers differentiate recurring patterns of intimate partner violence based on the extent to which violence is used to exert power and control over a partner and in the relationship.<sup>80</sup> In other words, they place significant focus on the context of the violence rather than viewing it as a series of separate acts.<sup>81</sup> Or, as explained by

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75. JOHNSON, *supra* note 65, at 17-24, app. A at 91-101 (analysis of data sets supporting existence of intimate terrorism, situational couple violence, and violent resistance).

76. *Id.* at 4; see also Nicola Graham-Kevan & John Archer, *Intimate Terrorism and Common Couple Violence: A Test of Johnson's Predictions in Four British Samples*, 18 J. INTERPERSONAL VIOLENCE 1247, 1247-51 (2003).

77. Ver Steegh & Dalton, *supra* note 61, app. at 467.

78. See *id.* app. at 467-68.

79. See *id.* app. at 467.

80. JOHNSON, *supra* note 65, at 5; see also Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 478-80 (2008).

81. JOHNSON, *supra* note 65, at 11 ("The critical distinctions among types of violence have to do with general patterns of power and control, not with the ostensible motives for specific incidents of violence.").

Evan Stark and discussed in the next section, viewing intimate partner violence via the “prism of the incident-specific and injury-based” definitions has obscured the role of coercive control.<sup>82</sup>

#### 1. Coercive Relationships: With or Without Violent Acts

In coercive-controlling relationships, a partner uses a variety of tactics, often including physical and sexual violence, for the purpose of exerting long-term power and control over the other.<sup>83</sup> Tactics typically involved are illustrated in Ellen Pence and Michael Paymar’s Power and Control Wheel, and they include:

- coercion and threats
- intimidation
- emotional abuse
- isolation
- minimizing, denying, and blaming
- manipulation of children
- use of male privilege
- economic abuse<sup>84</sup>

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82. EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 10 (2007).

83. Kelly & Johnson, *supra* note 80, at 481-84.

84. ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL 3 fig.1.1 (1993).





Adapted from Pence & Paymar (1993)<sup>85</sup>

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85. Kelly & Johnson, *supra* note 80, at 479 fig.1.

This kind of intimate partner violence is also called battering, intimate terrorism,<sup>86</sup> or control-instigated violence.<sup>87</sup> It is commonly experienced by victims who contact law enforcement and stay in shelters and it is the type of violence many professionals picture when they hear or use the terms “domestic violence” or “intimate partner violence.”<sup>88</sup> Many intimate partner violence statutes and policies were written with coercive-controlling violence in mind.<sup>89</sup>

Coercive-controlling violence is more likely than other types of violence to be frequent, severe, and to escalate over time.<sup>90</sup> However, coercive-controlling violence varies in terms of frequency and severity depending on whether other tactics prove sufficient to control the partner.<sup>91</sup>

Coercive-controlling violence is overwhelmingly perpetrated by men,<sup>92</sup> and there appear to be at least two types of male perpetrators. “Dependent” perpetrators are emotionally dependent, jealous, and obsessed with their partners, while “antisocial” perpetrators have antisocial personalities and are more likely to be violent outside the family.<sup>93</sup> Both are characterized by impulsiveness, willingness to use violence, and hostility toward women.<sup>94</sup> Nevertheless, coercive-controlling perpetrators often convincingly present themselves to courts and family law professionals as cooperative and engaged parents and partners.<sup>95</sup>

Researchers Mary Ann Dutton and Lisa A. Goodman have studied the use of coercion in intimate partner violence and proposed a model for understanding the process.<sup>96</sup> They define coercive control as “a dynamic process linking a demand with a credible threatened negative consequence for noncompliance.”<sup>97</sup> First, the perpetrator “sets the stage”

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86. Johnson & Ferraro, *supra* note 74, at 949.

87. ELLIS & STUCKLESS, *supra* note 74, at 34.

88. Kelly & Johnson, *supra* note 80, at 478, 482.

89. *See id.* at 476, 478.

90. JOHNSON, *supra* note 65, at 29.

91. Kelly & Johnson, *supra* note 80, at 481.

92. *Id.* at 482 (noting that two data samples examining coercive-controlling violence found that eighty-seven and ninety-seven percent of these cases were male-perpetrated).

93. JOHNSON, *supra* note 65, at 32; *see also* Holtzworth-Munroe & Stuart, *supra* note 74, at 491-92 (describing dysphoric/borderline and violent/antisocial perpetrators).

94. JOHNSON, *supra* note 65, at 33.

95. *See* LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 122-26 (2002); *see also* Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 34 (2004) (identifying that batterers manipulate the legal system to continue their abuse).

96. Dutton & Goodman, *supra* note 66, at 746 & fig.1.

97. *Id.* at 746-47.

by creating and exploiting vulnerabilities of the target, wearing down resistance, and promoting emotional dependency.<sup>98</sup> Eventually the perpetrator makes demands (which need not be explicit) accompanied by credible threats (which may be overt or implied) of negative consequences.<sup>99</sup> The perpetrator monitors compliance through some form of direct or indirect surveillance.<sup>100</sup> If a negative consequence is delivered, future threats become all the more credible.<sup>101</sup> Dutton and Goodman explain that “[a] single threat may dictate a target’s behavior for years, while she or he holds the (accurate or inaccurate) assumption that the threat is real and ongoing.”<sup>102</sup> Violence serves as an important accelerator of coercion and once it is used, a real possibility exists that it will be used again.<sup>103</sup> Using the term “domestic violence” in a narrow sense, Dutton describes the effect of the coercive process as follows:

Domestic violence is a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is a pattern of behavior exhibited by the batterer that includes words, actions, and gestures, which, taken together, establish power and control over an intimate partner.<sup>104</sup>

In some coercive-controlling relationships, control over the victim may be maintained without resort to physical violence. Tactics such as threats, intimidation, economic control, manipulation of children, and isolation may be sufficient to control the victim for a period of years or at least for a while.<sup>105</sup> Johnson has coined the terms “incipient intimate terrorism” and “nonviolent coercive control” to describe these situations.<sup>106</sup> Such victims suffer the consequences of coercion and may be at high risk for future physical and sexual abuse.<sup>107</sup> Unfortunately,

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98. *Id.* at 747-49.

99. *Id.* at 749-50.

100. *Id.* at 750.

101. *Id.*

102. *Id.* at 751.

103. *Id.* at 748 (stating that “a line has been crossed” when violence occurs); *see also* JOHNSON, *supra* note 65, at 9 (“When violence is added to such a pattern of power and control, the abuse becomes much more than the sum of its parts.”).

104. Mary Ann Dutton, *Expert Witness Testimony*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK* 8-8 (Deborah M. Goelman et al. eds., 1996); *see also* CATHERINE KIRKWOOD, *LEAVING ABUSIVE PARTNERS: FROM THE SCARS OF SURVIVAL TO THE WISDOM FOR CHANGE* 58 (1993) (describing the “web” of emotional abuse).

105. *See* Dutton & Goodman, *supra* note 66, at 750-51.

106. JOHNSON, *supra* note 65, at 46-47.

107. *See id.* at 47. Note that situations involving nonviolent coercive control are included in the

legal focus on violent acts encourages lawyers and judges to disregard incipient coercive control and minimize its risk to and effect on the victim and children. However, the UCLA's use of the term "coercive or violent relationship" recognizes that significant coercion may be taking place even though there may not have been recent or previous physical violence.<sup>108</sup>

Of course, many nonviolent relationships involve some controlling aspects. As Johnson explains, "[e]veryone 'controls' their partner to some extent in an intimate relationship; after all, a relationship by definition involves mutual influence."<sup>109</sup> What separates coercive-controlling relationships is the amount of control and the way coercion serves as a driver. Thus, in his research Johnson used "questions about threats, intimidation, surveillance, and reducing resistance to identify a pattern of coercive, controlling violence . . . inferring that violent partners who engage in more than a few of these behaviors are using violence in the service of control."<sup>110</sup>

**"Normal" Levels of Control:**

- no physical violence
- little or no control
- little or no coercion

**Incipient or Nonviolent Coercive-Control:**

- no physical violence (or no recent violence)
- pattern of control
- pattern of coercion (demand, surveillance, consequence)

**Coercive-Controlling Violence:**

- physical violence
- pattern of control
- pattern of coercion (demand, surveillance, consequence)

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UCLA as "coercive" relationships. See UCLA § 15, at 484-85.

108. See UCLA § 15, at 484-85.

109. JOHNSON, *supra* note 65, app. A at 87.

110. *Id.* at 16.

Victims of coercive-controlling violence and incipient coercive control experience a number of consequences. They may suffer severe physical injury, fear, anxiety, depression, reduced self-esteem, symptoms of post-traumatic stress, and economic consequences.<sup>111</sup> Despite clear evidence that leaving a coercive-controlling partner increases the risk of violence as the perpetrator loses control of the victim,<sup>112</sup> most victims of coercive-controlling violence do eventually escape after engaging in a process of reaching out and planning to leave.<sup>113</sup>

Victims of coercive-controlling violence have good reason to deny or minimize violence. If disclosure is discovered or even suspected by the perpetrator, the victim and children will likely be subjected to additional abuse.<sup>114</sup> Consequently, as discussed below, it is imperative that family law professionals screen continuously and create multiple opportunities for disclosure.<sup>115</sup> A victim may be more likely to disclose coercive-controlling violence after establishing a trusted relationship with an open and empathetic listener.<sup>116</sup>

Children exposed to intimate partner violence are also likely to be physically or sexually abused, and it appears that this primarily occurs in cases involving coercive-controlling violence.<sup>117</sup> In fact, some mothers report that perpetrators purposefully involve children in the violence.<sup>118</sup> Although many children exposed to intimate partner violence do well in the long term, they are more likely than other children to exhibit anxiety, depression, symptoms of trauma, and aggressive or antisocial behaviors.<sup>119</sup>

As might be imagined, perpetrators of coercive-controlling violence are poor parental role models. They undermine the other parent and may use the child custody process and threats against the children to continue

111. *Id.* at 38-42; Dutton & Goodman, *supra* note 66, at 752-53; Kelly & Johnson, *supra* note 80, at 482-84.

112. JOHNSON, *supra* note 65, app. B at 102-03.

113. *Id.* at 38; *see also* Lee H. Bowker, *A Battered Woman's Problems Are Social, Not Psychological*, in CURRENT CONTROVERSIES, *supra* note 73, at 154, 155-56 (listing seven personal strategies used by victims of battering to end abuse).

114. *See supra* notes 101-03 and accompanying text.

115. *See infra* Part V.

116. Thomas W. Miller et al., *Clinical Pathways for Diagnosing and Treating Victims of Domestic Violence*, 34 PSYCHOTHERAPY 425, 431 (1997).

117. Jeffrey L. Edleson & Oliver J. Williams, *Introduction to PARENTING BY MEN WHO BATTER* 3, 11-15 (Jeffrey L. Edleson & Oliver J. Williams eds., 2007); *see* JOHNSON, *supra* note 65, at 81; *see also* Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 291-92 (2009) (linking physical and sexual abuse to domestic violence with a "median co-occurrence of 41% and a range of 30% to 60%").

118. Edleson & Williams, *supra* note 117, at 11.

119. *Id.* at 13-15; Stark, *supra* note 117, at 291-92.

to exert control over the victim parent.<sup>120</sup> Although it may seem counterintuitive, for a variety of reasons, some children express desire for ongoing contact with, or to be in the primary care of, a coercive controlling parent.<sup>121</sup> Special care must be taken to fashion safe and appropriate parenting arrangements—in most cases of coercive-controlling violence, contact should be supervised and should only occur if it can be accomplished safely and without trauma for the child.<sup>122</sup> Joint legal and physical custody arrangements are inappropriate because they keep family members in danger and provide the perpetrator with a continued opportunity to exercise control.<sup>123</sup>

## 2. Violent Resistance to Coercion

As the severity of coercive-controlling violence escalates, victims typically react by attempting to placate the perpetrator as well as by resisting demands.<sup>124</sup> Victims of coercive-controlling violence may at first see the violence as isolated incidents and then, over time, come to understand its controlling purpose.<sup>125</sup> They may significantly alter their behavior and personalities to try to satisfy the perpetrator's demands and stay safe.<sup>126</sup>

“Violent resistance” occurs when a victim of coercive-controlling violence, usually a woman, uses violence in reaction to the abuse.<sup>127</sup> As Johnson explains, “[t]he critical defining pattern of violent resistance is that the resister is violent but *not* controlling and is faced with a partner

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120. Peter G. Jaffe et al., *A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes*, 6 J. CHILD CUSTODY 169, 172 (2009); see also BANCROFT & SILVERMAN, *supra* note 95, at 30-33 (describing battering fathers as likely to be rigidly authoritarian with little empathy for children combining a pattern of neglect with brief periods of interest in the children).

121. See BANCROFT & SILVERMAN, *supra* note 95, at 39-41 (discussing traumatic bonding and conclusions by children that their safety depends on maintaining close ties with the violent parent); JOHNSTON ET AL., *supra* note 5, at 318-25 (exploring the desire, opposition, or contradictory feelings children have about contact with a violent parent and urging involvement of a child specialist).

122. See Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 516-18 (2008) (analyzing when parenting arrangements including co-parenting, parallel parenting, supervised exchange, supervised access, and suspended contact are appropriate in domestic violence cases); see also JOHNSTON ET AL., *supra* note 5, at 307-34 (proposing the “5P” assessment: potency of violence; pattern of violence; primary perpetrator of violence; parenting problems; and preferences and perspectives of the child(ren)).

123. Jaffe et al., *supra* note 122, at 511 tbl.2; see also Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1017-18 (1995) (describing “tangential spouse abuse” where coercive tactics are extended to the children to manipulate the mother).

124. Dutton & Goodman, *supra* note 66, at 752.

125. See *id.*

126. JOHNSON, *supra* note 65, at 50-51.

127. Kelly & Johnson, *supra* note 80, at 484.

who is *both* violent and controlling.”<sup>128</sup> In fact, most victims of coercive-controlling violence will resist by using violence to protect themselves and, occasionally, in retribution.<sup>129</sup> Unfortunately women who defend themselves using violence are twice as likely to be injured as women who do not use violence.<sup>130</sup>

#### **Perpetrator**

- Violent
- Controlling

#### **Violent Resistor**

- May be violent
- *Not* controlling

A coercive-controlling perpetrator will often claim that a violent resistor is an initiator of intimate partner violence or that the violence was “mutual.”<sup>131</sup> Determining whether there is a general pattern of coercive control is of paramount importance in such cases, and investigation of context provides a framework for analyzing these claims.<sup>132</sup> Failure to thoroughly assess cases involving intimate partner violence, sometimes rationalized by the statement that they involve “he said, she said” situations, places family members in danger and is an abdication of professional responsibility.

### 3. Non-Coercive Violent Relationships

There are forms of intimate partner violence that do not involve a pattern of coercive control. Although the most common form is conflict-instigated violence, intimate partner violence can stem from other causes such as conflict arising from separation, mental illness, and societal breakdown in times of disaster and war.<sup>133</sup>

Conflict-instigated violence occurs when a tense or emotional situation spirals into a violent incident but there is no underlying pattern of coercive control.<sup>134</sup> It is the most common form of intimate partner

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128. JOHNSON, *supra* note 65, at 10.

129. *Id.* at 51-53.

130. *Id.* at 53 (citing National Crime Victimization Survey data).

131. *See id.* at 9.

132. *Id.* at 12 (noting that in rare cases both partners could be violent and controlling).

133. *See id.* at 63-65, 70 (stating that the violence can be caused by relationship status, sources of stress that are not the fault of the couple, or psychological problems).

134. *See* ELLIS & STUCKLESS, *supra* note 74, at 34; *see also* JOHNSON, *supra* note 65, at 60-61 (referring to this as situational couple violence); Janet R. Johnston & Linda E. G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 *Fam. & Conciliation Cts.*

violence, but as explained by Joan B. Kelly and Johnson, “[i]t is not a more minor version of Coercive Controlling Violence; rather, it is a different type of intimate partner violence with different causes and consequences.”<sup>135</sup> The dynamics of conflict-instigated violence vary widely from a single minor incident that never recurs to a chronic problem resulting in serious injuries.<sup>136</sup>

Johnson organizes the risk factors for chronic conflict-instigated violence into three categories. The first category of risk factors involves sources of conflict, such as the couple’s relationship, finances, children, division of labor, and use of alcohol and drugs.<sup>137</sup> The second category concerns patterns of communication, including verbal aggression, verbal skills deficits, and shared or contested power.<sup>138</sup> The third category of risk factors includes individual factors like personality, family history of violence, education, and ethnicity.<sup>139</sup>

Conflict-instigated violence is as likely to be initiated by female partners as male partners,<sup>140</sup> and in that sense it is less gendered than coercive-controlling violence, which is overwhelmingly initiated by men.<sup>141</sup> However, conflict-instigated violence is not gender neutral in that women suffer more consequences, including injury and psychological effects.<sup>142</sup>

As compared to couples experiencing coercive-controlling violence, the parties are less likely to separate or divorce.<sup>143</sup> However, separation-instigated violence may be viewed as a category of conflict-instigated violence.<sup>144</sup> As its name implies, it involves a violent incident or incidents that occur at the time of separation and may surprise parties who, by definition, do not have a history of prior violence or coercion.<sup>145</sup>

Special care must be taken not to confuse conflict-instigated violence with coercive-controlling violence. Perpetrators of coercive-controlling violence will often claim that the violence was “mutual,” or perpetrated by the other party.<sup>146</sup> Of course there are cases of female-

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Rev. 282, 292 (1993) (referring to this as male-controlling interactive violence).

135. Kelly and Johnson, *supra* note 80, at 485.

136. JOHNSON, *supra* note 65, at 70.

137. *Id.* at 63-65.

138. *Id.* at 66-67.

139. *Id.* at 67-68.

140. Kelly & Johnson, *supra* note 80, at 485.

141. *See supra* note 92 and accompanying text.

142. JOHNSON, *supra* note 65, at 69-70, 108-09 (discussing the myth of gender symmetry).

143. *See id.* at 70; *see also* Ver Steegh, *supra* note 63, at 1395-96 (victims of situational couple violence less likely to leave partner).

144. Ver Steegh & Dalton, *supra* note 61, at 458.

145. Kelly & Johnson, *supra* note 80, at 487-88.

146. *See supra* note 131 and accompanying text.



initiated conflict-instigated violence. However, if either party has a pattern of coercive control whether violent or incipient, it is likely not a case of conflict-instigated violence.<sup>147</sup> A thorough assessment is needed before coercive-controlling violence can ever be ruled out.

Although the dynamics are different from coercive-controlling violence, conflict-instigated violence may also put children at risk. Parents with poor conflict resolution skills and anger management problems should not share joint legal and physical custody of children but may be able to parallel parent or benefit from supervised exchange.<sup>148</sup>

### C. *Things Aren't Always What They Seem . . . But Sometimes They Are*

As the foregoing discussion illustrates, intimate partner violence involves a complex set of issues that are ideally navigated by practitioners with substantial expertise and experience. In cases of severe coercive control, the perpetrator may present an affable, non-abusive countenance while the victim appears troubled and less credible.<sup>149</sup> Children may express a preference to live with a parent who terrifies them.<sup>150</sup> Victims may be reluctant to disclose serious sexual and physical abuse to their lawyers even when assured that the information will be kept confidential.<sup>151</sup> These actors are not engaged in self-defeating behaviors; rather, they are acting in self-preservation within the confines of a coercive environment.<sup>152</sup> This concept is illustrated by Stark as follows:

A woman wears the same outfit every day, rarely goes out, and continually paces back and forth in a small space. Imagine how hard it would be to explain her behavior if you were unable to reveal that the woman is confined in a jail cell. The domestic violence field faces a similar predicament when it tries to account for how battered women behave without identifying their "cage."<sup>153</sup>

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147. Ver Steegh & Dalton, *supra* note 61, at 458.

148. Jaffe et al., *supra* note 122, at 512-13 tbl.2.

149. *See supra* note 95 and accompanying text.

150. *See supra* note 121 and accompanying text.

151. Frederick, *supra* note 65, at 526 (citing research showing that victims often decline to disclose violence even to advocates, lawyers, and court personnel).

152. *Id.*

153. STARK, *supra* note 82, at 198.

On the other hand, some intimate partner violence is not part of a larger pattern of coercive control, and many families deny that intimate partner violence is occurring—because it is not.<sup>154</sup>

Practitioners must screen for intimate partner violence and watch vigilantly for indicators of it. Learning about the various dynamics involved is useful for understanding context, spurring comprehensive inquiry, and recognizing the need for following a screening protocol.

#### V. WHAT IS REASONABLE INQUIRY AND CONTINUOUS ASSESSMENT BY THE COLLABORATIVE LAWYER?

UCLA section 15(a) provides that “[b]efore a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer must make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.”<sup>155</sup> However, initial inquiry alone is not sufficient in that section 15(b) requires that “[t]hroughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.”<sup>156</sup> Although commentators believe that all family law attorneys have a professional duty to screen for intimate partner violence,<sup>157</sup> the UCLA is the first statute to explicitly address it.

##### A. *Developing and Following a Screening Protocol*

For a collaborative lawyer to make a “reasonable inquiry,” he or she must develop and consistently use a screening protocol that involves multiple methods of screening that occur at different points in time across the stages of the case.<sup>158</sup> The inquiry should be designed to discern the existence, severity, frequency, and nature of violence and/or coercion as well as its purpose, meaning, and effect.<sup>159</sup> A screening protocol may include methods such as participation in a confidential face-to-face screening interview, completion of a written questionnaire,

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154. See JOHNSON, *supra* note 65, at 72 (“A slap from an intimate terrorist who has taken complete control of his partner’s life is not the same as a slap from a generally noncontrolling partner in the heat of an argument . . .”).

155. UCLA § 15(a), at 484.

156. *Id.* § 15(b), at 485.

157. See Drew, *supra* note 3, at 7.

158. See LINDA GIRDNER, ABA CENTER ON CHILDREN AND THE LAW, DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR JUDGES AND ADMINISTRATORS: INSTRUCTOR’S GUIDE 15, 20-23 (1999) (example of thoughtful screening protocol for mediation).

159. Frederick, *supra* note 65, at 525.

continued monitoring for indications of control and domination, and a search of court and public records.<sup>160</sup> The protocol should seek information about the use of violence and coercion by both parties—this is critical to understanding the context of its use.<sup>161</sup>

Initial screening may not lead to disclosure about coercion or violence even when the coercion or violence is frequent and severe.<sup>162</sup> Victims of coercive-controlling violence may well fear that disclosure will put them in further danger, threats regarding the children will be carried out, their experiences will be viewed with skepticism, or their violent resistance will be used against them.<sup>163</sup> In essence, attorneys need to earn the trust of these victims before they will feel safe making disclosures.<sup>164</sup> Perpetrators may also be reluctant to disclose coercion or violence because they fear repercussions or are actively engaged in perpetrating abuse.<sup>165</sup>

### B. Confidential Face-to-Face Interviews

The confidential screening interview is a primary method of detecting and discussing intimate partner violence.<sup>166</sup> It affords the attorney the opportunity to ask open-ended and follow-up questions as well as to observe body language and create a personal bond.<sup>167</sup> The attorney can begin to assess the prospective party's capacity to negotiate and pay attention to cues such as whether the attorney feels "manipulated, threatened, demeaned, [or] charmed."<sup>168</sup> Considerable skill is required to effectively conduct a screening interview; simply asking if there has been intimate partner violence does not constitute reasonable inquiry.<sup>169</sup> Privacy and confidentiality is vitally important—

160. Ver Steegh & Dalton, *supra* note 61, at 460; *see also* ANNE MENARD, SCREENING AND ASSESSMENT FOR DOMESTIC VIOLENCE: ATTENDING TO SAFETY AND CULTURE 12 (2007), available at <http://www.healthymarriageinfo.org/docs/screendv.pdf>.

161. Frederick, *supra* note 65, at 525.

162. *Id.* at 526 (citing research showing that victims often decline to disclose violence even to advocates, lawyers, and court personnel).

163. ANNE MENARD, DEVELOPING DOMESTIC VIOLENCE PROTOCOLS 3, available at <http://www.healthymarriageinfo.org/docs/devdvprotocols.pdf>.

164. Dana Harrington Connor, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 898 (2006).

165. *See* Ver Steegh & Dalton, *supra* note 61, at 460 (discussing how "domestic violence can be difficult to discern" because either party may downplay the abuse for different reasons).

166. John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 234 (2003).

167. *See* GIRDNER, *supra* note 158, at 18.

168. *Id.*

169. *See* Burman, *supra* note 166, at 236-37; *see also* MINN. STATE BAR ASS'N FAMILY LAW SECTION, DOMESTIC ABUSE COMM., SUGGESTED SCREENING QUESTIONS (2010) (unpublished manuscript, on file with the Minnesota State Bar Association Family Law Section, Domestic Abuse

interviews should never be undertaken with the other party present or within sight or hearing.<sup>170</sup>

The ABA Commission on Domestic Violence's *Tool for Attorneys to Screen for Domestic Violence* provides tips on conducting interviews and the following examples of topics of inquiry:

- Has your intimate partner ever pushed, slapped, hit or hurt you in some way?
- Has your intimate partner ever hurt or threatened you?
- Has your intimate partner ever forced you to do something you did not want to do?
- Is there anything that goes on at home that makes you feel afraid?
- Does your intimate partner prevent you from eating or sleeping, or endanger your health in other ways?
- Has your intimate partner ever hurt your pets or destroyed your clothing, objects in your home, or something you especially cared about?
- Has your intimate partner taken the children with out permission, threatened to never let them see you again, or otherwise harmed them?<sup>171</sup>

Prospective parties should be informed about the relevance of intimate partner violence to the case and be assured that the lawyers will be open to discussion of it or related topics at any point. As will be explored later, attorneys must be prepared to refer prospective clients to appropriate resources and engage in some level of risk assessment and safety planning.<sup>172</sup> Lawyers who are reluctant to ask what they perceive as intrusive questions should remember that failure to screen could contribute to the injury or the death of a client, and have moral and professional consequences for the lawyer.<sup>173</sup>

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Committee) (includes risk assessment questions, forty-five suggested screening questions, and discussion of "what to listen for" regarding topics such as how decisions were made in the relationship, what happens when "you speak your mind," what happens when partners fight or are angry, and extent of trust between partners regarding decision making).

170. COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, *TOOL FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE* (2005), available at <http://www.abanet.org/domviol/screening/toolcdv.pdf>; see also GIRDNER, *supra* note 158, at 15 (listing separate direct interviews as a best practice for conducting domestic violence screenings).

171. COMM'N ON DOMESTIC VIOLENCE, *supra* note 170; see Burman, *supra* note 166, at 236-37 (listing twelve questions for screening).

172. See *infra* Part VII.B.1.

173. Burman, *supra* note 166, at 235; see also Drew, *supra* note 4, at 7-8.

### C. Written Questionnaires

Written questionnaires can be useful to identify issues for further assessment, and examination of various questionnaires and checklists may help lawyers identify topics and sample questions that could be incorporated into face-to-face interviews.<sup>174</sup> If a questionnaire is provided to a prospective party to complete, it should never be completed within the sight or hearing of the other party.

Although a number of screening tools and instruments exist, they serve different purposes and vary in terms of length and validity.<sup>175</sup> Consequently, collaborative lawyers should seriously consider what they are screening for before choosing an instrument.

Questionnaires developed for use by mediators may be among the most helpful to collaborative lawyers because mediators are similarly concerned about full and voluntary participation in processes similar to four-way meetings. For example, the Domestic Violence Evaluation (DOVE) instrument takes risk level, violence predictors, and type of violence into account, and recommends specific mediator interventions

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174. See, e.g., COMM'N ON DOMESTIC VIOLENCE, *supra* note 170.

175. See COMM'N ON DOMESTIC VIOLENCE, *supra* note 170; HOLLY JOHNSON, DANGEROUS DOMAINS: VIOLENCE AGAINST WOMEN IN CANADA 163 tbl.6.4 (1996); Graham-Kevan & Archer, *supra* note 76, at 1252, app. A at 1266-67; Richard M. Tolman, *The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners*, 4 VIOLENCE & VICTIMS 159, 160-61, 162-63 tbl.1 (1989); see also CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 42-43 tbl.4-1 (1994) (discussing the Conflict Assessment Scale); GIRDNER, *supra* note 158, at 17-23 (Tolman Screening Model and others); MARILYN MCKNIGHT, MEDIATING IN THE SHADOW OF DOMESTIC VIOLENCE 14-15 (1997); Desai & Saltzman, *supra* note 73, at 43-47 (discussing measurement tools including the Abusive Behavior Inventory, the Conflict Tactics Scale, the Conflict Tactics Scale 2, the Index of Spouse Abuse, the Measure of Wife Abuse, the Partner Abuse Scale, the Severity of Violence Against Women Scale, the Sexual Experiences Survey, and the Women's Experience with Battering Scale); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2156 (1993) (Conflict Assessment Protocol); Glenda Kaufman Kantor & Jana L. Jasinski, *Dynamics and Risk Factors in Partner Violence*, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 1, 40 tbl.1.3 (Jana L. Jasinski & Linda M. Williams eds., 1998) (Abusive Behavior Inventory, the Aggression Scale, the Danger Assessment Instrument, Spouse Specific Aggression Scale); Nancy R. Rhodes, *The Assessment of Spousal Abuse: An Alternative to the Conflict Tactics Scale*, in INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 27, 27-32 (Emilio C. Viano ed., 1992); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, app. A at 112 (2001); Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 757 (2007) (discussing Connecticut's domestic violence screening instrument, DVSI-R, and the Divorce Mediation Assessment Instrument); Straus et al., *supra* note 73, at 287 (discussing the Revised Conflict Tactics Scale); Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 272 (discussing the Conflict Assessment Protocol).

depending on the results.<sup>176</sup> It has been empirically validated by a two-year field study.<sup>177</sup> States such as Michigan and Maryland have developed extensive screening protocols for use in mediation and other ADR processes.<sup>178</sup>

“PPP Screening” was designed for use in developing parenting arrangements—it considers the potency of violence, the pattern of violence, and the primary perpetrator.<sup>179</sup> It was later expanded to include consideration of parenting problems and the preferences and perspective of children.<sup>180</sup>

If screening for coercive control, Nicola Graham-Kevan and John Archer have developed a Controlling Behaviors Scale that builds on the tactics identified by Pence and Paymar in the Power and Control Wheel.<sup>181</sup> It asks questions about five categories of controlling behaviors: economic, threats, intimidation, emotional, and isolation.<sup>182</sup>

176. Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658, 659, 664-65 (2006).

177. *Id.* at 659.

178. See generally DOMESTIC VIOLENCE & MEDIATION WORK GROUP, SCREENING CASES FOR FAMILY VIOLENCE ISSUES TO DETERMINE SUITABILITY FOR MEDIATION AND OTHER FORMS OF ADR: SCREENING PROTOCOLS AND TOOLS FOR MARYLAND CIRCUIT COURTS (2005), available at <http://www.courts.state.md.us/family/pdf/screening.pdf>; OFFICE OF DISPUTE RESOLUTION, MICH. SUPREME COURT, DOMESTIC VIOLENCE AND CHILD ABUSE/NEGLECT SCREENING FOR DOMESTIC RELATIONS MEDIATION: MODEL SCREENING PROTOCOL (2006), available at <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>.

179. Jaffe et al., *supra* note 122, at 504, 505 tbl.1.

180. JOHNSTON ET AL., *supra* note 5, at 316-23.

181. Graham-Kevan & Archer, *supra* note 76, at 1252.

182. *Id.* The following questions are included on the Controlling Behaviors Scale, which does not include questions about physical aggression:

*Economic. . . .*

1. Did you/your partner disapprove of the other working or studying?
2. If yes, did you/your partner try and prevent or make difficult the other working or studying?
3. Did you/your partner feel it was necessary to have control of the other's money (e.g., wage, benefit)?
4. If yes, did you/your partner give the other an allowance or require other to ask for money?
5. Did you/your partner have knowledge of the family income?

. . . .

*Threats. . . .*

1. Did you/your partner make or carry out threats do something to harm the other?
2. Did you/your partner threaten to leave the other and/or commit suicide?
3. Did you/your partner threaten to report the other to welfare?
4. Did you/your partner encourage the other to do illegal things he/she would not otherwise have done?

. . . .

*Intimidation. . . .*

1. Did you/your partner use looks, actions, and/or gestures to change the other's behavior?

Practitioners should seek a screening instrument or instruments that will work in his or her practice. Questionnaires should provide helpful information but not be so lengthy or cumbersome that prospective clients will be unable to complete one in a timely fashion.

#### D. Observation and Check-in

Because violence or coercion may not be readily disclosed, attorneys must continuously watch for signs of domination and control, and remain vigilant regarding body language, domination of discussion, difficulty expressing needs, insulting behavior, and building lopsided agreements.<sup>183</sup> If the attorney observes any such indications, he or she should caucus or meet separately, and confidentially, with the client.

#### E. Documentary Review

Inquiring about and independently searching for documents and records may yield important information concerning a history of

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2. If yes, did you/your partner make the other afraid when this was done?
  3. Did you/your partner smash property when annoyed/angry?
  4. If yes, was it the other's property?
  5. When angry, did you/your partner vent anger on household pets?

.....  
*Emotional. . . .*

1. Did you/your partner put the other down when they felt the other was getting "too big for their boots"?
2. If yes, did you/your partner put the other down in front of others (friends, family, children)?
3. Did you/your partner try to humiliate the other in front of others?
4. Did you/your partner tell the other that he/she was going crazy?
5. Did you/your partner call the other unpleasant names?

.....  
*Isolation. . . .*

1. Did you/your partner restrict the amount of time the other spent with friends and/or family?
2. If you/your partner went out, did the other want to know where the other went and who the other spoke to?
3. Did you/your partner limit the other's activities outside the relationship?
4. Did you/your partner feel suspicious and jealous of the other?
5. If yes, was this used as a reason to monitor and control the other's activities?

*Id.* app. A at 1266-67; *see also* JOHNSON, *supra* note 175, at 163 (listing indications of emotional abuse as: "(1) He insists on knowing who she is with and where she is at all times[;] (2) He calls her names to put her down or make her feel bad[;] (3) He is jealous and doesn't want her to talk to other men[;] (4) He tries to limit her contact with family or friends[;] (5) He prevents her from knowing about or having access to the family income, even if she asks"); Tolman, *supra* note 175, at 162-63 tbl.1 (listing fifty-eight scale items used in a study).

183. *See* Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 WILLAMETTE L. REV. 905, app B at 925-26 (1997).

intimate partner violence and level of dangerousness.<sup>184</sup> Are there past or current protective orders?<sup>185</sup> Have there been arrests and/or convictions for past abuse?<sup>186</sup> Documentary review provides an objective check in situations where a victim may be too fearful to disclose violence and a perpetrator may be hiding it. Of course, absence of documents and records does not mean that there has been no intimate partner violence.

#### F. Multiple Opportunities to Disclose

In the final analysis, collaborative law attorneys should create multiple and varied opportunities for disclosure and detection of coercion and violence.<sup>187</sup> Although there is no magic formula, one helpful idea is to place oneself in the shoes of a victim of coercive-controlling violence who is being threatened with consequences if disclosure is made, and then imagine the circumstances under which you would feel safe, or unsafe, addressing it.

#### G. Room for Improvement

In her study, Macfarlane expressed concern that the collaborative lawyers studied did not actively screen for domestic violence:

There is as yet no systematic screening for domestic violence, although some within the CFL movement are raising concerns about this issue. In some more established groups, discussion is beginning over appropriate protocols for such cases. When asked, most CFL lawyers agree that they would not take a CFL case in which there was a history of domestic violence, but they do little other than rely on their instincts and some basic questioning to screen out such cases.<sup>188</sup>

Macfarlane illustrates potential repercussions for collaborative law clients with an example. “One of the most worrying comments in the whole study was a statement made by a client who was still residing with her spouse. She told us, ‘I could hardly s[t]ay in the four-way with [X] there, I’m scared to go home tonight.’”<sup>189</sup>

While section 15 of the UCLA leaves no doubt that collaborative lawyers have a duty to develop and implement screening protocols,<sup>190</sup> it appears not to be a current widespread practice.<sup>191</sup>

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184. GIRDNER, *supra* note 158, at 16-17.

185. *Id.*

186. *Id.*

187. *See id.* at 15, 19.

188. MACFARLANE, *supra* note 19, at 66. “CFL” stands for collaborative family law.

189. *Id.* at 35.

190. UCLA § 15, at 484-85.



## VI. THE DEFAULT: NO COLLABORATIVE LAW IF HISTORY OF COERCIVE OR VIOLENT RELATIONSHIP

The UCLA starts with the premise that a collaborative law process should not be used in cases involving coercive or violent relationships.<sup>192</sup> Under section 15(c), if the lawyer “reasonably believes” that there is a history of a coercive or violent relationship, the lawyer may not start or continue with the collaborative law process unless certain requirements are met.<sup>193</sup> The collaborative lawyer may proceed if the prospective party so requests, but only if the lawyer “reasonably believes that the safety of the party or prospective party can be protected adequately during a process.”<sup>194</sup>

Thus, the UCLA requires the collaborative lawyer to make reasonable inquiry concerning whether the parties have a history of coercion or violence.<sup>195</sup> The collaborative process should generally not proceed if the lawyer “reasonably believes” that such a history exists.<sup>196</sup> However, in an effort to promote autonomy and choice, the prospective party can, with informed consent, request to participate.<sup>197</sup> In addition to facilitating an informed decision, the lawyer must form an independent judgment—he or she must “reasonably believe” that the collaborative law process can be safely completed.<sup>198</sup> The issues of informed consent, appropriateness, and safety are explored in the following sections.

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191. In addition to Macfarlane’s findings, the collaborative law books and training materials reviewed for the purpose of writing this Article sometimes mention domestic violence but generally do not provide in-depth or practical information regarding screening protocols, risk assessment, safety planning, and modification of the collaborative law process in such cases. *See, e.g.*, Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 146 (2008).

192. UCLA, prefatory note, at 459.

193. *Id.* § 15(c), at 485.

194. *Id.* § 15(c)(2), at 485.

195. *Id.* § 15(a), at 484; *see supra* Part V.

196. *See* UCLA § 15(a), at 484.

197. *Id.* prefatory note, at 461 (“Reconciling the need to insure safety for victims of domestic violence with the party autonomy that alternative dispute resolution processes such as collaborative law promotes and assumes is thus a significant and continuing challenge for policy makers and practitioners.”).

198. *See supra* note 194 and accompanying text. Although section 15(c)(2) does not expressly provide so, an interesting question is whether the requirement regarding reasonable belief of safety of the party or prospective party extends to the other party as well.

## VII. INFORMED CONSENT AND APPROPRIATENESS

A. *Informed Consent*

Under section 14, collaborative lawyers are required to take steps to ensure that a decision to participate is informed and voluntary.<sup>199</sup> Because collaborative law is a limited form of representation, under Rule 1.2 of the ABA Model Rules of Professional Conduct, the limitation of scope must be a reasonable one given the circumstances, and the client must give informed consent.<sup>200</sup>

Before a collaborative law participation agreement is signed, the UCLA requires that a prospective collaborative lawyer perform three tasks. First, he or she must “assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party’s matter.”<sup>201</sup> Second, the lawyer is required to:

[P]rovide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative law matter, such as litigation, mediation, arbitration, or expert evaluation.<sup>202</sup>

Finally, the lawyer must advise the prospective party regarding potential termination of the process (both unilateral and if tribunal intervention is sought) and disqualification of the lawyer and firm.<sup>203</sup>

As a backdrop to discussing informed consent in cases involving coercion or violence, it should be noted that in her study, Macfarlane

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199. UCLA § 14, at 484.

200. Formal Op., *supra* note 11, at 3; Ethics Subcommittee, ABA Section of Dispute Resolution, *Summary of Ethics Rules Governing Collaborative Practice*, 15 TEX. WESLEYAN L. REV. 555, 559 (2009) [hereinafter *Ethics Rules*] (Rule 1.2 requires a two-pronged analysis: is the scope reasonable under the circumstances, and is there informed consent?); Fines, *supra* note 191, at 145-46 (collaborative law agreement unreasonable if power balance or emotional stability would make process unlikely to be fair or stable); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007) (Informed consent is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”); Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 157 (noting that a limited scope agreement must be reasonable under the circumstances and that collaborative law may not be reasonable in cases involving spousal or child abuse).

201. UCLA § 14(1), at 484.

202. *Id.* § 14(2), at 484.

203. *Id.* § 14(3), at 484.

expressed some concern about the “quality and depth” of informed consent in collaborative cases generally.<sup>204</sup> While the collaborative lawyers discussed the major aspects of the collaborative process with clients, Macfarlane found that some of the clients did not seem to fully understand the ramifications of participation, in part because explanations were too abstract, but also because some of the collaborative lawyers did not have sufficient experience to anticipate potential problems.<sup>205</sup>

Although not specifically geared to the UCLA or cases involving intimate partner violence, Forrest S. Mosten has developed a chart illustrating the benefits and risks associated with key aspects of collaborative practice.<sup>206</sup> It addresses collaborative guidelines and principles, disqualification, professional teams, party decision making and communication, voluntary disclosure of information, confidentiality, and time and cost.<sup>207</sup> In addition, he urges collaborative lawyers to inform prospective clients about their own models of practice, other models of collaborative law, and other methods of dispute resolution.<sup>208</sup> He recommends asking clients to sign a statement confirming their understanding of the process.<sup>209</sup>

Assuring informed consent is more challenging in cases involving coercive or violent relationships. The next section explores factors related to “appropriateness” of collaborative law if a coercive or violent relationship is involved.

### *B. Appropriateness Factors When There is a History of a Coercive or Violent Relationship*

When a potential coercive or violent relationship exists between the parties, additional scrutiny is required to assess appropriateness and

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204. MACFARLANE, *supra* note 19, at 64.

205. *Id.* at 64-65.

206. FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* 145-50 (2009).

207. *Id.*; *see also* Mosten, *supra* note 21, at 170-77 (describing the duties of attorneys regarding informed consent before providing collaborative representation); Peppet, *supra* note 200, at 156 (“Obviously informed consent requires that a lawyer fully explain the costs and benefits of entering into a limited retention agreement and the alternatives to doing so. In the Collaborative Law context, this certainly necessitates describing the process fully; explaining its advantages and disadvantages vis-à-vis other dispute resolution processes (e.g., litigation, mediation, arbitration, regular negotiation), and warning the client explicitly about potential financial, strategic, and personal risks or costs.”).

208. Mosten, *supra* note 21, at 171.

209. *See* MOSTEN, *supra* note 206, at 150; *see also* Patrick Foran, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 811-12 (2009) (client informed consent should be in writing).

assure informed consent.<sup>210</sup> The risks of participating in a collaborative law process are greater than in other cases, and must be fully explored with a prospective party.<sup>211</sup>

### 1. Is it Safe to Participate?

Safety is the initial and most important factor to consider when assessing whether participation in collaborative law should be an option.<sup>212</sup> The prospective lawyers for both parties need to counsel prospective parties regarding safety, and also formulate a reasonable belief concerning whether a collaborative process can be safely conducted.<sup>213</sup> Any doubts about safety should be resolved in favor of non-participation.

#### i. Risk Assessment

If there is intimate partner violence, the collaborative law process will likely take place at one of the most dangerous points in time.<sup>214</sup> As discussed previously, especially in cases involving coercive-controlling violence, leaving the relationship may increase the likelihood that the victim will be assaulted—most victims of intimate partner violence are, separated or divorced.<sup>215</sup> Thus, victims of coercive-controlling violence are likely to be in heightened danger during and after the divorce process. Although fundamentally different from coercive-controlling violence and more akin to conflict-instigated violence, separation-instigated violence, by definition, occurs only during the process of separation and divorce.<sup>216</sup>

Screening for past intimate partner violence may yield valuable information concerning level of dangerousness.<sup>217</sup> However, additional steps should be taken to assess risk going forward.<sup>218</sup> Predictions of future behavior are difficult, and care should be taken not to place undue confidence in them.

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210. See JOHNSON, *supra* note 65, at 4; Frederick, *supra* note 65, at 523.

211. See Mosten, *supra* note 21, at 170 (suggesting that all the material risk of participating in the collaborative law process must be explained to the client in order to obtain the client's informed consent).

212. See UCLA § 15 cmt., at 460.

213. See *id.* § 15(c), at 485.

214. See *supra* note 112 and accompanying text.

215. JOHNSON, *supra* note 65, app. B at 102-03 (summarizing studies on post-separation assault including finding that separated women were twenty-five times more likely to be assaulted than married women).

216. Kelly & Johnson, *supra* note 80, at 487.

217. See *supra* Part V.

218. See Connor, *supra* note 164, at 923.

Attorneys should always confidentially gauge a prospective party's level of fear and beliefs about the likelihood of future coercion or violence. Research indicates that victims' perceptions concerning risk are a "relatively accurate" predictor of reoccurrence.<sup>219</sup> However, some may minimize the violence and consequently underestimate ongoing risk.<sup>220</sup>

An attorney potentially representing a coercive-controlling perpetrator should keep in mind that the perpetrator will likely deny or minimize coercion and violence or assert that the victim was the primary aggressor.<sup>221</sup> As noted previously, a victim of coercive-controlling violence is likely to have used violent resistance but this should not be confused with being the primary perpetrator.<sup>222</sup> If a party or prospective party communicates "a plan to inflict bodily injury or commit a crime of violence," such a communication is not privileged under the UCLA,<sup>223</sup> and the collaborative lawyer or professionals may have a duty to warn or report.<sup>224</sup>

A number of instruments have been developed for the purpose of assessing risk and/or lethality.<sup>225</sup> For example, the Danger Assessment was developed by Jacquelyn C. Campbell for the purpose of assessing risk of homicide.<sup>226</sup> It contains twenty "yes or no" risk factor questions,

219. Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS* 85, 98 (Jacquelyn C. Campbell ed., 2d ed. 2007) [hereinafter *ASSESSING DANGEROUSNESS*]; see also Connor, *supra* note 164, at 921-24 (discussing debate and research regarding victim's perceptions of risk); D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 *J. INTERPERSONAL VIOLENCE* 778, 797 (2004) ("[T]he predictive power of women's perceptions suggests the importance of obtaining and heeding women's appraisal of their situations, as advocates have long argued, and including them in risk instruments.").

220. Heckert & Gondolf, *supra* note 219, at 797 ("[T]he women who are at greatest risk may be those who feel somewhat safe. This may be because they have some uncertainty or uneasiness but not enough to take proactive action to reduce risk.").

221. BANCROFT & SILVERMAN, *supra* note 95, at 124. Note that the victim of coercive-controlling violence may have used some violence to resist the perpetrator but that is fundamentally different than acting as the primary perpetrator/initiator of the pattern of coercive control.

222. See *supra* notes 127-31 and accompanying text.

223. UCLA § 19(a), at 488.

224. *Id.* § 13, at 483-84; see also Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 *U. CIN. L. REV.* 447, 465-67 (2006) (analyzing the lawyer's duty to warn).

225. See N. Zoe Hilton & Grant T. Harris, *Assessing Risk of Intimate Partner Violence*, in *ASSESSING DANGEROUSNESS*, *supra* note 219, at 105, 112-15 (comparing instruments used to assess risk of wife assault recidivism including the Domestic Violence Screening Instrument, the Danger Assessment, the Spousal Assault Risk Assessment, the Ontario Domestic Assault Risk Assessment, and the Violence Risk Appraisal Guide); see also Burman, *supra* note 166, at 238-39 (listing factors for assessing risk).

226. Campbell, *supra* note 219, at 92-98, 93 fig.5.2. The Danger Assessment is also available at [DangerAssessment.org](http://DangerAssessment.org): Intimate Partner Violence Risk Assessment, Danger Assessment,

and includes a calendar for recording the dates and information concerning severity of incidents (from “no injuries” to “wounds from weapon”).<sup>227</sup>

In contrast, the DOVE instrument, designed by Desmond Ellis and Noreen Stuckless for use in mediation, inquires about nineteen statistically significant predictors of male violence after separation.<sup>228</sup> The predictors are grouped into seven categories:

- past violence (assault, serious physical injury, sexual assault, leaving home or calling police because of partner’s violence);
- past abuse (emotional abuse, serious emotional injury);
- emotional dependency (threats to harm/kill self if partner left, threats to harm/kill partner if partner left, possessiveness or jealousy);
- relationship problems (hard to get along with, communication deficits, blame, anger);
- mental health problems (taking medication);
- control (tried to control partner, used violence/abuse to control partner); and
- substance abuse (drinking, drugs).<sup>229</sup>

Specific mediator interventions are recommended based on a risk ranking (low risk, moderate risk, high risk, and very high risk).<sup>230</sup> For example, face-to-face mediation might occur in low-risk cases, provided that the parties agree to certain conditions, but in very-high-risk cases only telephone or online mediation might take place, and then only if there is credible evidence of change.<sup>231</sup>

Because risk assessment is such a critical and specialized function, collaborative lawyers without substantial expertise in intimate partner violence should involve a domestic violence advocate or mental health professional who specializes in intimate partner violence to assist in evaluating and counseling a prospective party concerning risk and lethality.

## ii. Safety Planning

Any party or prospective party who has been a victim of intimate partner violence, particularly coercive-controlling violence, should have

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<http://www.dangerassessment.org/WebApplication1/pages/product.aspx> (last visited June 1, 2010).

227. See Campbell, *supra* note 219, at 93 fig.5.2, 95-96.

228. Ellis & Stuckless, *supra* note 176, at 660.

229. *Id.* at 660 tbl.1.

230. *Id.* at 664-65.

231. See *id.*

a safety plan to limit the risk of future violence.<sup>232</sup> ABA Standards of Practice provide that a safety plan should include “methods for limiting harm during a violent incident; keeping children safe from abuse; preserving assets; minimizing opportunities for abuse at court, at home, at work, online, or at school; planning before leaving an abusive relationship; and enforcing a protective order.”<sup>233</sup> The ABA Commission on Domestic Violence and the Tort Trial and Insurance Practice Section have prepared a downloadable brochure on safety planning for victims that addresses what to do if attacked, how to prepare for any future violence occurring at or away from home, and what to teach and how to protect children.<sup>234</sup> It also contains the National Domestic Violence Hotline phone number.<sup>235</sup> If a collaborative lawyer is not skilled at safety planning, he or she should involve a domestic violence advocate or other trained person to assist.<sup>236</sup>

Another aspect of safety planning has to do with safety issues directly connected to participation in a collaborative law process.<sup>237</sup> The parties should agree to written ground rules that are closely monitored and enforced.<sup>238</sup> Depending on the case, the ground rules should include a prohibition on coercion or violence inside or outside of the four-way meetings, separate arrivals and departures, and potentially no contact outside of sessions.<sup>239</sup> The collaborative law attorneys should have considered how to safely terminate an ongoing process and be prepared to do so.<sup>240</sup>

Obviously, many cases involving intimate partner violence cannot be safely resolved through a collaborative law process.<sup>241</sup> Some

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232. STANDARDS OF PRACTICE, *supra* note 44, at 23-24.

233. *Id.* at 24.

234. COMM’N ON DOMESTIC VIOLENCE & TORT TRIAL & INS. PRACTICE SECTION, AM. BAR ASS’N, BE SAFE BE SENSIBLE BE PREPARED: STEPS TO SAFETY, <http://www.abanet.org/tips/publicservice/DVENG.pdf> [hereinafter STEPS TO SAFETY]; *see also* Connor, *supra* note 164, at 935 (“[T]he attorney must make sure that when she is ready to leave she has identified a safe exit plan, a place to go, and a way to get there. The client should be ready if she needs to leave quickly by having a bag packed, a list of people to contact, and some money readily available.” (citation omitted)).

235. STEPS TO SAFETY, *supra* note 234.

236. *See Ethics Rules*, *supra* note 200, at 563.

237. *See* Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 198-99 (2003).

238. *See id.*

239. *See id.*; *see also* UCLA § 15(c), at 485 (stating that a collaborative attorney cannot continue a collaborative law process if the lawyer reasonably believes the client has a history of a coercive or violent relationship with another party unless the lawyer “reasonably believes that the safety of the party or prospective party can be protected adequately during the process”).

240. *See* GIRDNER, *supra* note 158, at 30 (discussing safe termination of a mediation process).

241. Voegele et al., *supra* note 18, at 1012.

situations will be more obvious such as those where there is ongoing coercive-controlling violence coupled with use of weapons and threats of harm to children. However, other high-risk cases may present more subtly, and even experienced domestic violence professionals may not initially identify them.

## 2. What Is the Likelihood that Court Involvement Will be Sought?

In some cases, particularly those involving coercion or violence, court involvement is desirable and necessary.<sup>242</sup> As a foundational issue, the prospective party may prefer to have a judge decide the case based on state law as opposed to engaging in ongoing negotiation.<sup>243</sup> Going to court could protect a victim of coercive-controlling violence from coercion and threats generated by the perpetrator to attempt to control the settlement process.<sup>244</sup>

Disqualification extends to tribunal or court activity “related to the collaborative matter,”<sup>245</sup> which is defined as “involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.”<sup>246</sup> Consequently, if a victim of intimate partner violence needs to obtain or enforce a protective order,<sup>247</sup> a collaborative lawyer could seek one if no “successor lawyer” is available, but the lawyer would ultimately be disqualified from representation.<sup>248</sup> A court appearance on criminal charges<sup>249</sup> stemming from incidents of intimate partner violence might also trigger disqualification.

Collaborative law is not a good option if court involvement, or threat of court involvement, is possible or likely.<sup>250</sup> A victim of coercive-

242. See Wanda Wieggers & Michaela Keet, *Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities*, 46 OSGOOD HALL L.J. 733, 755-56 (2008).

243. See *id.*

244. See *id.*

245. UCLA § 9(a), at 481.

246. *Id.* § 2(13), at 468.

247. See generally Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* (Eve S. Buzawa & Carl G. Buzawa eds., 1996), and EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (2003), regarding the effectiveness of protective orders.

248. UCLA § 7, at 480 (“During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].”); *id.* § 9(c)(2), at 482 (“A collaborative lawyer . . . may represent a party . . . to seek or defend an emergency order . . . if a successor lawyer is not immediately available to represent that person.”).

249. For a discussion of the history and effectiveness of arrest in domestic violence cases, see BUZAWA & BUZAWA, *supra* note 247, at 104.

250. See UCLA, prefatory note, at 437.



controlling violence should not have to choose between the safety of a protective order and keeping her lawyer.

### 3. Is Either Party Impaired?

One or both of the parties may lack capacity or suffer from an impairment that would prevent full participation in a collaborative law process. For example, a victim of abuse may suffer from depression or Post-Traumatic Stress Disorder and either or both parties could have substance abuse issues. In such cases, parties should be referred to appropriate community treatment resources and a collaborative process should not be pursued, or should be considered only after successful treatment.<sup>251</sup>

### 4. Is Participation Voluntary?

There are two aspects of voluntariness that should be explored with a potential party. First, is a decision to participate being made without coercion, intimidation, or manipulation?<sup>252</sup> The most obvious source of pressure is another prospective party who wants to participate.<sup>253</sup> However, collaborative lawyers should take care not to heighten any such pressure to participate by incautiously extolling the virtues of collaborative law. Macfarlane found a tendency for collaborative lawyers to promote the process with all clients and/or to only accept collaborative cases.<sup>254</sup> Fortunately, others apply criteria for determining when collaborative law is suitable and describe the process in that light.<sup>255</sup>

Second, is the prospective party aware that he or she can withdraw from the process at any time, and would the prospective party be able to do so without fear of retribution from the other party?<sup>256</sup> Participation is not voluntary if it is continued in order to avoid reprisal.

### 5 Will Both Parties Assert Interests and Make Fair and Voluntary Agreements?

Because the collaborative law process is premised on participant autonomy and self-determination,<sup>257</sup> collaborative clients are expected to

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251. See Voegele et al., *supra* note 18, at 1012.

252. See UCLA § 14(3)(B), at 484 (The collaborative lawyer should inform the client that “participation in a collaborative law process is voluntary.”).

253. See MACFARLANE, *supra* note 19, at 59.

254. *Id.* at 65.

255. *Id.*

256. See UCLA § 14(3)(B), at 484 (stating that the collaborative lawyer should inform the client that the client can “terminate unilaterally a collaborative law process with or without cause”).

257. MACFARLANE, *supra* note 19, at 42.

engage in problem solving to a greater extent than participants in more traditional processes.<sup>258</sup> Thus, both parties must freely assert interests and reach agreements that are voluntary in nature.

Commentators have expressed concerns about the efficacy of collaborative law where one party is in a weaker negotiating position.<sup>259</sup> Concerns are most commonly raised with respect to power disparities between men and women.<sup>260</sup> In her study, Macfarlane found “no evidence” that collaborative law cases “result in weaker parties bargaining away their legal entitlements.”<sup>261</sup> She does, however, warn that collaborative lawyers may not be equipped to handle high-conflict cases and cases involving violence, and that there is a “clear need for the use of more intense and demonstrably effective screening protocols to ensure that appropriate cases—rather than all cases—are guided toward CFL, and for particular care to be taken with cases that have the potential for abuse or intimidation.”<sup>262</sup> In their analysis of eight collaborative law cases, Michela Keet, Wanda Wieggers, and Melanie Morrison found that clients had mixed experiences with respect to power imbalance and gender issues, noting “potential dangers where concessions are made in the context of unequal bargaining power.”<sup>263</sup>

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258. *Id.* at 43.

259. *Id.* at 59.

260. See Penelope Eileen Bryan, “Collaborative Divorce”: Meaningful Reform or Another Quick Fix?, 5 PSYCHOL., PUB. POL’Y, & L. 1001, 1002, 1014 (1999) (discussing power disparities between men and women and noting that women may fail to appropriately assert financial interests); Fines, *supra* note 191, at 146 (discussing risk of abuse and differences in financial resources); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1366 (2003) (“This dynamic may be particularly problematic if the husband abused and intimidated the wife, who may resort to CL to avoid confronting her husband and who may lack the emotional strength to resist his efforts to continue—or even prolong—the negotiations. In this situation, her lawyer’s incentives would actually align with her husband’s interests and conflict with her interests.”).

261. MACFARLANE, *supra* note 19, at 78 (noting that a larger sample of cases would be necessary to “test this tentative conclusion”).

262. *Id.* at 80 (“CFL could make a vulnerable client yet more vulnerable to an abusive spouse unless appropriate planning and safeguards are developed while the process is ongoing. In addition, collaborative lawyers are advised to assess carefully their own abilities to deal with particularly high-conflict cases without additional specialist expertise.”).

263. Keet et al., *supra* note 20, at 188; see also John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 221 (weaker party may be pressured into agreement); Wieggers & Keet, *supra* note 242, at 759 (“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

In the final analysis, determination about suitability for participation must be made on an individual basis with the recognition that the situation may change over time. Most victims of coercive-controlling violence or incipient coercive-controlling violence should not participate in a collaborative process because of the high likelihood that the perpetrator will use tactics of coercion and control to intimidate and manipulate the process. The coercion may be blatant—collaborative lawyers should monitor tone of voice, facial expressions, passivity, outbursts and threats—or it may be so subtle that it is invisible to anyone except the victim.<sup>264</sup> Once the process of coercion (demand, surveillance, and imposition of consequences) is established, even small gestures or expressions carry different meaning for the parties.<sup>265</sup> A victim of coercive-controlling violence could be intimidated into a collaborative law process and pressured into agreements without the knowledge of her attorney. In a less extreme case, a victim could acquiesce to substantively less favorable terms to escape the relationship.

At the same time, a perpetrator of incipient coercive control or coercive-controlling violence may have difficulty recognizing that the victim has separate needs and interests.<sup>266</sup> To participate in a collaborative process and comply with agreements and ground rules, the perpetrator must be able to acknowledge the other party's autonomy, overcome a sense of entitlement and need to control, and accept responsibility for actions.<sup>267</sup>

In addition to pressure from the other party, participants may feel a generalized pressure to settle arising from the fact that collaborative law is by definition geared toward settlement, and settlement is the expected result.<sup>268</sup> In cases that do not involve coercion or violence, this expectation can benefit families by providing an incentive to reach a resolution.<sup>269</sup> However, where there is a history of coercion or violence, if unchecked, pressure to settle can result in capitulation.<sup>270</sup>

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legal advice at appropriate stages of the process, and limited skill sets in dealing with problems of abuse.”).

264. See Graham-Kevan & Archer, *supra* note 76, app. A at 1267 (listing using a look, action, or gesture to change a partner's behavior as an indicator of intimidation).

265. See Dutton & Goodman, *supra* note 66, at 745-46; Graham-Kevan & Archer, *supra* note 76, app. A at 1267.

266. See JOHNSON, *supra* note 65, at 28 (stating that perpetrators will often cut their victims off from resources they need).

267. See GIRDNER, *supra* note 158, at 19.

268. See *supra* note 12 and accompanying text.

269. Lande, *supra* note 263, at 219-20 (discussing interviews with lawyers stating that the disqualification agreement “forces” parties to pursue settlement).

270. See *id.* at 221.

Of course, some parties, particularly those with a history of conflict-instigated or separation-instigated violence, may be well able to assert their interests and fully participate in a collaborative process.<sup>271</sup> Such decisions depend on context, but in some cases, the parties may learn valuable conflict resolution skills from participation in four-way sessions and possibly work with a coach or therapist.<sup>272</sup>

#### 6. Will Both Parties Make Disclosures and Act in Good Faith?

The collaborative law process requires a basic level of trust and willingness to participate in good faith. Pauline H. Tesler illustrates this when she describes “transparency” as a key collaborative concept:

It includes the following: honesty and candor about what one is doing and why one is doing it (both lawyers and clients); conduct of information exchange and negotiations in four-way meetings attended by both clients and both lawyers so that all important conversations are six-way communications experienced directly by each participant; candor about goals, priorities, and reasoning; and accountability and acceptance of responsibility. When transparency is present, there are no hidden agendas or hidden balls; there is no secret tactical maneuvering; there are no triangulated attempts to blame absent persons for faults never disclosed to them; there is no taking advantage of misunderstandings or errors.<sup>273</sup>

Thus, both parties must enter the process with some belief that the other party intends to act with honesty and integrity.

A major concern is that coercive-controlling perpetrators will use the collaborative law process to control and manipulate the victim.<sup>274</sup> In the traditional court process, coercive-controlling perpetrators are known for filing harassing motions, seeking custody of children, making false allegations, and filing parallel actions.<sup>275</sup> Although collaborative law forecloses some of these avenues for the meantime, coercive-controlling perpetrators will likely try to use the collaborative law process in a similar way.<sup>276</sup> For example, a perpetrator may view four-way meetings as an opportunity to intimidate the victim, fail to make required

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271. See Kelly & Johnson, *supra* note 80, at 487 (stating that in a separation instigated violence situation, neither partner is “intimidated, fearful, or controlled by the other,” and the violent incident is usually isolated).

272. See Voegelé et al., *supra* note 18, at 984.

273. TESLER, *supra* note 9, at 78.

274. See Elizabeth J. Kates, Considering Collaborative Law: When Is it Appropriate?, Collaborative Lawyers, Inc. (2009), <http://www.collaborativelawflorida.com/Articles/Considering-Collaborative-Law.html>; Kelly & Johnson, *supra* note 80, at 493.

275. BANCROFT & SILVERMAN, *supra* note 95, at 125; Goodmark, *supra* note 95, at 34.

276. See Lande, *supra* note 263, at 220.

disclosures regarding income and assets, unwittingly enlist the collaborative lawyers in pressuring the victim to settle, and unilaterally terminate the process after multiple sessions.<sup>277</sup> On the flip side, a victim of coercive-controlling violence may hesitate to disclose information out of fear that it will be used inappropriately or that disclosure will result in retaliation.<sup>278</sup>

When interviewing a prospective party, collaborative lawyers should inquire about the likely intentions of the prospective party and the other party. If trust levels are low due to coercion and control, collaborative law is not a good option.

#### 7. What Are the Consequences for the Prospective Party if the Process is Terminated and the Collaborative Lawyer is Disqualified?

The collaborative law process could be unilaterally terminated by either party,<sup>279</sup> and if court involvement is sought, the lawyers would be disqualified from continuing representation.<sup>280</sup> Depending on the situation of the party, this could result in hardship. For example, a coercive-controlling perpetrator could engage in the collaborative law process, but then seek court involvement in order to disqualify the victim's attorney. The victim may have a close working relationship with the lawyer and be forced to suddenly seek new counsel.<sup>281</sup> This would be even more problematic if the victim could not afford to retain new litigation counsel.

#### 8. What Model of Collaborative Law Will Be Used?

Because collaborative law processes vary extensively, it is important to understand key features of the actual process being considered.<sup>282</sup> Prospective parties with a history of intimate partner violence should seek the following in a collaborative law model of practice:

- Counsel should regularly meet privately with clients outside of four-way meetings and the private meetings should be confidential;<sup>283</sup>

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277. *Id.* (discussing “punitive” disqualification).

278. *See* Kelly & Johnson, *supra* note 80, at 481.

279. UCLA § 5(f), at 477.

280. *Id.* § 9(a), at 481.

281. Lande, *supra* note 263, at 220 (discussing lawyers' concerns about abandoning clients when they are the most needed).

282. MACFARLANE, *supra* note 19, at 7.

283. *See id.*

- Clients should not be pressured to reveal sensitive information particularly in relation to safety issues;<sup>284</sup>
- The collaborative lawyers should give legal advice to their clients that is specific to each client rather than generalized to both;<sup>285</sup>
- Counsel should have primary loyalty to the client rather than to the “whole family”;<sup>286</sup> and
- Counsel should not have a “harmony agenda” that might encourage conflict avoidance and glossing over of safety issues.<sup>287</sup>

The collaborative lawyers should be flexible enough to modify the collaborative process as needed to meet the safety and other needs of the parties. The lawyer’s commitment to the client should clearly outweigh the lawyer’s commitment to the collaborative process.<sup>288</sup>

#### 9. What Experience and Expertise Does the Prospective Lawyer Have Regarding Collaborative Law and Intimate Partner Violence?

Prospective parties should inquire about the experience of the prospective collaborative lawyer and in particular, the lawyer’s training and experience with respect to intimate partner violence. If known, it is similarly important to consider the expertise and experience of the other collaborative lawyer because the process will also be affected by his or her experience or lack thereof.

The experience and skill levels of collaborative lawyers vary considerably. For example, Macfarlane cautions that “while lawyers on the one hand set up the conditions for an open and frank—and often necessarily emotional—exchange in the four-way, they may have been unprepared and poorly equipped to deal with the consequences.”<sup>289</sup>

#### 10. Will an Expert in Intimate Partner Violence be Involved?

Unless the lawyers have extensive experience handling cases involving intimate partner violence, the participants and their lawyers should consider involving a domestic violence advocate or other expert.<sup>290</sup> The expert could assist with risk assessment and safety

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284. *See id.*

285. *See id.*

286. *Id.* at 49.

287. *Id.* at 35.

288. *Id.* at 59 (“[W]eaker parties may be pressured to agree to an outcome that does not recognize their needs. This risk is probably heightened where the lawyer’s commitment to the collaborative process—that is ensuring that the parties settle and that litigation is not necessary—appears to outweigh his or her commitment to the client.”).

289. *Id.* at 35.

290. *Id.* at 51.

planning, participate in four-way meetings, and monitor compliance with ground rules.

#### 11. What Alternatives to Collaborative Law are Available?

Section 14(2) of the UCLA requires comparison of the risks and benefits of collaborative law to “other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation.”<sup>291</sup> Some of the considerations will be different when coercion or violence is involved.<sup>292</sup>

##### i. Litigation

Litigation may encompass a variety of processes including negotiated settlement.<sup>293</sup> However, it is generally more structured and less consensus-based than collaborative law.<sup>294</sup> Specific rules and orders govern discovery, and penalties may be imposed for lack of compliance. Although the vast majority of cases settle, a judge may be involved in the settlement process and ultimately, if the parties don’t reach agreement on all issues, a judge will issue an appealable final decision.

Collaborative law was developed, in part, in reaction to problems associated with the adversarial litigation process.<sup>295</sup> For example, parents report that litigation escalates conflict, is inefficient, takes too long, costs too much, and yields decisions insufficiently tailored to their needs.<sup>296</sup> However, particularly in cases involving coercive-controlling violence, litigation can provide protection for victims through enforceable court orders, neutral third-party decision making, and application of established legal norms.<sup>297</sup>

##### ii. Arbitration

In arbitration the parties select a neutral third party who functions much like a judge to hear evidence and, in most cases, make a binding

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291. UCLA § 14(2), at 484.

292. *Id.* prefatory note, at 459-63.

293. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 66 (2008).

294. *See id.* at 66-69.

295. *See* UCLA, prefatory note, at 426.

296. *See* Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 *FAM. L.Q.* 283, 298-99 (1999).

297. Lande & Herman, *supra* note 13, at 285.

decision.<sup>298</sup> Arbitration affords more privacy than use of the court system, and it may be faster and less costly.<sup>299</sup>

States differ considerably concerning the availability and use of arbitration in family law cases. Some states allow arbitration of alimony and child support issues, but require court determination of children's best interests when it comes to custody.<sup>300</sup> A few states have adopted statutes regulating matrimonial arbitration.<sup>301</sup> The American Academy of Matrimonial Lawyers promulgated a Model Family Law Arbitration Act that provides for de novo judicial review of arbitration awards in family cases.<sup>302</sup>

Given jurisdictional differences regarding the availability and nature of family law arbitration, collaborative lawyers must tailor descriptions of the process to local availability and practice. In cases involving intimate partner violence, potential participants should weigh factors such as the intimate partner violence expertise of the arbitrator, access to the courts for protective and emergency orders, and the extent to which decisions can be enforced and appealed.

### iii. Cooperative Law

The cooperative law process may be thought of as collaborative law without the disqualification agreement.<sup>303</sup> Cooperative law attorneys seek settlement through the use of interest-based techniques, but cooperative lawyers are not disqualified from litigating if court involvement should become necessary or desirable.<sup>304</sup> In his study of cooperative lawyers in Wisconsin, John Lande found that key components of cooperative law include civility, disclosure of

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298. Lynn P. Burleson, *Family Law Arbitration: Third Party Alternative Dispute Resolution*, 30 CAMPBELL L. REV. 297, 298 (2008).

299. *Id.* at 301, 314.

300. Elizabeth A. Jenkins, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R. 5th 69, § 4(a), at 84-85 (1996); *id.* § 5(b), at 94-95; *see also* Toiberman v. Tisera, 998 So. 2d 4, 7, 9 (Fla. Dist. Ct. App. 2008) (under statute, prohibition of arbitration of child-related issues foreclosed arbitration of other issues); Fawzy v. Fawzy, 973 A.2d 347, 361 (N.J. 2009) (parents' right to choose method of dispute resolution will only be infringed if justified by threat of harm to child).

301. *See* Burleson, *supra* note 298, at 297-98 (listing Colorado, Connecticut, Indiana, Michigan, New Hampshire, New Mexico, and North Carolina as states with matrimonial arbitration statutes).

302. *See* MODEL FAMILY LAW ARBITRATION ACT, executive summary, § 123(a)(7) (Am. Acad. Of Matrimonial Lawyers Arbitration Comm. 2004), available at <http://www.aaml.org/go/library/publications/model-family-law-arbitration-act/>.

303. Lande & Herman, *supra* note 13, at 281.

304. David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in INNOVATIONS, *supra* note 7, at 63, 64-65.



information, use of joint experts, and negotiation sessions similar to four-way sessions.<sup>305</sup> Lande describes situations where a party might prefer a cooperative law process to a collaborative law process:

Parties may prefer a Cooperative process instead of a Collaborative process when they 1) trust the other party to some extent but are uncertain about that person's intent to cooperate, 2) do not want to lose their lawyer's services in litigation if needed, 3) cannot afford to pay a substantial retainer to hire new litigation counsel in event of an impasse, 4) fear that the other side would exploit the disqualification agreement to gain an advantage, or 5) fear getting stuck in a negotiation process because of financial or other pressures.<sup>306</sup>

Cooperative lawyers seek to provide clients with the benefits of collaborative law without subjecting them to the potentially harsh consequences associated with disqualification.<sup>307</sup>

Cooperative law may be a realistic option for some couples with a history of conflict-instigated violence because the process can reduce conflict levels outside of the shadow of disqualification.<sup>308</sup> However, especially for situations involving coercive-controlling violence or incipient coercive control, many of the risks inherent in collaborative law apply. These include questions about safety, ability to assert interests, good faith participation, and potential lack of intimate partner violence expertise on the part of the lawyers.<sup>309</sup>

#### iv. Early Neutral Evaluation

During early neutral evaluation, the parties and their lawyers (if they are represented) meet for several hours with a team of family law experts who, after hearing from both parties, render a confidential, nonbinding evaluation of the case.<sup>310</sup> Ideally, the recommendation provides a reality check for the parties and an opportunity to negotiate settlement with the assistance of the neutral evaluators.<sup>311</sup>

Early neutral evaluation could be useful in cases involving conflict-instigated violence, especially if both parties are represented, and the

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305. Lande, *supra* note 20, at 20-21.

306. *Id.* at 23.

307. *See id.*

308. *See supra* notes 305-06 and accompanying text.

309. *See supra* notes 232-41, 262, 273 and accompanying text; *see also supra* Part IV.C (noting that it is important for collaborative attorneys to screen for intimate partner violence).

310. Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 674 (2006).

311. *See id.*

evaluators have substantial experience with intimate partner violence.<sup>312</sup> However, early neutral evaluation may be a problematic choice for situations involving coercive-controlling violence or incipient coercive-controlling violence depending on whether the parties are represented, the evaluators are experts in coercive-controlling tactics, the process is appropriately modified and made safe, and the participants are able to assert interests and participate in good faith.<sup>313</sup> Because evidence is not formally presented, the evaluators rely on the assertions of the parties,<sup>314</sup> and in cases of coercive-controlling violence, the evaluators could be provided with a skewed version of events. A victim may not assert relevant facts even while a perpetrator portrays himself favorably.

#### v. Mediation

Mediation is an interest-based process where a neutral third party facilitates a voluntary settlement process but does not make decisions or give evaluations.<sup>315</sup> The mediator organizes discussion, promotes communication, helps participants identify important interests, and explore options.<sup>316</sup> Mediation settlement rates vary by program, but range from forty percent to eighty percent<sup>317</sup> with the majority of participants reporting satisfaction with the process.<sup>318</sup> If settlement is reached, mediation is often faster<sup>319</sup> and less costly than litigation.<sup>320</sup>

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312. *See id.* at 676, 679.

313. *See id.* at 678-80.

314. *Id.* at 674.

315. Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001).

316. *Id.*

317. ELLIS & STUCKLESS, *supra* note 74, at 103; *see also* Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 99 (1993) (finding agreement rates to be between forty-five and seventy-five percent); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 422 (1985) (stating that fifty-eight percent of mediated custody cases in Denver, Colorado reached agreement); Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 394, 397 (Kenneth Kressel & Dean G. Pruitt eds., 1989) [hereinafter *MEDIATION RESEARCH*] (finding the median settlement rate to be approximately sixty percent); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH*, *supra*, at 9, 18 (stating that almost eighty percent of child support mediation cases in Delaware reached settlement).

318. *See* ELIZABETH M. ELLIS, *DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT* 74 (2000); Folberg, *supra* note 317, at 424; *see also* Kressel & Pruitt, *supra* note 317, at 395-96 (stating that seventy-five percent of participants were satisfied with the process); Clement & Schwebel, *supra* note 317, at 98 (stating that the satisfaction rate for parties who settle is between eighty and one hundred percent).

319. Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 376 (1996).

Much has been debated and written about whether mediation is appropriate in cases involving intimate partner violence.<sup>321</sup> Concerns are frequently expressed that power imbalances are insurmountable, mediation is too private, and that mediators lack expertise in intimate partner violence.<sup>322</sup> Whether mediation is appropriate for a given family likely depends on safety issues, whether the parties are represented, the pattern of violence, the frequency and severity of the violence, the ability of both parties to assert interests and participate in good faith, the quality of the process, and the financial resources of the parties.<sup>323</sup>

If it occurs, mediation should be conducted by an experienced and specially-trained mediator who institutes tailored safety precautions and procedures. At a minimum, these should include written ground rules, inclusion of lawyers and support persons, separate arrivals and departures, and use of separate caucusing.<sup>324</sup>

### C. Client Counseling

The UCLA places heavy reliance on the client counseling skills of collaborative lawyers.<sup>325</sup> Section 14 requires the collaborative lawyer to assess appropriateness factors “with” the prospective party; provide the party with sufficient information for making an informed decision; and advise the prospective party regarding termination, voluntariness, and disqualification.<sup>326</sup>

David Hoffman explains the difficulty of the task:

Often when I am involved in intake conversations with potential clients, I am surprised by how uncertain the clients are about whether they prefer mediation, Collaborative Practice, or some other process. This should not be so surprising, because no matter how many articles the clients may have read about these processes, they are still abstractions to clients. Moreover, the choice of a dispute resolution process at the beginning of a case is essentially a judgment call about the future, made at the confusing intersection of law, fact, and emotion. While there are rational criteria that one can apply to such decisions, the best decisions, in my view, derive at least to some degree from the professional’s intuition—the distilled experience that we have had in

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320. Joan B. Kelly, *Is Mediation Less Expensive?: Comparison of Mediated and Adversarial Divorce Costs*, 8 *MEDIATION Q.* 15, 20 tbl.1, 23 (1990).

321. See Ver Steegh, *supra* note 237, at 180.

322. *Id.* at 180-90.

323. *Id.* at 196-97.

324. *Id.* at 198-99.

325. UCLA, prefatory note, 438 (discussing lawyers’ traditional role as counselor).

326. *Id.* § 14, at 484.

numerous other cases where we have seen the choice of mediation or Collaborative Practice or some other process turn out badly, or turn out well, or turn out somewhere in-between. As newcomer to these processes, the client can, for the most part, provide only raw data—albeit crucially important data—about the overall circumstances of the case, the parties’ negotiating style, and information about the parties’ temperaments, preferences, and readiness to participate in meaningful negotiations.<sup>327</sup>

Because the stakes are so high in cases involving intimate partner violence, the lawyer’s ability to listen, ask informed questions, and work in partnership with a prospective client is critical. The Prefatory Note of the UCLA advises that “[a] collaborative lawyer should generally discuss the option of beginning, continuing or terminating a collaborative law process with the victim with great care and sensitivity, and memorialize the victim’s decision in writing if possible.”<sup>328</sup>

#### VIII. THE COLLABORATIVE LAWYER’S REASONABLE BELIEF REGARDING SAFETY

Even if there is a history of a coercive or violent relationship, so long as there is informed consent, a prospective party may request that the collaborative process continue or proceed.<sup>329</sup> If such a request is made, section 15 instructs the collaborative lawyer not to proceed unless the lawyer “reasonably believes that the safety of the party or prospective party can be protected adequately during a process.”<sup>330</sup>

Safety is, of course, a primary appropriateness factor, and should have been fully explored with the prospective party in connection with ensuring informed consent.<sup>331</sup> Thus, the lawyer will have gleaned valuable information relevant to safety via his or her screening protocol as well as through risk assessment and safety planning.<sup>332</sup> Using this information, section 15 clearly empowers and, in fact, requires the lawyer to refuse to proceed if safety might be compromised.<sup>333</sup> In such an event, the lawyer should counsel the prospective client concerning other available options, referrals to community resources, and safety planning for the immediate future.

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327. David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 36 (citation omitted).

328. UCLA, prefatory note, at 462.

329. *Id.* § 15(c)(1), at 485.

330. *Id.* § 15(c)(2), at 485.

331. *See supra* notes 212-41 and accompanying text.

332. *See supra* notes 212-41 and accompanying text.

333. *See* UCLA § 15(c)(2), at 485.

## IX. INTIMATE PARTNER VIOLENCE: A ROADMAP FOR COLLABORATIVE LAWYERS

The following checklist provides a roadmap for collaborative lawyers with respect to the intimate violence provisions of the UCLA.

### 1. Lawyer's "Reasonable Inquiry" Protocol

- Is there a history of:
  - Coercion and violence?
  - Coercion without violence (incipient)?
  - Violence without coercion?
- Protocol: multiple opportunities for confidential disclosure
  - Interviews
  - Questionnaires
  - Monitoring
  - Documentary search

### 2. Default: No Collaborative Process

- Request to proceed—with informed consent?

### 3. Participant Informed Consent

- Is it safe to participate?
- Might court involvement be needed?
- Is either party impaired?
- Is participation voluntary?
- Will both parties assert interests and make fair and voluntary agreements?
- Will both parties make disclosures and participate in good faith?
- What are the consequences of termination and disqualification?
- What model of collaborative law will be used?
- Do the collaborative lawyers have experience with intimate partner violence?
- Will an expert in intimate partner violence be involved in the process?
- What are other available alternatives?

#### 4. Lawyer's "Reasonable Belief Regarding Safety"

- Risk assessment
- Safety planning

#### 5. Potential Modifications to Process

- Involvement of domestic violence advocate/expert
- Enforced ground rules
- Regular confidential meetings with counsel outside of four-ways
- Other modifications tailored to needs

### X. CRITIQUE AND RECOMMENDATIONS

Through use of the term "coercive or violent," the Act recognizes that intimate partner violence encompasses more than violent acts and includes within its scope situations involving coercion without violence, coercion with violence, and non-coercive violence.<sup>334</sup> Each of these impacts the viability of the collaborative process, albeit in different ways.

By adopting an informed consent model, the UCLA implicitly recognizes that intimate partner violence varies tremendously from one case to the next, and that bright line rules about participation may be too simplistic. Instead, the Act vests primary decision making about the suitability of the process with the prospective parties, not the courts.<sup>335</sup> This approach recognizes that the parties ultimately know more about their needs, and it protects the right to self-determination.

The UCLA informed consent model places specific duties on collaborative lawyers which, if not complied with, could result in lawyer liability.<sup>336</sup> At the same time, creation of expectations for collaborative lawyers provides a level of accountability needed to ensure the long-term integrity of the process. Collaborative lawyers must make reasonable inquiry regarding the history of coercion or violence, actively counsel regarding informed consent, and take steps to form reasonable beliefs about safety.

Unfortunately, many lawyers leave law school ill-prepared to implement an intimate partner violence protocol, let alone work with a client to assess risk and engage in safety planning.<sup>337</sup> Although legal

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334. *Id.* prefatory note, at 459-60.

335. *Id.* at 443.

336. *See id.* at 446-47.

337. Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 524 (2006).

education is becoming more practice-focused and more likely to teach such skills, current practicing lawyers will not benefit from those changes.

Macfarlane discovered that while a few collaborative lawyers are raising the issue of intimate partner violence, “[t]here is as yet no systematic screening for domestic violence.”<sup>338</sup> She calls for development of screening criteria accompanied by widespread training for collaborative lawyers.<sup>339</sup> Although many collaborative lawyers might not accept cases involving intimate partner violence, without implementing appropriate screening protocols they may not know or find out about its existence.<sup>340</sup> If they “discover” it during a four-way meeting, they may not know how to respond or what to do. This not only puts clients at risk of harm and lawyers at risk of malpractice suits; it also threatens the integrity and viability of collaborative law practice:

There is an unfortunate tendency for innovative informal dispute resolution processes to respond to the potential for “bad press” by either minimizing or simplifying the new and complex practice choices faced by practitioners; it would be prescient of the CFL movement to avoid repeating these mistakes. At present, CFL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion. This freedom is an inevitable consequence of an informal, private process driven by the parties rather than by a set of external rules. In exercising their professional discretion in these and other areas of potentially “ethical” decision making, CFL lawyers need to be sensitive to the scrutiny that their new process will receive, and ready to anticipate and address issues that arise. The responsiveness of the CFL movement to charting this hitherto unknown territory will be important in establishing its legitimacy and credibility.<sup>341</sup>

While the intimate partner provisions of the UCLA provide important safeguards for families and for collaborative lawyers,<sup>342</sup> to avoid separation of powers issues, the UCLA does not require special qualifications or training for collaborative lawyers.<sup>343</sup> This is a major roadblock to effective implementation of the Act, and it requires three responses. First, individual collaborative lawyers should immediately seek intimate partner violence training, form relationships with domestic

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338. MACFARLANE, *supra* note 19, at 66.

339. *Id.*

340. *Id.*

341. *Id.* at 64 (citation omitted).

342. UCLA, prefatory note, at 459.

343. *Id.* at 449-50.

violence advocates and other experts, and if possible, gain valuable experience by volunteering at a local domestic violence shelter.

Second, collaborative law organizations at local, state, national, and international levels should work with domestic violence experts to develop training programs concerning intimate partner violence and the UCLA requirements. The training should be interactive in nature, have clear educational outcomes, and require practitioners to demonstrate the knowledge, skills, and professional attributes needed to provide competent representation in cases potentially involving intimate partner violence. Collaborative law organizations should also establish intimate partner violence mentoring programs to encourage practitioners who have experience with intimate partner violence cases to work with less experienced collaborative lawyers.

Third, in any state adopting the UCLA, the Supreme Court or body that regulates lawyers should promulgate a rule requiring initial and ongoing intimate partner violence training for collaborative lawyers. This approach avoids separation of powers issues, allows for meaningful implementation of the UCLA, and protects prospective parties to a collaborative law process.

At a minimum, collaborative lawyers need to understand the dynamics of intimate partner violence, implement an effective screening protocol, assess risk, assist with safety planning, and counsel clients to ensure informed consent in cases involving intimate partner violence. An untrained lawyer will not be able to reasonably inquire about coercion or violence or formulate a reasonable belief about safety.<sup>344</sup> Collaborative lawyers also need the reflective skills to recognize when they are out of their range of competency and should retain a domestic violence advocate or other expert.<sup>345</sup>

The UCLA does not address the issue of potential modifications to the collaborative process that could promote safety and effectiveness in cases of intimate partner violence.<sup>346</sup> For example, if the collaborative process goes forward, it could be modified to include some form of separate caucusing and retention of a domestic violence advocate or other expert as a part of the collaborative law team. Although such modifications could not be uniformly dictated, collaborative lawyers should be sufficiently flexible to make modifications based on the needs of the family.

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344. See Drew, *supra* note 3, at 8-10.

345. See *id.* at 8.

346. See UCLA, prefatory note, at 459-63 (lacking discussion regarding potential modifications to the process in the case of intimate partner violence).



Some may argue that the intimate partner violence provisions of the UCLA require too much of collaborative lawyers and that they are being asked to do work more appropriately accomplished by professionals from other disciplines.<sup>347</sup> While collaborative lawyers should be strongly encouraged to invite advocates and other experts into the process, because of its private nature, collaborative lawyers necessarily bear the ultimate responsibility for the safety and integrity of the process.

Unfortunately, without the necessary training, mentoring, and experience needed to implement the UCLA's intimate partner violence provisions, collaborative lawyers, and thus the collaborative law process, may fall short of the mark. If the UCLA is to fulfill its promise, collaborative lawyers, collaborative law organizations, and bodies regulating law practice will need to fill the training gap.

## XI. CONCLUSION

The UCLA dangles a carrot for collaborative lawyers in the form of formal recognition of the collaborative process, but it also swings the stick of potential lawyer liability for failure to comply with its intimate partner violence provisions. If the UCLA is widely adopted and the intimate partner violence provisions are taken seriously, they have the power to transform collaborative law practice. Even if the UCLA is not broadly implemented, all family lawyers should take notice of the intimate partner violence provisions—in addition to offering a thoughtful guide for practice, they are likely to serve as a model for future legislation in other areas of family law.

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347. See, e.g., Bryan, *supra* note 260, at 1011-13.