

A VISION FOR COLLABORATIVE PRACTICE: THE FINAL REPORT OF THE HOFSTRA COLLABORATIVE LAW CONFERENCE

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I. INTRODUCTION

In November 2009, Hofstra University School of Law's Center for Children, Families and the Law hosted a Conference on the Uniform Collaborative Law Act, in conjunction with the Uniform Law Commission, the Association of Family and Conciliation Courts, the International Academy of Collaborative Professionals ("IACP"), and the American Bar Association Section of Dispute Resolution. This event marked the first time a law school has sponsored a conference exclusively focusing on the innovative practice of collaborative law.

The goal of the Conference was to assess collaborative practice in light of the adoption of the Uniform Collaborative Law Act ("UCLA"). Specifically, the Conference Working Groups sessions addressed the central legal and practical issues in collaborative law, and began the process of evaluating how the new practice modality alters the way lawyers approach dispute resolution. This Final Report summarizes the work of the Conference and addresses the vision of collaborative practice for twenty-first-century lawyers, as well as for mental health and financial professionals.¹

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1. The term "collaborative law" refers to the legal dimensions of "collaborative practice" as embodied in the UCLA. *See* UNIF. COLLABORATIVE LAW ACT (2009), *in* 38 HOFSTRA L. REV. 421

Eight Hofstra law students served as student reporters for the Conference. They worked under my direction, with assistance from Professor Andrew Schepard, the Reporter for the UCLA, and Franca Sachs, the Executive Director of Family Law Programs and the LGBT Rights Fellowship at Hofstra. The law student reporters began their work weeks before the Conference by drafting Issue Papers to guide the Conference working sessions. Each Issue Paper focused on an important facet of collaborative practice which would be the subject of discussion at one of the eight Conference working sessions. During the Conference, the student reporters worked with professionals from the legal academy and from collaborative practice in facilitating these sessions. They also made presentations summarizing the discussions and findings at the Conference's closing plenary session.

In the weeks following the Conference, the student reporters revised the Issue Papers and submitted them to me for editing. These law students are in large measure responsible for this Final Report, and their names deserve prominent mention, along with the topic for which each student reporter was responsible: Michelle Dantuono (Informed Consent); Jaime Birk (Withdrawal from Representation); Stephanie Conti (Disclosure of Information Requirements); Joseph Lavin (Interdisciplinary Practice); Beyza Killeen (Coercive or Violent Relationships); Roya Vasseghi (Collaborative Practice in Non-Family Disputes); Mary Ann Harvey (Access to Justice and Vulnerable Populations); and Ashley Lorange (Training Law Students and Recent Graduates).

The text of the UCLA, along with the Prefatory Note and Comments by Professor Andrew Schepard, provide a detailed overview of collaborative law.² This Final Report will focus on collaborative practice, and specifically on what Conference participants concluded were the key issues in the field, as well as the rewards and risks of this emerging practice methodology. Collaborative practice has been praised as “a rising star in the realm of Alternative Dispute Resolution.”³ While

(2010) [hereinafter UCLA]. Collaborative practice is the preferred term overall because “the practice has grown to include not only lawyers but also mental health professionals, financial professionals, [and] child specialists” David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 13 n.3; see also John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 625 n.27 (2007) (suggesting that collaborative practice is the more appropriate term because it is “actually a multi-disciplinary process that often involves professionals working in teams that include financial, mental health, and child development experts”).

2. See UCLA, prefatory note, at 421-93.

3. Joshua Isaacs, *A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law*, 18 GEO. J. LEGAL ETHICS 833, 833 (2005).

it clearly fits within the scope of alternative dispute resolution (“ADR”), collaborative practice presents a radically new alternative to litigation. More than any other ADR process, collaborative practice aspires to alter the culture of lawyering by challenging the expectation that the lawyer’s role is to solve the client’s problem. Collaborative lawyers are engaged in shifting power in the legal system from lawyers to clients. The goal is to empower clients to achieve the resolution they view as most appropriate.

This Report is organized as the Issue Papers were, addressing the central concerns of collaborative practice in eight parts. Part II deals with the collaborative lawyer’s extended responsibilities in assuring that the client fully understands the collaborative law participation agreement. Because the disqualification clause forbids lawyers from representing a client in litigation of a matter which the lawyer handled as part of the collaborative process, obtaining the informed consent of a client to this relatively new concept is critical. Part III discusses the circumstances which trigger a lawyer’s duty to cease representing a client in a collaborative process. Collaborative lawyers must withdraw from representation if either party commences litigation in a collaborative law matter, or if a client violates certain provisions of the collaborative law participation agreement.

Part IV analyzes the disclosure of information requirements. Collaborative practice disavows formal discovery. Instead, as the UCLA provides, “a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery.”⁴ This section analyzes the role of information exchange in collaborative practice. Part V addresses issues in connection with the substantial involvement in collaborative practice by professionals with expertise in mental health, mediation, and financial planning, often as third-party neutrals hired jointly by the parties. Part VI discusses the UCLA’s requirement that a lawyer “make reasonable inquiry [into] whether [a] prospective party has a history of a coercive or violent relationship with another prospective party.”⁵ This section examines whether collaborative law may provide a reasonable ADR method for victims of domestic violence.

Part VII explores the world of civil collaborative practice. While most collaborative lawyers today practice family and matrimonial law, the methodology has expanded to civil disputes generally. This section considers particular concerns about collaborative practice in those areas.

4. UCLA § 12, at 483.

5. *Id.* § 15, at 484-85.

Part VIII discusses key issues in access to justice and vulnerable populations. Collaborative practice at present primarily serves wealthy clients, because retaining a team of collaborative professionals for each case is quite expensive. At the same time, collaborative practice offers clients the potential for a less expensive and more durable resolution than litigation. This section analyzes the UCLA's provisions modifying collaborative law to afford greater representation to low income clients, as well as several practical ways that collaborative practice may be adapted to serve that same population. Part IX focuses on the education and training of future collaborative lawyers. How should law schools and professional groups allocate their resources to ensure the proper development of this new practice methodology? Finally, the conclusion suggests that the radical heart of collaborative law has the potential to convert dispute resolution to peacemaking.

II. INFORMED CONSENT

Collaborative law's most salient feature may be the necessity for—and difficulty in—ensuring that the client's consent to participating in a collaborative law process truly be informed.⁶ Collaborative practice is not yet well known among the general public, and potential clients may be largely unaware of the process, and in particular its limited-scope representation and disqualification requirements.⁷ Collaborative law must be seen in sharp contrast to the traditional norm of the legal profession, that a lawyer is generally retained for all purposes, including litigation.⁸

Collaborative practice constitutes a limited-scope representation, “an attorney-client relationship in which provided services are limited to certain agreed upon tasks.”⁹ A collaborative law process commences “when the parties sign a collaborative law participation agreement.”¹⁰ This document reflects the parties' commitment to proceed with the

6. See *id.* prefatory note, at 457.

7. See *id.* prefatory note, at 428-34 (discussing collaborative law's growth and development).

8. See Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 158-59 (2004) (“When a client decides to retain an attorney, the conventional assumption is that the attorney will thereafter provide the full range of legal services necessary to provide a complete resolution of their legal problem, including representation in court, if necessary.”).

9. MADELYNN M. HERMAN, NAT'L CTR. FOR STATE COURTS, PRO SE: SELF-REPRESENTED LITIGANT TRENDS IN 2003: LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS 1 (2003), http://www.ncsconline.org/WC/Publications/KIS_ProSe_Trends03.pdf.

10. UCLA § 5, at 476.

matter in a collaborative law process.¹¹ In this “unbundling” of legal services, the client must understand that the lawyer is committed to providing less than the full range of legal representation in the dispute.¹² Model Rule 1.2(c) of the American Bar Association (“ABA”) Model Rules of Professional Conduct provides that an attorney “may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹³

The ABA Model Rules define informed consent 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.”¹⁴ Relevant factors suggested by the Model Rules include the degree to which a client is experienced in “legal matters generally and in making decisions of the type involved.”¹⁵ Clients unfamiliar with litigation and ADR may find the requirements of collaborative law confusing and even overwhelming. The Working Group also considered it noteworthy that many potential collaborative law clients are undergoing the emotional and financial traumas associated with family dissolution, thus making it imperative that collaborative lawyers explain the process with extreme care.¹⁶ But even seasoned users of legal services and those acquainted with

11. *See id.* § 4, at 474. “A collaborative law participation agreement must . . . state the parties’ intention to resolve a collaborative matter through a collaborative law process . . .” *Id.* § 4(a)(3), at 474.

12. HERMAN, *supra* note 9, at 1 (“These service agreements are often referred to as unbundling, discrete task representation, partial representation, or limited representation.”); *see also* UCLA, prefatory note, at 440; Kevin Slator, *A Look at Limited Scope Legal Assistance*, MINN. LAW., Dec. 1, 2008, <http://www.mncourts.gov/lprb/fc08/fc120108.html> (suggesting that the worsening economy may lead to increased use of limited-scope representation in divorce cases).

13. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002). The Comment to this Rule suggests its rationale: “A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives.” *Id.* R. 1.2 cmt. 6.

14. *Id.* R. 1.0(e).

15. *Id.* R. 1.0 cmt. 6.

16. *See* Spain, *supra* note 8, at 161 (suggesting that divorce clients may be “‘in transient states of impaired capacity to attend to long-term enlightened self-interest’ calling into question even their ability to give informed consent to limit the scope of representation to be undertaken through a collaborative law process” (quoting PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 161 (2001))). But other collaborative lawyers insist that even in very difficult matrimonial conflicts, counsel may help the client develop “a *rational sense of self* to overcome fierce and long-held reactive emotions” toward his or her spouse. FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT* 82 (2009); *see also* Susan A. Hansen & Gregory M. Hildebrand, *Collaborative Practice*, in *INNOVATIONS IN FAMILY LAW PRACTICE* 38-39 (Kelly Browe & Nancy Ver Steegh eds., 2008) (stating that “the collaborative lawyer must understand the emotional dynamics of divorce in order to assist in effectively containing emotion and managing conflict within the process”).

collaborative law's philosophy must engage in the rigors of informed consent.¹⁷ Compliance with the standards set by the Model Rules is only a beginning. Collaborative lawyers have a duty to advise their clients of the risks and benefits of all dispute resolution mechanisms, as well as their potential personal and economic costs.¹⁸

The requirement that collaborative lawyers withdraw from representing their clients should either client commence (or resume) litigation of the dispute is a unique aspect of collaborative law, and thus the feature most likely to be misunderstood. The conditions governing withdrawal of counsel are more fully discussed in Part III of this Report.¹⁹ The obligation to obtain the potential collaborative client's informed consent depends to a great extent on the lawyer's ability—and commitment—to ensure that the client understands the ramifications of the disqualification requirement.²⁰ The interweaving of limited-scope representation and the disqualification clause in establishing informed consent may be seen in a 2007 ABA Ethics Opinion, which concluded that collaborative law is a “permissible limited scope representation”; that the disqualification provision is “not an agreement that impairs [the lawyer's] ability to represent the client, but rather is consistent with the client's limited goals for the representation”; and that so long as “the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process.”²¹

Before a prospective client signs a participation agreement, the attorney must assess the appropriateness of the matter for possible resolution within the collaborative law framework.²² The lawyer must

17. See UCLA, prefatory note, at 457; see also Spain, *supra* note 8, at 160.

18. See Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 156 (suggesting that in collaborative law, obtaining informed consent “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, etc.); and warning the client explicitly about potential financial, strategic, and personal risks or costs”). The issue of advanced training for collaborative lawyers is discussed in *Training Law Students and Recent Graduates*, Part IX, *infra*.

19. See *infra* Part III.

20. See UCLA, prefatory note, at 451.

21. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

22. UCLA § 14, at 484; see also Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237, 246-47 (2008) (noting the importance of informed consent); Spain, *supra* note 8, at 158 (“An attorney offering his or her services as a collaborative lawyer must . . . have the capacity to properly screen cases as being appropriate for this practice model.”). Although the UCLA mandates a written and signed participation agreement, it does not require that the performance of the lawyer's obligation to obtain informed consent be documented in a writing. The Working Group considered and rejected the idea of mandating such a document, reasoning that compliance could simply be achieved by the client's signing a boilerplate recitation of the relevant UCLA provisions. The Group concluded that the better practice was to insist on the lawyer's obligation to fully inform the client, leaving the content

also provide the putative client with adequate information in order for the latter to make an informed comparison of the various processes which might be appropriate for resolution of the controversy, focusing on their “material benefits and risks.”²³ The alternatives to be weighed include, but are not limited to, collaborative law, litigation, mediation, arbitration, and expert evaluation.²⁴ Participants in this Working Group session noted that lawyers are not required to obtain the client’s informed consent prior to commencing litigation or any other form of ADR, and suggested that the collaborative law framework might serve as a model for other dispute resolution methodologies, with the goal of enhancing client awareness and satisfaction. The Working Group concluded that evaluating the risks and benefits of litigation or ADR is at least as difficult as doing so in collaborative law, and assuring that a client’s consent is informed is equally arduous.

Counsel must also advise the potential client that the collaborative law process is voluntary and that any party may terminate the process unilaterally.²⁵ This requirement contains two components which should be highlighted for a possibly unwary client: (a) in a matrimonial matter, the client’s spouse has the right to terminate the process, and the client has no enforceable right to object,²⁶ and (b) any party has the right to end the collaborative process “with or without cause.”²⁷ Further, the process terminates automatically “if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter,” and neither the collaborative lawyer, nor any lawyers associated with him or her in practice, may represent the client in court.²⁸

and documentation to the lawyer. The UCLA provides that parties “may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this [act].” UCLA § 4(b), at 474.

23. UCLA § 14(2), at 484.

24. *Id.*

25. *Id.* § 14(3)(B), at 484. Note that the various dispute resolution methods are not static choices, but options in dynamic tension. For example, the greatly increasing popularity of ADR is connected to the widespread dissatisfaction with litigation, particularly with the adversarial system’s cost, delay, and inflexibility. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 426 (2d ed. 2000).

26. UCLA § 14(3)(B), at 484. The same right attaches, of course, to *any* party in *any* collaborative law process. *Id.*

27. *Id.*

28. *Id.* § 14(3)(A), (C), at 484. Note that the disqualification requirements of this section allow for exceptions in specified circumstances. A collaborative lawyer may appear in court or before a tribunal to request approval of “an agreement resulting from the collaborative law process,” *id.* § 9(c)(1), at 482, or “to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party” or statutorily-specified household member. *Id.* § 9(c)(2), at 482. Attorneys who work in a law firm “which represents low income clients without fee” will not be subject to

Collaborative law's disqualification requirement calls for heightened clarity in lawyer-client discussions.²⁹ In light of the requirement, collaborative law is best presented not as one option along a continuum of ADR methods, but rather as "a separate ADR operating system."³⁰ Clients may be investing substantial financial resources in the collaborative process.³¹ Should it fail, they may find themselves unable to afford other methods of resolving their disputes.³² Even those clients who understand the potential for disqualification are often unaware of the potential extent of additional costs.³³ Further, in an effort to avoid the financial and emotional toll which would follow termination of the collaborative law process, a party may experience inordinate pressure to settle.³⁴ If disqualification occurs, clients must begin anew retaining and building a relationship with an attorney entirely unfamiliar with the case.³⁵

The Working Group participants emphasized that a prospective collaborative law client has the additional burden of accurately assessing the willingness of his or her co-disputant to participate fully in the process, since as noted above, either side can terminate the process unilaterally and without cause.³⁶ Collaborative lawyers must exercise care in describing the benefits of interest-based negotiation, a process with the potential to yield more satisfying and longer-lasting resolutions. The danger, of course, lies in promising swift, painless, lower-cost results that the collaborative process might not be able to deliver in a

imputed disqualification. *Id.* § 10 cmt., at 483. The same rationale excludes attorneys working in a law firm representing government agencies or subdivisions from imputed disqualification. *See id.* § 11, at 483.

29. *See* John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 383 (2010).

30. Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 987 (2007) (internal quotation marks omitted).

31. *See* Lande & Mosten, *supra* note 29, at 369.

32. *Id.*

33. *Id.*

34. *See* JULIE MACFARLANE, DEP'T OF JUSTICE OF CAN., THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 25, 59, 64-65 (2005), available at <http://dsp-psd.pwgsc.gc.ca/Collection/J3-2-2005-1E.pdf> (citing a three-year study using 150 interviews of lawyers, clients, and other participants in the collaborative law process throughout the United States and Canada).

35. The Working Group noted that clients involved in litigation also face discontinuities and extra expenses when their legal representation is, for a variety of reasons, terminated.

36. *See supra* note 27 and accompanying text.

particular dispute, despite its great success in many other cases.³⁷ These expectations might be frustrated if the process drags on longer than anticipated, with expenses mounting far more rapidly than results.³⁸ Some empirical data suggested that many collaborative law clients were unprepared for the length of the process.³⁹

Before choosing to engage in collaborative law, clients need some assurance that the process may effectively lead to a resolution of their dispute.⁴⁰ Screening procedures for the appropriateness of a particular dispute for collaborative resolution vary widely in effectiveness.⁴¹ In addition, unforeseen obstacles may arise when parties are less than forthcoming with information or when the need for additional resources is not apparent at the outset.⁴² Attorney training and experience may aid in making assessments about the appropriateness of collaborative law to a specific matter, but the range of variables involved suggests that the process will remain one of art, not science.⁴³ The Working Group concluded that clients with realistic expectations of the collaborative law process would likely participate more fully in problem solving and be less apt to terminate the process.

The UCLA stresses the collaborative lawyer's role as an important educator of clients.⁴⁴ The Act aims to protect potential clients from missteps by mandating that attorneys provide meaningful and targeted

37. See MACFARLANE, *supra* note 34, at vii, 25-27; see also *id.* at ix (characterizing collaborative lawyers as expressive of "loftier goals that, for some, bordered on an ideological commitment").

38. See *id.* at 25 ("[S]ometimes, clients who signed on for [collaborative law] largely because of the 'promises' of speedy and inexpensive dispute resolution are bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution."); see also 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, 284 (2004) ("Although the collaborative law structure is not inherently inconsistent with lawyers' professional responsibility related to zealous advocacy, some clients may feel dissatisfied with their representation due to the incentives created by the disqualification agreement and the norms of some practitioners to press for settlement.").

39. See Michaela Keet et al., *Client Engagement Inside Collaborative Law*, 24 CAN. J. FAM. L. 145, 145, 165 (2008) (reporting the results of small study of former participants in the collaborative law process in Canada analyzing "the degree to which clients were meaningfully engaged in the process").

40. See Lande & Mosten, *supra* note 29, at 361.

41. See *id.* at 383.

42. See *id.* at 381-82.

43. See UCLA, prefatory note, at 450; see also Voegelé et al., *supra* note 30, at 999.

44. See UCLA, prefatory note, at 458 ("The act thus envisions the lawyer as an educator of a prospective party about the appropriate factors to consider in deciding whether to participate in a collaborative law process."). Forrest S. Mosten has argued that the collaborative attorney must manage an expanded array of roles; including client educator, process manager, client counselor, fact gatherer, legal researcher, negotiator and negotiation coach, drafter or ghostwriter, and preventive legal health provider. See MOSTEN, *supra* note 16, at 48-50.

information.⁴⁵ Rather than providing detailed checklists, the Act furnishes a solid conceptual foundation for practical implementation.⁴⁶ It affords collaborative lawyers the freedom to represent their clients with a measure of flexibility, tempered with adherence to professional responsibility rules tailored to collaborative practice. Much work remains to be done. But the present task devolves on bar associations, collaborative law practice groups, law schools, and collaborative lawyers themselves to develop standards to enhance the quality of lawyering and encourage “best practice” norms to further assure that clients are fully informed of the problem-solving options most suited to themselves and their dispute.

III. WITHDRAWAL FROM REPRESENTATION

This section discusses two types of situations in which a lawyer must withdraw from representation of a client in a collaborative law process. The duty to withdraw may be triggered by a client’s commencement (or resumption) of litigation of the matter,⁴⁷ as well as by a client’s refusal to comply with the disclosure requirements of collaborative law.⁴⁸

The principle of mandatory withdrawal in compliance with the disqualification requirement is exclusive to collaborative law.⁴⁹ Barring collaborative lawyers from participating in litigation is “a fundamental defining characteristic of collaborative law.”⁵⁰ The theory of collaborative practice holds that the best way to guarantee interest-based negotiation and to avoid positional bargaining is to put the courtroom beyond the reach of the lawyers.⁵¹ The disqualification requirement is thus “the enforcement mechanism that parties create by contract to ensure that problem-solving negotiations actually occur.”⁵²

Collaborative lawyers also dissent, at least in part, from Mnookin and Kornhauser’s famous aphorism that bargaining always takes place “in the shadow of the law.”⁵³ In suggesting that the legal framework may not encapsulate the entirety of the parties’ problem or potential solution,

45. See UCLA § 14, at 484.

46. *Id.*

47. See UCLA § 14(3)(A), at 484.

48. See UCLA § 14(3)(B), at 484.

49. See Voegelé et al., *supra* note 30, at 978.

50. UCLA § 9 cmt., at 482; see also *id.* prefatory note, at 426.

51. See Voegelé et al., *supra* note 30, at 982.

52. UCLA, prefatory note, at 426.

53. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

collaborative lawyers have observed that attorneys “who practice within an adversarial paradigm are often myopic in their advice to clients by limiting problem definition to what the ‘law’ proscribes and framing the terms of settlements around what might happen in court.”⁵⁴ In other words, lawyers behave more collaboratively and become more creative problem-solvers when the courthouse door is shut to them.

As discussed in the previous section on informed consent, withdrawal from representation in a collaborative law case is mandatory when one party terminates the process and commences litigation.⁵⁵ Ensuring that the client is aware of the circumstances under which counsel must withdraw is essential to obtaining informed consent to this type of limited-scope representation.⁵⁶ Significantly, clients need to be advised that in the event that *either* party submits the matter to litigation, the collaborative lawyers for *both* parties are disqualified.⁵⁷ The Working Group advised that this provision should not only be discussed at length with each client, but should also be detailed in the participation agreement.⁵⁸

Withdrawal from representation may also become necessary as a result of certain client behavior. A client who withholds or misrepresents material information, or otherwise acts in bad faith, is violating the collaborative law participation agreement which he or she endorsed.⁵⁹ That agreement, which “state[s] the parties’ intention to resolve a collaborative matter through a collaborative law process,”⁶⁰ of necessity includes a commitment to the UCLA provision setting out the requirements for disclosure of information.⁶¹ A party is thus bound, “on the request of another party” to “make timely, full, candid, and informal

54. Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489, 491 (2009); see also Voegelé et al., *supra* note 30, at 987-88 (“The disqualification agreement removes the participants from the shadow of the courtroom and attempts to change the focus of the negotiation.”).

55. See *supra* pp. 572-78.

56. See *supra* pp. 574-78.

57. See UCLA, prefatory note, at 425.

58. An alternative to collaborative law is “cooperative law.” See Lande & Herman, *supra* note 38, at 284. This form of practice shares with collaborative law the commitment to interest-based negotiation and voluntary disclosure of all relevant information. *Id.* But “cooperative law” norms do allow the parties to retain their original counsel should litigation become the chosen alternative. See MOSTEN, *supra* note 16, at 29-30 (discussing cooperative law); John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 205-07 (reporting on an empirical study of cooperative law practice); Lande & Herman, *supra* note 38, at 284. Note that cooperative law’s rejection of the disqualification requirement puts it outside the UCLA framework.

59. See Voegelé et al., *supra* note 30, at 1018-20.

60. UCLA § 4(a)(3), at 474.

61. UCLA § 12, at 483. See *infra* Part IV.

disclosure of information related to the collaborative matter without formal discovery.”⁶² The provision also mandates prompt updating of “previously disclosed information that has materially changed.”⁶³ While parties may “define the scope of disclosure during the collaborative law process,”⁶⁴ they may not do so in a way that contravenes “the fundamental nature of the collaborative law process.”⁶⁵ Because “[v]oluntary disclosure of information is a hallmark of collaborative law,”⁶⁶ the thoroughgoing obligation to provide disclosure cannot be waived or compromised.

Must a collaborative lawyer withdraw from representation upon learning that a client has violated the disclosure requirements?⁶⁷ The UCLA affirms that the standards of professional responsibility are unaffected by the Act, and thus continue to apply to collaborative lawyers.⁶⁸ The norms of collaborative practice will always be in tension with the Model Rules of Professional Conduct, however, since the latter “are based on the dominant practice model of an attorney representing a client as a partisan advocate in a traditional adversarial role.”⁶⁹

ABA Model Rule 1.16 sets forth the factors to consider in assessing the propriety or necessity of attorney withdrawal from representation.⁷⁰

62. UCLA § 12, at 483.

63. *Id.*

64. *Id.*

65. *Id.* § 4 cmt., at 476.

66. *Id.* prefatory note, at 455.

67. Note parenthetically that the UCLA does not specify sanctions for a party who violates any aspect of the Act. *See id.* prefatory note, at 456. Sanctions are redolent of and inherent in an adversarial legal system, and thus inappropriate to the collaborative law process. A party who learns of bad faith behavior by a co-disputant may, of course, retaliate by terminating the collaborative law process. *See id.* prefatory note, at 456. Knowledge that this unilateral power is entrusted to both sides may serve as a deterrent to deviant conduct by either party.

68. *Id.* § 13, at 483 (noting that the Act “does not affect . . . the professional responsibility obligations and standards applicable to a lawyer or other licensed professional”).

69. Spain, *supra* note 8, at 156; *see id.* at 156 n.99 (noting that paragraph two of the preamble to the Model Rules of Professional Conduct states that “a lawyer’s responsibility as an advocate requires that ‘a lawyer zealously asserts the client’s position under the rules of the adversary system.’”).

70. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.16 (2007). Model Rule 1.16 provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

While this rule provides significant guidance on the issue, the particulars of this type of practice may complicate the question. Collaborative practice “challenges practitioners in ways not necessarily addressed by the ethics of individual disciplines.”⁷¹ For example, Comment 8 to Model Rule 1.16 permits a lawyer to “withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement . . . limiting the objectives of the representation.”⁷² Collaborative law practice appears to satisfy Model Rule 1.16(c) because the participation agreement generally protects clients by providing a thirty-day grace period when the collaborative process is deemed to continue after lawyer withdrawal in order to allow the party to secure new collaborative counsel, should the party desire.⁷³

The IACP has promulgated a series of aspirational principles, minimum standards, and ethical standards to guide collaborative lawyers and other professionals in various aspects of the practice.⁷⁴ The Ethical

- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Id.

71. IACP, ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS pmbL., at 1 (2008), <http://www.collaborativepractice.org/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf>.

72. MODEL RULES OF PROF’L CONDUCT R. 1.16 cmt. 8 (2007).

73. UCLA § 5(g), at 477.

74. *See generally* IACP, *supra* note 71 (identifying common principles and standards that Collaborative practitioners must consider when making decisions, setting out an ethical and professional framework to be followed by practitioners, and identifying the responsibilities of Collaborative practitioners with respect to their clients); IACP, MINIMUM STANDARDS FOR A COLLABORATIVE BASIC TRAINING (2004), http://www.collaborativepractice.org/lib/Ethics/IACP_TrningStds_Adptd_407_13_Corctd.pdf (articulating the substantive and procedural requirements necessary to satisfy the minimum IACP Standards for a Basic Training in the collaborative process); IACP, MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS (2004),

Standards aim to supplement, not supplant the Model Rules applicable to lawyers.⁷⁵ With regard to the lawyer's obligation to withdraw in the face of client misbehavior, the IACP Ethical Standards provide an analysis more fine-tuned to the collaborative practice dilemma:

9. Withdrawal/Termination.

9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:

- A. Such conduct is contrary to the principles of Collaborative Practice; and
- B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.

9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:

- A. Withdraw from the Collaborative case; and
- B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.

9.3 Nothing in these ethical standards shall be deemed to require a

http://www.collaborativepractice.org/lib/Ethics/IACP_Practitioner_Standards.pdf [hereinafter MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS] (stating the basic requirements that must be met before a practitioner may advertise that he or she satisfies the IACP Standards for Collaborative Practice in family related disputes); IACP, MINIMUM STANDARDS FOR COLLABORATIVE TRAINERS (2004), <http://www.collaborativepractice.org/lib/Ethics/IACP-TrmerStds-Adptd-40713-Corctd.pdf> (discussing the basic requirements that must be met before a professional may be regarded as a trainer who satisfies IACP Standards for Training in Collaborative Practice); IACP, PRINCIPLES OF COLLABORATIVE PRACTICE (2005), <http://www.collaborativepractice.org/lib/Ethics/Principles%20of%20Collaborative%20Practice.pdf> (describing the distinguishing features of Collaborative Practice and its client-centered approach).

75. See IACP, *supra* note 71, § 1.1, at 1.

Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

9.4 A Collaborative practitioner must suspend or withdraw from the Collaborative process if the practitioner believes that a Collaborative client is unable to effectively participate in the process.

9.5 Upon termination of the Collaborative process, a Collaborative practitioner shall offer to provide his/her client(s) with a list of professional resources from the Collaborative practitioner's respective discipline from whom the client(s) may choose to receive professional advice or representation unless a client advises that he or she does not want or need such information.⁷⁶

In terms of a collaborative lawyer's obligations, the IACP Ethical Standards thus provide that the attorney should counsel the client that withholding or misrepresenting material information contravenes the principles of collaborative practice, and that maintenance of that misconduct will necessitate the lawyer's withdrawal from representing the client.⁷⁷ Should the client persist, the attorney should withdraw.⁷⁸ Under the UCLA, attorney withdrawal generally terminates the collaborative process.⁷⁹

But attorney withdrawal due to client misconduct is ethically problematic.⁸⁰ These concerns are heightened by the quantum of attorney discretion in deciding whether and when to withdraw, as well as the nature of the advice given to the client and the nature of the demand made to the client to alter his or her conduct in order to avert the

76. *Id.* §§ 9.1-5, at 5-6.

If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative Practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative Process.

Id. § 7.1(A)(2), at 4.

77. *Id.* § 9.1, at 5.

78. *Id.* § 7.1(A)(2), at 4.

79. *See* UCLA § 5(d)(3), at 477 (providing that a collaborative law process terminates "except as otherwise provided . . . when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party").

80. *Compare* IACP, *supra* note 71, §§ 9.1-4, at 5 (describing situations that require the advice and counsel of the Collaborative practitioner, which may lead to his or her subsequent mandatory withdrawal from the case), *with* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2007) (illustrating that an attorney may exercise discretion when deciding whether to withdraw from a case).

lawyer's withdrawal from representation.⁸¹ If the client's recalcitrance stems from a basic mismatch of client with collaborative process, the conundrum may be due to inappropriate screening and/or improperly obtained informed consent by the attorney at the outset.⁸² The ethical issues may be exacerbated if, facing the withdrawal of the collaborative lawyer, the client has exhausted (or substantially spent) the material and/or emotional means available to resolve the dispute.⁸³

Another aspect of this issue concerns the appropriate method of withdrawal. Is an attorney ethically required to withdraw "silently" rather than "noisily" in order to protect the client?⁸⁴ The IACP Ethical Standards for Collaborative Practitioners provide for "silent" withdrawal.⁸⁵ Some support for this proposition may be found in Rule 1.6 of the ABA Model Rules, which prohibits a lawyer from revealing confidential information.⁸⁶ Requiring "noisy" withdrawal might run afoul of Model Rule 1.7(a)(2), which bars representation if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person.⁸⁷ While silent withdrawal is preferable, the participation agreement may specify otherwise.⁸⁸

In sum, withdrawal from representation stemming from obligations pursuant to the disqualification clause is unique to collaborative lawyers. But most of the other ethical issues surrounding attorney withdrawal are not specific to the collaborative process. The nature of collaborative law often necessitates a more particularized analysis of the issue, but always

81. See *supra* note 80.

82. See Lande & Mosten, *supra* note 29, at 355-58 & tbl.1.

83. See *id.* at 397-98.

84. Compare IACP, *supra* note 71, § 9.3, at 5 (noting that Collaborative practitioners are not required to "disclose the underlying reasons" for withdrawal), with MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (requiring that "upon termination of representation" a lawyer shall give "reasonable notice to the client").

85. See IACP, *supra* note 71, § 9.3, at 5 ("Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.").

86. MODEL RULES OF PROF'L CONDUCT R. 1.6; see also *id.* cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.").

87. *Id.* R. 1.7(a)(2).

88. Model Rule 1.7(a)(2) may also warrant withdrawal if the lawyer concludes that there is a significant risk that the representation will be materially limited by the lawyer's own interests. *Id.* Collaborative lawyers must reasonably believe that they can provide competent and diligent client representation, in the same way as trial attorneys must use good judgment when agreeing to represent clients who wish to settle their disputes rather than litigate. See 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, 1373-74 (2003).

within the framework of the professional responsibilities common to all lawyers.

IV. DISCLOSURE OF INFORMATION REQUIREMENTS

If informed consent is the bedrock principle supporting collaborative law, voluntary disclosure is the link between philosophy and practice. To facilitate a mutually satisfactory resolution, the UCLA requires the parties to make “timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery,” and to “update promptly previously disclosed information that has materially changed.”⁸⁹ Unfettered disclosure of material information allows the parties to make informed decisions and reach intelligently negotiated agreements.⁹⁰ With no means to compel discovery, parties depend on each other’s candor, commitment, and good faith in exchanging information.⁹¹ This process of mutual reliance is intended to foster trust and serves to reinforce the overriding message of the collaborative process: that the solution to the parties’ problem lays within the parties’ grasp.⁹²

By contrast, formal discovery within the adversarial process suggests that the information exchange must be mediated by lawyers.⁹³ Discovery rules embody a regularized procedure, and courts are empowered to sanction parties who withhold information or otherwise distort or delay the process.⁹⁴ The UCLA contains no sanctions for noncompliance with the disclosure of information requirements.⁹⁵ But the parties are not without recourse, since any party may terminate the collaborative law process at any time for any reason.⁹⁶ Consistent with collaborative law’s emphasis on party interdependence, however, the fact that either party may terminate the process at any time may induce both parties to cooperate with the voluntary disclosure requirements.⁹⁷

89. UCLA § 12, at 483. The UCLA’s disclosure requirements were discussed in connection with Part III. *See supra* notes 59-66 and accompanying text.

90. *See generally* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991) (discussing the concept of principled negotiation and the issues that arise from its use).

91. *See* Voegelé et al., *supra* note 30, at 1018-20.

92. *See id.*; *see also* UCLA, prefatory note, at 426.

93. *See* Voegelé et al., *supra* note 30, at 1019.

94. *See, e.g.*, FED. R. CIV. P. 26-37 (regulating discovery and providing sanctions for noncompliance).

95. *See* UCLA, prefatory note, at 456.

96. UCLA § 5, at 477.

97. Moreover, as discussed in Part III, counsel for the nonconforming party may withdraw from representation, thus effectively terminating the collaborative law process. *See supra* notes 59-69 and accompanying text.

Additionally, the UCLA allows parties to “define the scope of disclosure during the collaborative law process.”⁹⁸ Parties may thus adapt the process to their specific needs, structuring their information exchange to maximize the likelihood of settlement. But in so doing, parties may not undermine “a defining characteristic of collaborative law,”⁹⁹ the requirement of a voluntary exchange of all material information.

Informed, interest-based negotiation is crucial to collaborative law and can only take place in a climate of candor and openness.¹⁰⁰ Collaborative counsel must ensure that clients know and comply with their full disclosure obligations. A lawyer’s duties in this regard begin before the process commences, with the requirement of obtaining a client’s informed consent.¹⁰¹ In order to maintain a secure environment for candid and complete disclosure during the collaborative law process, the UCLA deems all communications privileged and confidential.¹⁰² The Act defines a “[c]ollaborative law communication” broadly to encompass any statement, whether “oral or in a record, or verbal or nonverbal, that is . . . made to conduct, participate in, continue, or reconvene a collaborative law process.”¹⁰³

Confidentiality is essential to any lawyer-client relationship. A lawyer who discloses confidential information without obtaining the client’s consent is in violation of Model Rule 1.6.¹⁰⁴ In the collaborative law process, confidentiality is critical, “in much the same way that it has been recognized as essential to the success of mediation.”¹⁰⁵ The Working Group expressed a belief that careful attention by counsel to issues of informed consent at the outset, and sustained client counseling throughout, would greatly reduce the risk of inadvertent breaches of confidentiality during the collaborative law process.¹⁰⁶ Attorneys who believe that they are at risk of violating Model Rule 1.6 should attempt

98. UCLA § 12, at 483.

99. *Id.* § 12 cmt., at 483.

100. *See id.* prefatory note, at 455.

101. *See supra* Part II.

102. *See* UCLA §§ 16-19, at 485-91 (confidentiality and privilege provisions).

103. *Id.* § 2(1)(A), at 467. To qualify under the Act, the communication must “occur[] after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.” *Id.* § 2(1)(B), at 467.

104. Rule 1.6 provides as follows: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [another provision].” MODEL RULES OF PROF’L CONDUCT R. 1.6 (2007).

105. Spain, *supra* note 8, at 168.

106. *See* Christopher M. Fairman, *A Proposed Model For Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 94-95 (2005).

to obtain their client's informed consent to the disclosure before considering whether to withdraw from representation.¹⁰⁷

What happens to the information disclosed during the collaborative law process if the parties terminate the process? Parties concerned about the risk that their data may be used in future litigation may be reluctant to comply with the full disclosure obligations during the collaborative process.¹⁰⁸ Without assurances of confidentiality, "clients may be encouraged by their attorneys to withhold information that may be adverse to their interests."¹⁰⁹ Such advice would, of course, destroy the heart of the collaborative process. The UCLA's confidentiality and privilege sections are aimed at creating what Jennifer Kuhn has described as a "safe container."¹¹⁰ Kuhn imagined the disqualification clause as "a bubble around the parties and their respective attorneys."¹¹¹ Those outside the bubble are unable to get inside or to have access to the disclosed information.¹¹² Kuhn reasoned that the parties' agreement to negotiate in good faith and the executed disqualification agreement provides the parties with sufficient protection to allow them to feel safe in disclosing their information.¹¹³

The Working Group observed that, in practice, conflicts over the disclosure provisions are often avoided when parties and their counsel recognize that full and candid information exchange is more efficient in achieving a mutually satisfactory resolution. Clarity of expectations is essential in avoiding disclosure problems. But collaborative practice thrives on reciprocity rather than concealment, and so the emerging practice norm reinforces the disclosure obligations.¹¹⁴ This collaborative standard also alters nomenclature: Working Group members noted that collaborative attorneys often refer to one another not as *opposing*

107. See Gabriella L. Zborovsky, *Baby Steps to "Grown-Up" Divorce: The Introduction of the Collaborative Family Center and the Continued Need for True No-fault Divorce in New York*, 10 CARDOZO J. CONFLICT RESOL. 305, 326 (2008).

108. See Spain, *supra* note 8, at 168.

109. *Id.* at 169.

110. 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, 384 (2008).

111. *Id.* at 383.

112. *Id.*

113. *Id.* at 371 ("Because the clients and attorneys know beforehand that all information and communication from the process is privileged, unless otherwise discoverable, the clients will feel protected and safe while disclosing information."). Without the privilege and confidentiality components of the UCLA, a client might well fear leakage of information into subsequent litigation, particularly if the collaborative counsel were consulted by trial counsel or subpoenaed to testify at trial. See Spain, *supra* note 8, at 169 (expressing similar concerns).

114. See Fairman, *supra* note 106, at 79.

counsel but as *collaborative colleague*, thus furthering the culture of trust and candid exchange of information essential to collaborative law.

The interdisciplinary nature of collaborative law complicates the confidentiality assurances given in the UCLA.¹¹⁵ The Act does not affect the mandatory reporting obligations of the different professional disciplines involved in collaborative practice.¹¹⁶ This issue is discussed in Part V.¹¹⁷ Further, the interplay of collaborative law's full disclosure requirements with the UCLA's confidentiality and privilege provisions also raise concerns in cases of domestic violence.¹¹⁸ These issues are discussed in Part VI.¹¹⁹

V. INTERDISCIPLINARY PRACTICE

Collaborative practice is ardently interdisciplinary, with collaborative lawyers calling upon professionals in forensic psychology, mediation, and financial planning to join the collaborative team.¹²⁰ These professionals are usually retained jointly by the parties as third-party neutrals, although spouses in a conflicted divorce matter often retain separate mental health professionals as "coaches" throughout the process.¹²¹ While the UCLA does not seek to regulate the various disciplines which regularly participate in the collaborative process, practice groups are developing protocols for cross-disciplinary cooperation.¹²²

The substantial role played by a variety of professionals in collaborative practice highlights the cardinal importance of informed consent.¹²³ Collaborative attorneys must explain to prospective clients the functions which professionals from other disciplines might play in the process, particularly since many clients are accustomed to the traditional notion that legal matters involve only lawyers and clients.¹²⁴

115. See UCLA § 16, at 485.

116. See *id.* § 13, at 483-84.

117. See *infra* Part V.

118. See *infra* text accompanying notes 159-60, 172-78.

119. See *infra* Part VI.

120. See generally MOSTEN, *supra* note 16, at 105-26; ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES (2004) (discussing the value of interdisciplinary approaches to resolving divorce conflict).

121. See Hansen & Hildebrand, *supra* note 16, at 40 (describing a collaborative coach as a mental health professional who "assist[s] the client in managing emotional and psychological issues that might otherwise impair the client's effective functioning and participation in the settlement process").

122. See Voegelé et al., *supra* note 30, at 995-98 (providing illustrations of collaborative practice protocols for mental health and financial professionals).

123. See *supra* Part II.

124. See Spain, *supra* note 8, at 161; see also Voegelé et al., *supra* note 30, at 1015.

Even though some potential clients will be familiar with the role of experts in cases involving personal injury and medical malpractice in tort litigation, they may be at sea in understanding the notion of jointly-retained professionals who owe their loyalty to neither client individually, but to both clients collectively.¹²⁵ Under these circumstances, the discussion of informed consent must be rich and exhaustive in order that the client understand the extensive role which other professionals may play in the collaborative process.¹²⁶

Specific illustrations may be helpful for the client, and they may be drawn from the lawyer's experience or the growing body of literature on collaborative law.¹²⁷ For example, a mental health professional and a certified financial planner may join the two collaborative attorneys to guide the divorcing couple through the decisions involved in resolving their dispute.¹²⁸ A mental health professional with expertise in child development may assist the parties in devising appropriate visitation schedules.¹²⁹ Or a financial planner may facilitate the calculation of "the tax consequences of the parties' decisions and help ensure that the division of property and debt is still equitable after paying any required taxes."¹³⁰ The norms of practice evident in interdisciplinary cooperation reinforce the distance the collaborative process has placed between its method and the adversarial system.¹³¹

Because confidentiality standards and practices differ among the professions, the participation agreement must specify which information obtained within the collaborative law process will remain confidential.¹³² Unless disclosure is otherwise limited, the UCLA requires the voluntary

125. See Voegelé et al., *supra* note 30, at 976-77.

126. See Spain, *supra* note 8, at 161-62.

127. See Lande & Mosten, *supra* note 29, at 355-58 & tbl.1.

128. See Law Office of Marta J. Papa, P.C., Interdisciplinary Collaborative Law, <http://www.consideringdivorce.com/Interdisciplinary-Collaborative-Law.shtml> (last visited May 25, 2010).

129. *Id.*

130. *Id.*

131. Zeytoonian & Faxon have described how the collaborative law process can "liberate" experts:

[T]he collaborative process transforms the way experts are viewed and utilized. Collaborative, neutral experts are seen as a tool and a resource both for clients and for the process as a whole. Just as the collaborative lawyers are freed up to be creative in the interest-based process, so too are experts liberated to educate and advise the entire group on the best ways to accomplish the clients' future-oriented actions.

Michael Zeytoonian & R. Paul Faxon, *Two Legal Rivers Converge in Collaborative Law*, HARV. NEGOT. L. REV., Apr. 15, 2009, <http://www.hnlr.org/?p=132>.

132. See UCLA § 16, at 485; see also *id.* § 4(b), at 474 (allowing parties "to include in a collaborative law participation agreement additional provisions not inconsistent with this [act]").

exchange of all material information.¹³³ The Working Group believed that the interdisciplinary component of collaborative law proved most effective when parties have defined the scope of disclosure and confidentiality in their participation agreements. At the same time, informed consent is a continuous process, and it is impossible to predict all the issues that might arise in the context of intense negotiations.¹³⁴ Thus, while the participation agreement must be clear, it cannot be entirely comprehensive. It must be flexible enough to adapt to evolving party and interdisciplinary factors and to the attendant need for informal disclosure as well as confidentiality.

The Working Group also found it critical that, since professionals from various disciplines may be called upon to assist in the collaborative law process, all must be treated as equal partners with each other and with the collaborative attorneys. Lawyers trained in the adversarial model often find it difficult to cede control to other professionals involved in the case.¹³⁵ In litigation, both the client and the lawyer expect the latter to manage the case, including all witnesses and evidentiary presentation.¹³⁶ In that form of legal practice, professionals from other disciplines are tellingly referred to as expert “witnesses,” and they perform their functions under the direction of trial counsel.¹³⁷ By contrast, collaborative practice is what its name implies, and the attorneys must yield their place of prominence in favor of a participatory approach in which no professional dominates, but all work together to assist the clients.¹³⁸

Because interdisciplinary collaborative practice is relatively new, there are few frameworks in place which address the management of cross-disciplinary ethical conflicts. Lawyers, psychologists, and financial experts are developing not only working relationships, but also guidelines for reconciling contrasting ethical standards.¹³⁹ The UCLA alters neither “the professional responsibility obligations and standards applicable to a lawyer or other licensed professional” nor “the obligation of a person to report abuse or neglect of a child or adult under the law of

133. UCLA § 12, at 483.

134. See Carie P. Mack, *The Collaborative Law Process: A Better Way to Resolve Family Conflict*, <http://www.macklawoffice.com/CM/Custom/Collaborative-Law-Process.pdf> (last visited May 25, 2010).

135. See *id.*

136. See *id.*

137. See *id.*; see also FED. R. CIV. P. 26.

138. See Mack, *supra* note 134.

139. See Law Office of Marta J. Papa, P.C., *supra* note 128; see also Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 335 (2008).

this state.”¹⁴⁰ That provision merely clarifies the problem; it does not begin a reconciliation of the sometimes conflicting disciplinary obligations. These difficult issues should be addressed both in the process of obtaining informed consent and in the subsequent participation agreement, should the client consent to participate in a collaborative law process. The issues may be thorny. While lawyers are not mandated reporters of child abuse and certain other types of violence, many other professionals must comply with those obligations.¹⁴¹ At a minimum, the participation agreement should detail the irreconcilability of these conflicting professional obligations. In order that the client’s consent to the process be an informed one, the client must understand that the responsibility of non-lawyer professionals to report abuse is not abrogated by the confidentiality of collaborative law communications.¹⁴²

As noted above, a party may employ a mental health professional as a collaborative “coach” to assist the party individually to understand and cope with the difficult interpersonal issues and emotional conflicts that commonly arise in divorce.¹⁴³ The role of the “coach” is, however, quite different than that of the traditional expert hired by the party as a professional witness to provide testimony at a contested hearing or trial. As with jointly-retained experts, the use and scope of individually-employed consultants should be detailed in the participation agreement. The ethical obligations and best practices that govern the behaviors of mental health providers and lawyers may conflict.¹⁴⁴ Issues may arise regarding the meaning of confidentiality, the duty to report information to and about clients, the nature of preparation for client meetings, and civility of communication style.¹⁴⁵

One of collaborative law’s goals in avoiding litigation is to reduce the costs associated with contentious and prolonged court proceedings.¹⁴⁶ But the various professionals who comprise the collaborative team must be compensated, and clients need to understand

140. UCLA § 13, at 483-84.

141. See Joe Wheeler Dixon & Kim Embleton Dixon, Attorney-Client Privilege Versus Mandatory Reporting by Psychologists: Dilemma, Conflict, and Solution 3, available at <http://www.psychologyandlaw.com/Dixon%20&%20Dixon%202005%20%20Atty-Client%20Privilege%20&%20Mandatory%20Reporting.pdf> (unpublished manuscript).

142. See UCLA § 16, at 485. See Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 690-709 (2007) (discussing the “mandated reporting conundrum” in interdisciplinary practice).

143. See Hansen & Hildebrand, *supra* note 16, at 40-41.

144. See Dixon & Dixon, *supra* note 141, at 11.

145. *Id.*

146. See UCLA, prefatory note, at 427, 434.

that while the collaborative process may be less expensive than a similarly complex matter handled through litigation, there are no guarantees which limit expenses.¹⁴⁷ Nonparty professionals bring their expertise to the negotiation process, often in ways not envisioned by the clients and the lawyers at the outset.¹⁴⁸ For example, the parties might employ landscape architects, interior designers, and real estate agents in order to maximize the selling price of a house so that both parties might benefit. Estimating the cost of a collaborative divorce is not easy, but much more difficult is comparing its expense to that of obtaining a contested divorce in court.¹⁴⁹ Certainly a collaborative divorce which achieves a resolution would be far less expensive than the same divorce obtained after a courtroom struggle, in which each side typically employs its own team of experts.¹⁵⁰ But if the collaborative process fails and litigation ensues, the expense of the upcoming trial will be far greater, principally because the disqualification clause mandates that each party retain new counsel.¹⁵¹

If a party terminates the collaborative law process and initiates litigation, the focus of interdisciplinary concerns shifts to the question of what information these professionals may reveal in proceedings connected with litigation.¹⁵² Generally, collaborative law communications are protected by privilege.¹⁵³ But under certain circumstances, the privilege may be waived.¹⁵⁴ The Working Group discussed several problematic issues which may arise in the context of prior professional relationships. If a client and a nonparty professional engaged in a communication prior to the signing of the participation agreement, then that communication may be admissible in a subsequent legal proceeding should the matter proceed to litigation. By contrast, client communications with professionals who had an established professional relationship with the client prior to the collaborative law process might be subject to claims of privilege. Another interdisciplinary privilege concern relates to the threat of a claim of professional

147. See Voegelé et al., *supra* note 30, at 1002-04, 1015; see also Norman Soloway & Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, N.Y. DISP. RESOL. LAW., Spring 2009, at 36, 39.

148. See UCLA § 17 cmt., at 487.

149. One additional consideration is the fact that the collaborative process requires that each side retain counsel, while the parties in litigated divorces (as well as mediated ones) often proceed *pro se*.

150. See UCLA, prefatory note, at 434.

151. See Hoffman, *supra* note 1, at 33; see also Lande & Mosten, *supra* note 29, at 369.

152. See Soloway & Maxwell, *supra* note 147, at 39; see also Voegelé et al., *supra* note 30, at 1015.

153. See UCLA § 17, at 485-86.

154. *Id.* § 18, at 488.

misconduct or malpractice. The UCLA provides that the privilege does not extend to malpractice complaints.¹⁵⁵ Finally, note that the privilege generally does not apply to a communication “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult.”¹⁵⁶

The Working Group also discussed interdisciplinary issues which transcend even a successful collaborative process. The nonparty professionals may want to continue their professional work with one or both parties after the conclusion of the collaborative law process. Professionals with a prior relationship with a party may want to resume their practice. As with all other interdisciplinary issues, these concerns should be addressed in the drafting of the participation agreement.

VI. COERCIVE OR VIOLENT RELATIONSHIPS

The use of ADR processes by victims of domestic violence and their abusers is a point of contention among those in the legal and advocacy communities.¹⁵⁷ The question is whether ADR and, in particular, collaborative lawyering, can safely accommodate family members subjected to controlling, coercive behaviors by other family members. Concerns for client safety can arise in all forms of ADR, as well as in litigation, and are not necessarily more prevalent in collaborative law than in other settings.¹⁵⁸ Still, the desire to respect personal choice and facilitate self-empowerment is sometimes at odds with the impulse to protect those whose ability to choose has been eroded by prolonged exposure to abuse. In at least one sense, collaborative law offers more client security than both pro se litigation and mediation: the presence of lawyers for both parties helps ensure that parties are safely and appropriately engaging in the process of seeking a resolution.

Complicating the issue of whether collaborative law is safe and appropriate for victims of abuse is the lack of any universal definition of domestic violence.¹⁵⁹ The term may refer to isolated events in which one

155. *Id.* § 19(b)(1), at 488.

156. *Id.* § 19(b)(2), at 488.

157. *See generally* Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008) (exploring the practical, political, definitional and ideological differences between family court professionals who emphasize ADR and domestic violence advocates).

158. *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, 202 (2003).

159. *See id.* at 152 (“Definitions of domestic violence are difficult to apply because domestic violence encompasses a continuum of behavior that might start with ridicule and ultimately end in homicide.”); *see also* COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & SEXUALITY & GENDER LAW

spouse assaults the other during an argument.¹⁶⁰ Or the abuse may be part of a pattern of control exercised by a chronic batterer.¹⁶¹ Domestic violence may also vary in terms of frequency and severity and may involve multiple perpetrators.¹⁶² Each permutation raises its own concerns and requires a distinct approach to dispute resolution.¹⁶³

States also vary in their definitions of domestic violence, with some statutes recognizing acts that cause emotional trauma and others encompassing only acts of physical violence.¹⁶⁴ Domestic violence is generally thought to occur within the context of intimate relationships. But coercive and violent conduct may take place in any number of interactions.¹⁶⁵ Not merely a legal concept but a symptom of a deeply troubled relationship, coercive behavior can permeate a custody dispute, a struggle over dissolving a business partnership, or a quarrel over dividing the proceeds of an estate.¹⁶⁶ The UCLA has opted for the term “coercive or violent relationship.”¹⁶⁷ This term encompasses the essential nature of relationships characterized by domestic violence, as defined by the ABA Commission on 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.”¹⁶⁸

Collaborative law is a voluntary contractual endeavor premised upon the client’s provision of informed consent. Clients trapped in coercive environments where their will is subjugated to another’s control may not be truly free to decide to participate in a collaborative

CLINIC, HUMAN RIGHTS AND DOMESTIC VIOLENCE: AN ADVOCACY MANUAL 17 (2010), http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163703 (citing the United Nations General Assembly resolution on the Elimination of Domestic Violence against Women as recognizing that “domestic violence can take many different forms, including physical, psychological and sexual violence as well as economic deprivation and isolation”).

160. See Ver Steegh, *supra* note 158, at 152.

161. See *id.*

162. See Salem & Dunford-Jackson, *supra* note 157, at 445-46; see also Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456 (2008); Ver Steegh, *supra* note 158, at 159.

163. See Salem & Dunford-Jackson, *supra* note 157, at 446; see also Ver Steegh, *supra* note 158, at 152-59; Ver Steegh & Dalton, *supra* note 162, at 458-59.

164. See UCLA, prefatory note, at 459.

165. ABA COMM’N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 1, 3-4 (2007), available at <http://www.abanet.org/domviol/docs/StandardsCommentary.pdf>.

166. See UCLA, prefatory note, at 460.

167. *Id.* § 15, at 484-85; see also *id.* at 460.

168. ABA COMM’N ON DOMESTIC VIOLENCE, *supra* note 165, at 1.

process.¹⁶⁹ Other questions follow: Might some victims of coercive controlling violence suffer so extensively from the abuse and its after-effects that they lack the capacity to contract?¹⁷⁰ Will some coercive controlling perpetrators threaten and coerce victims into participating in collaborative law instead of going to court?¹⁷¹ And, finally, if an agreement is reached in the collaborative law process, how can it be the product of two autonomous individuals if the abuser continues to exert control over the victim during the negotiation?¹⁷²

Additionally, there are concerns that victims of domestic violence may suffer further harm by participating in a collaborative law process which requires them to face their abusers in a setting designed for rational thinking and strategic compromise.¹⁷³ The full disclosure of information required in the collaborative process may increase victims' vulnerability and compromise their safety.¹⁷⁴ Even if further harm can be avoided, there may be doubts as to whether victims are meaningfully able to participate in the process, either because they fear their abusers or because they are focused on seeking revenge, neither of which is a state of mind consonant with facilitating interest-based negotiation.¹⁷⁵

Despite these concerns, collaborative law may offer some victims of domestic violence a more satisfactory outcome than litigation, and an important alternative method for self-empowerment. One important caveat in this discussion is the financial wherewithal of a domestic violence victim to retain a lawyer. Abuse victims may experience difficulty in obtaining counsel either because the family's income is insufficient or because, as is often the case in situations involving domestic violence, the abuser maintains absolute control over the

169. See UCLA, prefatory note, at 460.

170. See Ver Steegh, *supra* note 158, at 195-96 (describing situations in which domestic violence makes mediation unsuitable).

171. See *id.* at 191 (noting that victims of domestic violence may feel pressured to mediate, even if they can choose not to participate).

172. See *id.* at 184-86 (discussing the potential impact of power imbalances between parties in domestic violence situations).

173. See Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 476 (2001).

174. See Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 730-31 (1993) (discussing confidentiality in the domestic violence mediation context).

175. See Patrick Foran, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 800-01 (2009) (stating that in interest-based negotiations the focus shifts "from a party's desired end-result to the clients' underlying priorities, needs, values, and objectives," and that the "principles of honesty, respect, transparency, and good faith embodied within the collaborative law approach provide an effective floor from which the parties are better able to effectuate their interests").

family's finances.¹⁷⁶ Victims seeking a collaborative resolution will be frustrated, since the UCLA requires each side to be represented by counsel.¹⁷⁷ Those who seek court adjudication will be equally unable to obtain representation, but may proceed pro se.

Whether the abuse victim has the assistance of counsel or is self-represented, he or she loses a large measure of control over the process upon filing a court action.¹⁷⁸ The framing of the issues, the amount of time devoted to considering each one, and the pace of the litigation are taken from the hands of the parties and decided by the court, unless the parties opt to remove the matter from the docket by resolving it themselves.¹⁷⁹ Whether the litigation results in a judicial decree or prompts a negotiated settlement, enforcement of the terms is a judicial concern.¹⁸⁰ If the abuser refuses to abide by the judgment, or chooses to violate the terms of visitation, maintenance, or property division, the victim must return to court for vindication, sometimes repeatedly.¹⁸¹ Any orders of protection will be left to the police to apply and the court to enforce. In many cases, effectuation of court orders necessitates further contact between the abuser and victim, whether in courtroom confrontations or—despite extant protection orders—at the victim's home or work site.¹⁸² While there are legitimate concerns surrounding the use of collaborative law in cases involving serious domestic abuse, in some cases the traditional adversarial system may exacerbate the underlying problems and protract the victimization.¹⁸³

The assertion that parties who participated in negotiating an agreement are much more likely to comply with its terms has a fair

176. See NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, POWER AND CONTROL WHEEL 1, <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf>.

177. UCLA § 4(a)(5), at 474 (requiring the participation agreement to “identify the collaborative lawyer who represents each party in the process”).

178. See Ver Steegh, *supra* note 158, at 176.

179. See P. Oswin Chrisman et al., *Collaborative Practice Mediation: Are We Ready to Serve this Emerging Market?*, 6 PEPP. DISP. RESOL. L.J. 451, 456 (2006).

180. See Leah J. Pollema, Note, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1117-18 (2007).

181. See *id.* at 1109-11, 1118 (discussing the legal system as an alternative means of abuse).

182. See *id.* at 1109-11.

183. See *id.*; see also Lande, *supra* note 58, at 251. Additionally, the collaborative process may provide a greater degree of safety since the UCLA mandates an ongoing responsibility for the lawyer to monitor for domestic violence. The lawyer must regularly check in with the client, and this frequency of contact may lead to more enhanced safety monitoring than is normally available in the adversarial system, which specifies no safety monitoring responsibilities for any lawyers. See *infra* notes 193-98 and accompanying text.

amount of evidentiary support.¹⁸⁴ The collaborative process affords abused parties greater power over outcomes and may be instrumental in restoring at least a portion of those parties' inner strength and self-esteem.¹⁸⁵ Collaborative law provides abused parties access to mental health practitioners, coaches, and counselors to help in managing conflict and manipulation.¹⁸⁶ The issue is complex, however. Diverting domestic violence cases from judicial control into collaborative law raises the issue of whether batterers will be held accountable.¹⁸⁷ With all its failings, the court system creates a public record and may provide the victim with a greater sense of vindication.¹⁸⁸

Not all victims, however, seek a public reprimand of their batterers. Collaborative law may serve their interest in privacy and empowerment while still allowing victims to seek an order of protection during the process, should one be needed.¹⁸⁹ The UCLA provides an exception to its rule barring collaborative lawyers from the courtroom in the event that an attorney needs to file an emergency motion seeking an order of protection.¹⁹⁰ Filing such a motion, however, results in the termination of the collaborative process.¹⁹¹ In sum, cases involving coercive or violent relationships must be carefully evaluated to ensure that collaborative law is actually a safer alternative for the victim than formal court proceedings.¹⁹²

The principal contribution of the UCLA in this area is the requirement that a collaborative lawyer "make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party."¹⁹³ This screening must be accomplished "[b]efore a prospective party signs a collaborative law participation agreement."¹⁹⁴ The Act also requires that, throughout the collaborative process, the lawyer "reasonably and

184. See, e.g., Foran, *supra* note 175, at 799 (discussing the benefits of settlements in the divorce context when parties were actively involved in the negotiations); see also *id.* ("When both parties take ownership of the negotiation process and the final settlement, the long-term results include a stronger post-divorce relationship and more positive impacts on the children.").

185. See Chrisman et al., *supra* note 179, at 457.

186. See Foran, *supra* note 175, at 798.

187. See Ver Steegh, *supra* note 158, at 180-82 (discussing whether the private nature of mediation will hold abusers accountable).

188. See *id.* (noting that the private nature of mediation may inhibit the prosecution and conviction of abusers, thereby preventing the establishment of legal precedent and public record).

189. See UCLA § 7, at 480.

190. *Id.* § 7 cmt., at 480-81.

191. *Id.*

192. *Id.*

193. *Id.* § 15(a), at 484.

194. *Id.*

continuously . . . assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.”¹⁹⁵ Moreover, the UCLA precludes a lawyer who “reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party”¹⁹⁶ from commencing or continuing a collaborative process unless the following conditions are met: “(1) the party or the prospective party requests beginning or continuing a process; and (2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.”¹⁹⁷

These screening obligations thus form a significant component of the lawyer’s obligation to obtain the client’s informed consent.¹⁹⁸

Various screening protocols are available to assist lawyers in satisfying this obligation, such as the one promulgated by the ABA.¹⁹⁹ The Working Group doubted that any one screening mechanism can identify all forms of coercive or manipulative behavior. Abused parties are often reluctant to disclose information related to the violence they have experienced, or may tend to downplay it.²⁰⁰ Moreover, attorneys have significant discretion in judging whether the frequency or severity of these incidents disqualifies the parties from participating in the process.²⁰¹

In creating this responsibility to screen for domestic violence, the UCLA does not prescribe special qualifications or training in domestic violence for collaborative lawyers.²⁰² The Act instead encourages collaborative lawyers to be familiar with “nationally accepted standards of practice for representing victims.”²⁰³ Knowledgeable and experienced attorneys may be expected to be aware of situations requiring either intervention or the need for greater expertise. But what about less experienced collaborative counsel? The Working Group believed that bar associations and collaborative practice groups may supply the

195. *Id.* § 15(b), at 484-85.

196. *Id.* § 15(c), at 485.

197. *Id.*

198. *See id.* § 15 cmt., at 485. Although the Act does not address the issue of malpractice liability, the general consensus among the participants in the Working Group was that a collaborative lawyer who fails to screen for domestic violence is committing legal malpractice.

199. *See* ABA COMM’N ON DOMESTIC VIOLENCE, TOOL FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE 1-2 (2007), <http://www.abanet.org/domviol/screeningtoolcdv.pdf>.

200. *See* Ver Steegh & Dalton, *supra* note 162, at 460.

201. *Id.*

202. *See* UCLA, prefatory note, at 463.

203. *See id.*

needed standards and training. Lawyers may also enhance their competence in recognizing situations involving domestic violence by working with mental health professionals experienced in this area. There are additional costs as well as benefits associated with utilizing mental health professionals during screening, however. Lawyers should be aware of the added expense to the client if another professional conducts the initial interview to screen for domestic violence, as well as the fact that disclosure of the abuse may not always be apparent in the initial interview.²⁰⁴ If the lawyer relies too heavily on the mental health professional's initial assessment and fails to utilize the screening tools, the lawyer may miss later warning signs.

Another problem the Working Group noted is that a coercive or violent relationship may not be detected until both parties' accounts of their relationship are heard and compared, which cannot take place until the four-way meetings following commencement of the collaborative process.²⁰⁵ The Group contrasted mediation with collaborative law in this regard. Mediators are charged with a domestic violence screening function, and perform it by interviewing and assessing *each* party.²⁰⁶

Several other provisions of the UCLA address the issue of domestic violence. Section 7 creates an exception to the stay of proceedings when emergency orders of protection are sought "to protect the health, safety, welfare or interests of a party or [family or household member]."²⁰⁷ Section 9(c)(2) creates an exception to the disqualification requirement for a collaborative lawyer and the other lawyers in the collaborative lawyer's firm when a client and/or dependent seeks such an order of protection and other lawyers are not immediately available.²⁰⁸ Finally, the Act creates an exception to the evidentiary privilege which otherwise covers communications during the collaborative process in situations involving threats of violence,²⁰⁹ involvement or potential involvement in criminal activity,²¹⁰ or child maltreatment.²¹¹

204. See *id.* prefatory note, at 461-62; see also Lande & Mosten, *supra* note 29, at 390-91.

205. See Lande & Mosten, *supra* note 29, at 414-15 (discussing the limitations of the four-way meeting).

206. See Ver Steegh, *supra* note 158, at 191.

207. UCLA § 7, at 480.

208. *Id.* § 9(c)(2), at 482.

209. *Id.* § 19(a)(2), at 488.

210. *Id.* § 19(a)(3), 488.

211. *Id.* § 19(b)(2), at 488.

VII. COLLABORATIVE PRACTICE IN NON-FAMILY DISPUTES

Although the benefits of collaborative law have been found in non-family law disputes (sometimes referred to as “civil collaborative law”),²¹² the movement’s spread outside its field of origin has progressed steadily but slowly.²¹³ Advocates of the broader use of collaborative law are working to expand their field, noting that the same reasons that make divorce and other family disputes ideal for the application of collaborative law exist for general civil disputes as well.²¹⁴ Although the non-family caseloads of collaborative lawyers are expanding, questions remain on the adaptability of a form of practice developed for settling family law disputes into an effective practice modality for resolving a wide range of other types of conflicts.²¹⁵

Preserving existing relationships constitutes one of the most significant rationales for resolving a family law dispute through collaborative law.²¹⁶ The desire to continue effective working alliances is not limited to family matters, but applies broadly to the handling of disputes in our legal system.²¹⁷ Utilizing collaborative law to resolve *any* dispute offers parties in conflict the opportunity to repair their relationship in the course of coming to a solution, instead of risking rupture in the process of winning or losing in litigation.²¹⁸ As one contributor to the field noted, although there will always be adversarial

212. See Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195, 196 (advocating the use of collaborative law techniques in business dispute resolution); John G. Browning, *Collaborative Law Promises a Kinder, Gentler Approach to Business Disputes*, D MAG., Sept.-Oct. 2009, http://www.dmagazine.com/Home/D_CEO/2009/September_October/Collaborative_Law_Promises_a_Kinder_Gentler_Approach_To_Business_Disputes.aspx (explaining the amenability of the collaborative process for resolving commercial conflicts).

213. See David A. Hoffman, *Collaborative Law in the World of Business*, COLLABORATIVE REV., Winter 2004, at 5-6, available at http://mdcollaborative.com/article_collab_law_world_of_business.htm (describing the resistance to Collaborative Law in nonfamily areas of practice); see also Fairman, *supra* note 22, at 242-43 (noting that collaborative law is primarily only practiced in the area of family law, most commonly divorces); Olivia Clarke, *A Team Approach to Solving Problems*, CHI. LAW., Dec. 2008, at 58, 58 (noting the increase in the movement to utilize collaborative law in non-family law cases).

214. The UCLA’s prefatory note expressed the hope that “over time, as collaborative law becomes more established and visible, more parties with matters in areas other than family and divorce disputes will come to understand its benefits and invoke the benefits and protections of the act.” UCLA, prefatory note, at 450.

215. See Hoffman, *supra* note 213, at 5-6.

216. See Bryan, *supra* note 212, at 196-97.

217. See Clarke, *supra* note 213 (noting that the practice of collaborative law in non family law disputes may be beneficial in other types of disputes where conflict exists side by side with the desire to preserve an ongoing relationship); see also Chrisman et al., *supra* 179, at 457 (“Besides saving the relationship by minimizing or eliminating anger, alienation, and regret, the collaborative process preserves the parties’ self-esteem and respect.”).

218. See Chrisman et al., *supra* 179, at 457.

litigation in the business world “much of U.S. companies’ litigation portfolios concern employees, customers, vendors, suppliers, contractual partners, etc., where continuing relationships are paramount—especially when conflict erupts.”²¹⁹

Many non-family disputes involve parties who are tied to a contractual relationship guaranteeing their continued dealings after the conflict is resolved.²²⁰ Utilizing collaborative law can make the process of resolving the problem less adversarial and lay the groundwork for the parties to extend and even improve their association.²²¹ Collaborative lawyers may thus be seen as engineers in the contemporary legal practice transition from dispute warriors to specialists in what Professor Julie Macfarlane has termed “conflict resolution advocacy,” not limited to family law.²²²

The Working Group suggested that the use of a concise participation agreement might facilitate the spread of the collaborative law process in non-family law disputes. Family law disputes typically generate longer, more involved participation agreements, while business clients often seek more streamlined efforts.²²³ The Working Group suggested the preliminary development of a “term sheet,” a short list of key points that the client would like to address during the negotiation. The “term sheet” would be a precursor to the actual participation agreement, but as a summary of the client’s objectives it may supply a quick and effective starting platform for the collaborative law process.

The informal disclosure process also protects the parties’ privacy. Litigation is inimical to privacy, as attorneys for both parties often “search out and exploit—in a courtroom and in publicly filed pleadings—every legally relevant shortcoming of the other party.”²²⁴ Similarly, in civil litigation, a company may be required to produce “voluminous business records and defend numerous depositions” exposing businesses to adverse publicity.²²⁵ Participation in the collaborative law process, with the UCLA provisions for confidentiality

219. Bryan, *supra* note 212, at 196-97.

220. See Hoffman, *supra* note 213, at 8 (noting that transactional work lends itself well to the practice of collaborative law because many lawyers trained in collaborative law also handle contract negotiations and other transactions and “have acquired a reputation for collaboration”).

221. See Chrisman et al., *supra* note 179, at 453, 457.

222. See JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW*, at xi (2008) (“[C]hanges in procedure, voluntary initiatives, and changing client expectations are coming together to create a new role for counsel and a new model of client service.”).

223. See UCLA, prefatory note, at 457-59 (discussing participation agreements and the need for informed consent).

224. Hoffman, *supra* note 213, at 4-5.

225. *Id.* at 6.

and privilege, keeps the parties outside the glare of the courtroom and mitigates the risk of adverse publicity.²²⁶

Additionally, the collaborative law process can significantly reduce the cost of dispute resolution in civil cases.²²⁷ Collaborative practice allows for the lawyers' billable time to be spent "directly working to achieve a favorable resolution, as opposed to time spent complying with civil procedural discovery requirements, motion practice or waiting for a case to be called in court proceedings."²²⁸ Collaborative law techniques such as jointly-retaining experts and compressing the information exchange may also streamline the process.²²⁹

Adversarial bias, or the need 'to be right,' is at the core of rights-based civil litigation and may be responsible for the slow spread of interests-based collaborative practice in non-family disputes, an area of the law which has not experienced as long and substantial exposure to ADR as has family law.²³⁰ Since collaborative law is relatively new to general civil dispute resolution, lawyers often lack appropriate training and may not feel comfortable utilizing the process without the assistance of an experienced collaborative mentor.²³¹ The Working Group discussed several remedies, including having a veteran collaborative lawyer act as a facilitator of the civil dispute-resolution process. The Group also suggested that an experienced collaborative lawyer could serve as a third-party neutral in a negotiation process in which the parties were represented by attorneys inexperienced in collaborative law. Proposals related to training future collaborative counsel are presented in Part IX.²³²

The Working Group also considered the impact of the disqualification requirement on general civil disputes. Even though the disqualification provision encourages parties to keep negotiating until a mutually-satisfactory solution is achieved, its very existence may

226. See UCLA §§ 16-17, at 485-86; see also Ver Steegh, *supra* note 158, at 180-82 (discussing the private nature of mediation as it relates to domestic violence cases).

227. See Bryan, *supra* note 212, at 197.

228. R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, COLLABORATIVE L.J., Fall 2007, at 8, available at http://www.collaborativelaw.us/articles/Prescription_For_Sanity.pdf (discussing the successful use of collaborative law in a restructuring a business).

229. *Id.* at 4.

230. See Hoffman, *supra* note 213, at 6 (suggesting that "the culture and sociology of litigation practice" continues to inflate the prestige of trial lawyering at the expense of collaborative and other ADR practices).

231. See Chrisman et al., *supra* note 179, at 455-56 (discussing the skills and training necessary for collaborative lawyers).

232. See *infra* Part XI.

dissuade businesses from turning to collaborative law.²³³ Unlike many individuals who seek out counsel for the first time when facing a marital dissolution, businesses often have well-established relationships with attorneys who routinely represent them in a variety of matters, ranging from transactional to litigation. Such firms may be understandably wary of a process requiring them to risk discharging familiar counsel in order to retain and educate new legal representatives about their business and their specific dispute, should the collaborative process fail and litigation prove necessary.²³⁴ The truth is, however, that the vast majority of all disputes submitted to a collaborative resolution process are successfully settled.²³⁵ Businesses should therefore expect with some confidence that most disputes may be resolved through representation by a collaborative lawyer. If that collaborative attorney is the firm's regular counsel, the firm may be even more prone to trust the arrangement. Additionally, while the failure of the collaborative process to resolve a dispute will necessitate the hiring of separate litigation counsel, it will not preclude representation of the client by the original collaborative lawyer in any unrelated business matters.²³⁶

Collaborative practice has become an attractive option for many types of non-family law disputes where preservation of the parties' relationships matters.²³⁷ Increasingly, businesses and other civil litigants are realizing that a cost-benefit analysis favors adoption of a collaborative process to resolve disputes.

VIII. ACCESS TO JUSTICE AND VULNERABLE POPULATIONS

Collaborative practice is designed to benefit any set of parties seeking an interest-based, holistic solution to a conflict.²³⁸ But one major disappointment to date has been the steep financial entry cost into collaborative law.²³⁹ As Gay Cox and Yulise Reaves Waters have noted,

233. See Clarke, *supra* note 213.

234. See *id.* (expressing a business client's concern or fear of losing a long-standing lawyer-client relationship).

235. See SHERRIE R. ABNEY, THE ADDENDUM TO THE CIVIL COLLABORATIVE PARTICIPATION AGREEMENT, GLOBAL COLLABORATIVE LAW COUNCIL 5, http://www.collaborativelaw.us/articles/why_the_addendum.pdf (noting that not more than one in every twenty-five cases leave the collaborative process to proceed to litigation).

236. See Clarke, *supra* note 213. Note that the UCLA defines "[r]elated to a collaborative matter" as "involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter." UCLA § 2(13), at 468.

237. See Hoffman, *supra* note 213, at 6.

238. See Chrisman et al., *supra* note 179, at 453; see also UCLA, prefatory note, at 425.

239. See UCLA, prefatory note, at 452-54; see also Gay G. Cox & Yulise Reaves Waters, *Penetrating the Walls: Overcoming Barriers to the Proliferation of Collaborative Practice in Underserved Communities*, COLLABORATIVE REV., Winter 2008-09, at 11, 11-12.

“[c]ollaborative professionals naturally seek to be healers and yearn for opportunities to offer the benefits of the process to a wider community, but many have been frustrated at the pace of seeing the process mainstreamed.”²⁴⁰ At present, the collaborative process is largely limited to the wealthiest segment of American families.²⁴¹ The link associating racial and ethnic minorities with poverty in the United States is a strong one, and Black and Hispanic families currently have the lowest household incomes.²⁴² Minority communities are not well served by the collaborative law process, since they are often economically disadvantaged.²⁴³ A lack of diversity among collaborative practitioners themselves has also been noted, and an undersized client base among members of underserved communities has made referrals to these practitioners even less common than they might be otherwise.²⁴⁴

Divorce rates among those living in poverty and with low levels of education are nearly twice as high as the general population rates.²⁴⁵ Although this cohort experiences marital breakdown at a higher rate than others, its low economic status leads it to have less access to legal representation in divorce and other family conflicts. “The need for civil legal representation for low-income people is particularly acute in family law disputes.”²⁴⁶ Recent studies have found that seventy percent of family law litigants do not have a lawyer on either side of a proceeding when the proceeding is filed in court, and the percentage increases to eighty percent by the time the matter is final.²⁴⁷

Despite one of the highest concentration of lawyers in the world, the United States fails to meet the legal needs of the poor.²⁴⁸ Eighty

240. Cox & Waters, *supra* note 239, at 11.

241. *Id.*

242. See LUKE REIDENBACH & CHRISTIAN WELLER, CTR. FOR AM. PROGRESS, THE STATES OF MINORITIES IN 2010: MINORITIES ARE SUFFERING DISPROPORTIONATELY IN THE RECESSION 1 (2010), http://www.americanprogress.org/issues/2010/01/pdf/state_of_minorities.pdf.

243. See *supra* notes 241-42.

244. Cox & Waters, *supra* note 239, at 12-13.

245. See DONALD J. HERNANDEZ, U.S. DEP'T OF COMMERCE, STUDIES IN HOUSEHOLD AND FAMILY FORMATION: WHEN HOUSEHOLDS CONTINUE, DISCONTINUE, AND FORM 18-21 (1992) (noting that couples living below the poverty line have a divorce rate twice that of the general population); R. Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States After 1980*, 8 DEMOGRAPHIC RES. 245, 249 (2003) (finding that roughly sixty percent of first marriages among women without high school degrees ended in separation or divorce, compared to slightly over thirty-three percent for among women with college degrees).

246. UCLA, prefatory note, at 453.

247. JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 11 (2004), http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf.

248. See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 3 (2005).

percent of low-income Americans who need civil legal assistance do not receive it, and legal aid programs reject approximately one million cases per year for lack of resources to handle them, a figure which does not include those who did not attempt to get legal help in the first place.²⁴⁹ In 2002, there was one private attorney to every 525 people from the general population.²⁵⁰ In that same year, there was only one legal aid attorney to every 6861 people at 125 percent of poverty or lower.²⁵¹ The structure of collaborative law is particularly problematic for those with lesser economic resources. Not only are they less likely to be able to afford counsel at the outset, they will be far less able to sustain the financial consequences implied by the disqualification requirement should the collaborative practice fail to resolve their dispute.²⁵²

The UCLA attempts to extend collaborative practice to low income populations by minimizing the impact of the imputed disqualification clause. After the termination of a collaborative process, “another lawyer in a law firm with which a collaborative lawyer . . . is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter,”²⁵³ so long as three conditions are met:

- (1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;
- (2) the collaborative law participation agreement so provides; and
- (3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.²⁵⁴

This provision allows “the legal aid office, law firm, law school clinic, or the private firm doing *pro bono* work to continue to represent the party in the matter if collaborative law concludes.”²⁵⁵ The relaxation of the imputed disqualification rule for low income clients is intended to induce lawyers practicing in associations representing indigent clients to

249. See *id.*; Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASH. POST, Oct. 15, 2005, at A9.

250. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 16 & tbl.5, 17 & tbl.6, 18 (2d ed. 2007).

251. *Id.*

252. See UCLA, prefatory note, at 453-54.

253. UCLA § 10(b), at 482.

254. *Id.*

255. *Id.* prefatory note, at 452-53.

incorporate collaborative law into their practice.²⁵⁶ In addition, volunteer lawyers are more likely to provide family law services when their representation is limited to collaborative law.²⁵⁷ An attorney representing a client pro bono could thus handle the collaborative portion of the representation with the assurance that if the process fails, another attorney in his or her “firm” could represent the client in litigation. This UCLA provision is obviously limited, but it reflects an initial step toward extending collaborative practice to a greater percentage of the population.

Other proposals to reduce the cost of collaborative law include having the parties limit the participation of other professionals in the process whenever feasible.²⁵⁸ Greater reliance on mediation—with minimal or no participation by counsel—could be considered, with the more expensive four-way meeting format reserved for any intractable issues unresolved through mediation.²⁵⁹ “Pay-as-you-go” models may allow parties to limit their monthly expenses and pace the work according to the available finances.²⁶⁰ Collaborative practitioners could also agree to represent a certain number of clients at a reduced rate or pro bono.²⁶¹ While these alternatives may make collaborative law available to a larger client population, care must be taken to maintain the professional essence of collaborative practice while making it more affordable. Far more extensive efforts are needed to make collaborative practice an effective means of problem solving for the majority of our population.

IX. TRAINING LAW STUDENTS AND RECENT GRADUATES

Three major reports issued within the last two decades have stressed the need to teach law students practical lawyering skills, including negotiation and ADR.²⁶² The MacCrate Report identified

256. *Id.* prefatory note, at 453.

257. See Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. DISP. RESOL. 465, 471-72.

258. See Cox & Waters, *supra* note 239, at 15.

259. *Id.* at 15-16.

260. *Id.* at 16.

261. *Id.*

262. ABA SECTION OF LEGAL EDUCATION & ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM §§ 7-8, at 185-99 (1992) [hereinafter MACCRATE REPORT]; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 105-06, 111-14 (2007); Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 530, 532 (2006).

practical skills as essential to lawyering.²⁶³ The Family Law Education Reform Report regarded expertise in ADR as essential to the practice of family law and recommended coursework in “mediation, mediation advocacy, collaborative law, cooperative law, and advanced techniques in negotiation.”²⁶⁴ Most recently, the Carnegie Report called for law schools to foster “civic professionalism” by “linking the interests of legal educators with the needs of [legal] practitioners and the members of the public the profession is pledged to serve.”²⁶⁵ It challenged law schools to match the first year’s “emphasis on well-honed skills of legal analysis” with “similarly strong skill in serving clients and a solid ethical grounding.”²⁶⁶ What role does legal education have in teaching collaborative law and practice?

The Working Group discussed several suggestions for enhancing education in collaborative law and practice, aware that although the orientation of many law schools has changed, legal education still largely exhibits a “tendency to emphasize adversarial training.”²⁶⁷ Law schools could offer collaborative law seminars,²⁶⁸ as well as relevant skills courses, such as clinics or externships with collaborative law practitioners or practice groups. The Working Group identified five core areas in which law students needed additional training: (1) the psychological components of divorce (including understanding loss and anger), (2) ADR courses (such as mediation, negotiation, alternatives to litigation, and arbitration), (3) interdisciplinary practice (working with mental health and financial experts), (4) lawyering theory and practice (professionalism, business/finance, interviewing, counseling, and negotiation), and (5) client-centered or “humanistic” lawyering.²⁶⁹

263. MACCRATE REPORT, *supra* note 262, § 7 cmts., at 190.

264. O’Connell & DiFonzo, *supra* note 262, at 525.

265. SULLIVAN ET AL., *supra* note 262, at 4.

266. WILLIAM M. SULLIVAN ET AL., SUMMARY: EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007), http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.

267. Bryan, *supra* note 212, at 202.

268. In 2010, Hofstra Law School introduced a Collaborative Family Law Seminar, co-taught by two collaborative practitioners, a lawyer and a psychologist. See Hofstra University Catalog, View Courses by Course Title, <http://bulletin.hofstra.edu/content.php?catoid=38&navoid=924> (select “LAW 2963—Collaborative Family Law Seminar” for description) (last visited May 25, 2010).

269. The working group believed that law schools should incorporate the fundamentals of client-centered lawyering into all core courses. Client-centered lawyering stems from the influential work of Carl Rogers, the psychologist who pioneered client-centered therapy. See generally CARL R. ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS, AND THEORY (1951). Client-centered representation was introduced to legal education by an innovative interviewing and counseling text by David Binder and Susan Price. See generally DAVID A. BINDER

Law students and recent law graduates are showing increased interest in resolving legal disputes through an ADR methodology.²⁷⁰ Law schools have promoted this interest by offering a greater number and variety of ADR courses.²⁷¹ However, lawyers and students serious about the field quickly discover that employment opportunities in ADR are limited, especially at the entry level.²⁷² Those interested in collaborative law face an additional hurdle: most collaborative practice groups require a minimum amount of legal practice experience to join, as much as several years for some practice groups.²⁷³

Setting such a high threshold may deter many current law students and recent graduates from entering the field. The Working Group, consisting primarily of collaborative lawyers, generally agreed that barriers for admission into collaborative practice groups no longer serve a function and should be eliminated. Requiring special training for collaborative law structurally disfavors entry into that form of practice, compared with litigation or mediation fields, which do not have particularized training requirements (as opposed to recommended training programs).

The Working Group also emphasized the importance of training new lawyers in collaborative law before, or while, they are trained in litigation. Becoming a collaborative lawyer after years of practicing trial law “requires rebuilding from the bottom up an entirely new set of attitudes, behaviors, and habits.”²⁷⁴ By contrast, the Working Group favorably pointed to the standards of the IACP, the largest collaborative professional association.²⁷⁵ The IACP’s minimum standards for collaborative lawyer practitioners include membership in good standing in the lawyer’s jurisdiction, twelve hours of basic collaborative law

& SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

270. See, e.g., ABA Section of Dispute Resolution, Law Student Advisory Committee, Committee Updates, <http://www.abanet.org/dch/committee.cfm?com=DR038000> (last visited May 25, 2010).

271. See Alfred Dennis Mathewson, *Commercial and Corporate Lawyers ‘n the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769, 770 (1999).

272. See Marty Nemko, *Best Careers 2009: Mediator*, U.S. NEWS & WORLD REP., Dec. 11, 2008, <http://www.usnews.com/money/careers/articles/2008/12/11/best-careers-2009-mediator.html>.

273. See COLORADO COLLABORATIVE LAW PROF’LS, MEMBERSHIP CRITERIA 3-9 (2008), available at <http://www.colocp.org/Portals/0/101%20Membership%20Criteria%202010.pdf>; N.Y. Ass’n of Collaborative Lawyers, 2008 NYACP Membership Requirements (Lawyers), <http://www.collaborativelawny.com/join.php> (last visited May 25, 2010); Cincinnati Acad. of Collaborative Prof’ls, *Becoming a Member of CP Cincinnati*, http://www.collaborativelaw.com/1-1_Collab-Group-Membership.cfm (last visited May 25, 2010).

274. See TESLER, *supra* note 16, at 24.

275. See Int’l Acad. of Collaborative Practice (ICAP), *Standards, Ethics, and Principles*, http://www.collaborativepractice.org/_t.asp?T=Ethics (last visited May 25, 2010).

training, a \$135 fee, a thirty-hour facilitative conflict resolution training, and fifteen hours of training in various related areas.²⁷⁶

Another Working Group proposal for facilitating entry into collaborative practice juxtaposed the widespread lack of affordability of legal services²⁷⁷ with the need for law students and recent graduates to obtain practice experience. Legal aid societies, as well as law school clinics and externship programs, have made inroads in this direction. But if law students and recent graduates are to provide collaborative legal representation to the poor, collaborative practice groups must take the lead in ensuring adequate training and competent representation. The Working Group discussed two additional possibilities: linking legal aid organizations with less experienced attorneys and mediators, and pairing students in collaborative law seminars and clinics with collaborative law centers or practice groups. Further development and implementation of these ideas would benefit the recipients of the legal services, as well as the providers who would receive invaluable training and experience in a relatively new practice modality.

X. CONCLUSION

Collaborative practice has radical aims. It seeks to change the culture of lawyering and place clients squarely in control of their conflicts and possible solutions. Shifting power from attorney to client is a prime characteristic of the “new lawyer.”²⁷⁸ Many innovations in legal education and practice, from training in client-centered lawyering to the mainstreaming of mediation and other ADR methodologies, have emphasized more careful attention to the client’s needs and interests.

But collaborative law and practice move the dynamic one major step forward. Jana Singer has argued that “[a]n overriding theme of recent divorce reform efforts is that adversary processes are ill suited for resolving disputes involving children.”²⁷⁹ Collaborative practice plays that theme to its conclusion, by removing the formal adversarial legal system as a framework for either analysis or resolution. The commitment of collaborative lawyers to this process could not be more

276. MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS, *supra* note 74, §§ 2.1-2.4, at 1-2.

277. *See supra* Part VIII.

278. *See* MACFARLANE, *supra* note 222, at xii-xiii (“Changes in the understanding of the lawyer-client ‘bargain’ affect norms of decision making and control between lawyer and client, as clients participate more directly than before in settlement processes and determine how much time, money, and emotional energy to invest and in what type of resolution.”).

279. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

clear; as evidenced in the rule that while clients may abandon the collaborative process to seek a remedy in litigation, collaborative lawyers may not.

The eight substantive sections of this Final Report provide a sense of the conversations within and conclusions of the eight Working Groups at Hofstra's Conference on the Uniform Collaborative Law Act. Based on the Issue Papers drafted and revised by the law student reporters, these sections reflect the aspirations and frustrations of this emerging new form of professional practice. But they speak most clearly about the great potential of collaborative practice to convert problem solving into peacemaking.²⁸⁰

280. See Mosten, *supra* note 54, at 516-18.