

---

# Professional Responsibility in Civil Domestic Violence Matters

*Julie Saffren\**

## I. INTRODUCTION

Professional responsibility takes on new meaning when domestic violence (DV) is involved. However, national and state ethics rules give no specific guidance for domestic violence practice.<sup>1</sup> This shortcoming presents a serious concern because domestic violence may be a matter of life and death for the client. For attorneys, particularly those who practice family law, ignorance of the unique dynamics of domestic violence can lead to ethical failures, and these may result in serious repercussions for victims, children and others.

I have confronted issues at the intersection of professional responsibility and the representation of domestic violence victims since I began practicing law in 2003 as a staff attorney at Support Network for Battered Women, a domestic violence agency in Santa Clara County, California;<sup>2</sup> began teaching law school courses in Domestic Violence, Family Law and Professional Responsibility; and began serving as a

---

\* Julie Saffren is a Family Law attorney and DV educator in Santa Clara County, California. Since 2006, she has been a lecturer at her alma mater, Santa Clara University School of Law, where she has taught Domestic Violence, Family Law and Legal Profession. She cocreated the Domestic Violence Limited Scope Representation program at the Pro Bono Project of Silicon Valley, training and mentoring attorneys and law students to represent low-income litigants in civil DV matters. In December 2006, *California Lawyer* named her one of California's Outstanding Pro Bono Attorneys. She serves on Santa Clara County's Domestic Violence Council and Death Review Committee. In 2009, she coauthored a domestic violence appeal, *In re Marriage of Nadkarni*. The published case established a legal definition for conduct that "disturbs the peace" under Family Code section 6320.

1. In California where I practice, attorneys are generally regulated in two ways. The Rules of Professional Conduct are developed by the State Bar's Board of Trustees and approved by the California Supreme Court. The State Bar Act is developed by legislators and codified in the Business and Professions Code. CAL BUS. & PROF. CODE §§ 6000–6238 (West 2012). Other bodies of ethics law may apply depending on specific areas of practice, e.g., criminal, civil or federal law.

2. Our agency provided shelter services, a twenty-four hour hotline, counseling for victims and children, and a range of legal services, including direct representation for victims seeking restraining orders under the Domestic Violence Prevention Act (DVPA). CAL. FAM. CODE §§ 6200–6390 (West 2012).

member of Santa Clara County's Domestic Violence Death Review Team.<sup>3</sup> In this last assignment, the collision of attorney ethics and domestic violence issues really "hit home," because the death of victims poignantly highlights missed opportunities for legal professionals to help ensure client safety.

Matters of professional responsibility pertain to decision-making and the scope of the attorney-client relationship, communication with clients, client capacity, confidentiality and attorney competency, among other duties. Effective representation of victims in civil domestic violence matters requires a comprehensive understanding of the complex dynamics of abuse.<sup>4</sup> Many duties are heightened if the case indicates factors that signal high lethality. Duties that relate to attorney competency will arise whether the client is a victim or an alleged perpetrator of domestic violence, especially since an understanding of safety issues is so necessary for competent representation.

Part II of this article explores several fundamental ethical duties implicated in civil domestic violence practice, with particular emphasis on the duty of competence and how that duty is heightened in a domestic violence matter. Part III further examines attorney ethical responsibilities but does so by looking through a "high lethality" lens, specifically what the findings of a Domestic Violence Death Review Team can teach attorneys about professional responsibility.

## II. KEY ETHICAL DUTIES IN CIVIL DOMESTIC VIOLENCE PRACTICE

### A. SCOPE OF REPRESENTATION

It is no secret that litigants represented by attorneys are in the minority in California's Family Court system. Large numbers of family court litigants, estimated at 70% to 80%,<sup>5</sup> do not have lawyers. This number

---

3. Death Review Teams are statutorily authorized under California Penal Code section 11163.3. CAL. PENAL CODE § 11163.3 (West 2012). These interdisciplinary committees identify and study domestic violence-related deaths, in hopes of increasing understanding of lethal violence and using that knowledge to prevent future deaths.

4. In 2007, the American Bar Association (ABA) Commission on Domestic Violence published an impressive set of aspirational guidelines called *Standards of Practice for Lawyers Representing Victims of DV, Sexual Assault and Stalking in Civil Protection Order Cases*. It is recommended to practitioners and students as a comprehensive resource on the issues discussed herein. COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 3 (2007), [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards\\_of\\_Practice\\_for\\_Lawyers\\_Representing\\_Victims\\_of\\_DV\\_SA\\_Stalking.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Victims_of_DV_SA_Stalking.authcheckdam.pdf) [hereinafter *ABA Standards*].

5. The *Statewide Action Plan for Serving Self-Represented Litigants*, published in 2004 by the Judicial Council of California, stated that 67% to 72% of petitioners were unrepresented when filing the divorce, and 80% were unrepresented at disposition. TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION

often increases if the matter concerns a Domestic Violence Protection Act (DVPA) restraining order request. In Santa Clara County where I practice, the number of self-represented litigants on the specialized domestic violence calendar is very high. It is not unusual for the entire calendar to be self-represented litigants, including petitioners seeking restraining order protection and respondents opposing the issuance of such orders. On these calendars, it seems that most of the litigants have children together, many have limited English proficiency, and many are low-income individuals. The specialized DV calendar starkly reflects the great need for interpreters, self-help resources, and *pro bono* attorneys. Many legal services programs statewide offer direct representation services, though most agencies provide assistance only to the party seeking the protection of a restraining order.<sup>6</sup>

The availability of limited scope representation rules enables Family Law practitioners to establish attorney-client relationships and represent litigants on separate and discrete issues of Family Law, including child support, spousal support, DV restraining orders, parentage, child custody and visitation, division of property, pension issues, contempt, or other issues.<sup>7</sup> This has been a boon to clients seeking to minimize their legal costs. Limited scope representation has also become a routine method for *pro bono* counsel to establish their scope of client representation in DV matters. It also facilitates more attorneys taking on *pro bono* work, since they are able to constrain the requirements and reach of their representation. However, ethical considerations arise when the scope of the attorney-client relationship is limited in a civil DV matter.

*Does the client fully comprehend what it means to have an attorney in limited scope?* For example, if an attorney represents the client in limited scope on a restraining order matter that includes custody and support issues, the represented client will not be able to obtain assistance provided to self-represented litigants through the Family Law Facilitator's office at court. The client will need to understand that "they are their own lawyer" on related issues such as divorce or property division. Limited scope representation may be seen as a form of contracting to limit an attorney's

---

PLAN FOR SERVING SELF-REPRESENTING LITIGANTS 11, [www.courts.ca.gov/documents/selfreplitsrept.pdf](http://www.courts.ca.gov/documents/selfreplitsrept.pdf) (last visited Sept. 1, 2012).

6. The Pro Bono Project of Silicon Valley in San Jose, California, introduced Domestic Violence Limited Scope Representation in 2005. This award-winning program trains and mentors volunteer attorneys and certified law students to represent either side in a civil domestic violence matter. The Pro Bono Project believes when both Petitioner and Respondent have DV-trained counsel, the court process is more accessible and comprehensible, the resulting orders have higher rates of compliance, conflict is reduced and both litigants receive important referrals to services. Attorney training ensures that counsel for the alleged abuser does not become a tool to further abuse the victim. *See Family Law Services*, PRO BONO PROJECT, [http://www.probonoproject.org/?page\\_id=65](http://www.probonoproject.org/?page_id=65) (last visited Sept. 1, 2012).

7. Limited scope representation is authorized under California Rule of Court 3.36. CAL. R. CT. 3.36 (2007), available at [http://www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf).

duty of diligence embodied in our duty of competence,<sup>8</sup> given that diligence typically means assisting the client until his or her legal problem is solved. I do not suggest limited scope representation is in any way unethical. But attorneys should be sure to give their clients a full understanding of the “cons” of limited scope, especially when the “pros” of obtaining a lawyer in limited scope are so attractive.

*When the client consents to pro bono counsel, have they given truly informed consent?* Put another way, for an indigent client, is having *pro bono* counsel always better than being self-represented? It may not be better if the *pro bono* attorney is well-meaning but not sufficiently trained. Domestic violence attorneys need specific training in order to counsel and advise their clients competently. Legal services agencies representing victims know they must provide excellent training for their staff attorneys as well as their attorney volunteers who take on domestic violence cases.

Establishing the legal issues for which an attorney represents her client is only the beginning of the ethics considerations of scope. The real question is, “What is the scope of decision-making between the attorney and the DV client?” That is where knowledge of the dynamics of domestic violence becomes crucial, and the attorney’s role must change from directing to empowering. According to the *ABA Standards*, ethical domestic violence practice should be client-centered representation,<sup>9</sup> where decision-making authority is vested in the client and the attorney provides appropriate legal options, thus empowering clients to choose the option that is right for them. This method of practice can be challenging for a number of reasons.

First, victims of abuse may not fully disclose to their attorney what is really happening in their homes and in their lives. This may be due to the amount of time needed to develop the trust and rapport necessary for full disclosure of matters so personal, traumatizing, terrifying, shameful or humiliating. Victims may minimize the abuse they suffer or the extent to which their children are exposed to abuse, fearing they will be judged harshly or worse yet, reported to authorities. They may have deep mistrust for attorneys or for institutions such as law enforcement, the District Attorney or child welfare authorities. These may be valid concerns based on their own experiences, either in this country or in their country of origin. Teen victims may be extremely reluctant to disclose abuse to adults, including parents or teachers. Victims of domestic violence may fail to

---

8. California Rule of Professional Conduct 3-110(B) states: “For purposes of this rule, ‘competence’ in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.” CAL. RULES OF PROF’L CONDUCT R. 3-110(B) (1992), available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=8qtNkWP-Kjw%3d&tabid=1233>.

9. See *ABA Standards*, Part III.F.1, stating, “The lawyer should advise the client about legal options and consequences, but must ultimately defer to the client regarding legal decisions.” *ABA Standards*, *supra* note 4, at 35.

adequately protect their children from exposure to abuse, thinking that as long as they themselves take the brunt of the abuse, their children are not adversely affected. This is erroneous thinking, since research shows exposure to domestic violence negatively affects a child's emotional, behavioral, social and cognitive development, and that children living in homes where domestic violence occurs are at a higher risk for direct physical abuse or other forms of neglect.<sup>10</sup>

Many victims are reluctant to report abuse to police or to participate in criminal prosecution. These victims may operate from a place of legitimate fear that the abuser will carry out his threats to hurt or kill her or the children if she involves the law. These victims may "go sideways" and recant statements to police or the court, creating credibility problems for themselves and their attorneys. Other reluctant victims may be members of cultural communities that are not comfortable resorting to government intervention.<sup>11</sup>

Many victims have trouble speaking for themselves, after months or years of abuse have systematically destroyed their autonomy or self-esteem. They may look to their attorneys as authority figures, asking, "What should I do?" Many victims fear the disapproval of their attorney or the court system when what they really want is to reconcile and/or cohabit with their abuser, and free their family from the interference of courts, police, or child welfare authorities. Teen victims of domestic violence may face strong pressure from parents to obtain protection orders when they are not ready to end their relationship with the abuser. Conversely, some teens may be pressured by family members to "work things out" with their abuser if the teen is pregnant.

Understanding the victim who wishes to remain in close contact with her abuser is a nuanced issue requiring a shift in mindset from the criminalization of domestic violence, which often aims to distance victims from abusers, to the remediation of domestic violence, enabling a family or relationship to remain intact but violence free.<sup>12</sup> Attorneys representing victims must understand and respect that keeping the family relationship intact may be a critically important outcome for their client, and must inform those clients of the availability of court orders that permit

---

10. PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 446-50 (Kathryn F. Kuehnle & Leslie M. Drozd eds., 2012).

11. See *infra* Part II.E (discussing cultural competency in the context of duty of competency).

12. Jill Davies, *When Battered Women Stay . . . Advocacy Beyond Leaving*, BUILDING COMPREHENSIVE SOLUTIONS TO DOMESTIC VIOLENCE, NAT'L RESOURCE CENTER ON DOMESTIC VIOLENCE (June 2008) [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/BCS20\\_Staying.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/BCS20_Staying.pdf). The work of Jill Davies has done much to train the domestic violence community how to advocate for victims in this situation.

cohabitation,<sup>13</sup> but may also include services and treatment for all family members, as well as safety planning for the cohabiting victim.

In all instances, attorneys must not substitute their judgment for that of their clients. At the outset, it is important the client understands the scope of the attorney-client relationship and the attorney understands his or her role is to present options and assist the client to keep herself and her children safe. Attorneys must remember the client's children are not themselves clients and the interests of the client and her children may not always be perfectly aligned. But it is always proper to advise a client of her duty to act in her children's best interests. It is also proper to confront a client when an attorney believes the choice she may wish to make (such as returning to a particularly dangerous abuser, not obtaining a restraining order or vacating an order) is one that renders her legally or physically vulnerable. Returning to an abuser may create a risk of physical harm for the client, and if she has children, that choice may very well expose her children to abuse as well. Such a decision could conceivably give rise to a conflict for the attorney. If an attorney believes her client's decision presents too great a danger to the client or the client's children, the attorney may be unable to effectively advocate for what the client wishes. In that instance, withdrawal from the case may be necessary and appropriate.

I believe it is never ethically proper for an attorney to order or instruct their victim client to do anything, whether it is "flee to a shelter tonight;" "report the abuse;" "get a restraining order;" "enforce your restraining order;" or "ask for child support." In giving those instructions, no matter how well-meaning my intent, I am providing my legal help in a controlling way. This looks very similar to the way the abuser exercises power and control over my client. I have disempowered my client at a time when I should be presenting options and encouraging her to make a self-directed decision, based on her own unique circumstances.

#### B. DUTY OF COMMUNICATION

As stated above in relation to scope of decision-making, attorneys need to be aware that building trust and rapport takes time. Even the most dedicated *pro bono* attorneys are going to be under a degree of time pressure when they do their job, and there is a tremendous amount of information that needs to be exchanged in the attorney-client relationship. The attorney's duty to communicate is explicit.<sup>14</sup> Everything meaningful

---

13. The only restriction in a "peaceful contact" order is one that prohibits unlawful abuse; stay away and "no contact" restrictions are not included. See Personal Conduct Orders § 6(a), Form DV-130: Restraining Order After Hearing (Order of Protection), JUDICIAL COUNCIL OF CAL., 2 (Jan. 1, 2012), <http://www.courts.ca.gov/documents/dv130.pdf>.

14. California Rule of Professional Conduct 3-500 states, "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and

needs to be conveyed to the clients in a way that they understand.<sup>15</sup> Therefore, communication is much more challenging when the client has limited English proficiency and an attorney must utilize a third party interpreter. Attorneys must guard against the tendency to simply summarize the “high points” of what just happened at the court hearing. Attorneys should conduct complete aftercare following any court proceeding and anticipate that the client will have follow up questions. Attorneys should be aware that the client may be reluctant to admit she did not understand what was said in court or what is being advised now. Clients may fear insulting an attorney for suggesting the attorney has not completely explained their situation to them. Attorneys should keep an open door and encourage *all* questions. Further, they should make a habit of asking clients repeatedly if there is anything else they want explained to them or need help understanding.

The entire court process is overwhelming for the client, not to mention the many other stressors occurring simultaneously in her life, including legal issues for which the attorney may not be representing her (e.g., immigration, criminal, housing, public benefits, or employment). The *ABA Standards* state, “The lawyer should always personally consult with the client prior to representation and prior to court proceedings for a private and meaningful exchange of case-related information.”<sup>16</sup> It is extremely important to keep communication lines open, especially prior to any court appearance, because many clients frequently change their mind about the legal relief they want. Clients may wish to vacate or modify orders, or may incorrectly believe they must vacate restraining orders if child visitation is to take place. Revisiting the client’s position on each issue for which the attorney represents her is therefore critically important.

### C. ISSUES OF CLIENT CAPACITY

Victims of domestic violence have a wide variety of reactions to abuse. Post-traumatic stress disorder and depression may be common among victims of domestic violence. Some victims may self-medicate as a way to deal with ongoing abuse. In some cases, the abuse can be so severe that the client is traumatized and may be impaired as a result.<sup>17</sup> Any client impairment, whether temporary or permanent, affects the attorney-client relationship and the client’s decision-making capacity. It is important for

---

copies of significant documents when necessary to keep the client so informed.” CAL. RULES OF PROF’L CONDUCT R. 3-500 (1997).

15. Comments to Rule 3-500 state, “[A] member will not be disciplined for failing to communicate insignificant or irrelevant information,” thus implying everything of significance and relevance should be communicated to the client in order to fulfill the duty. *Id.*

16. *ABA Standards*, *supra* note 4, at 28.

17. *See infra* Part II.E (discussing representation of a traumatized client in the context of duty of competency).

attorneys to help their client obtain the medical and mental health services they may need, and to understand how the attorney role may change if their client is experiencing a mental health crisis where their decision-making may be impaired.

Attorneys may not disclose confidential information about the client without client consent,<sup>18</sup> and a client in a mental health crisis may not choose to give consent for their attorney to reach out to third parties such as their healthcare providers. That leaves the attorney in a challenging circumstance if they feel their client's diminished capacity is causing the client to make decisions not in their interests. Under current ethics rules in California, if an attorney cannot obtain the client's explicit consent to communicate with third parties for purposes of assisting the client to protect themselves, the attorney's only option is to withdraw, since revealing client secrets is prohibited.<sup>19</sup>

Client capacity issues arise when a client is elderly, a minor or disabled. The *ABA Standards* caution attorneys that a client's limited legal capacity may hinder the formation of an attorney-client relationship. Clients sometimes seek legal services accompanied by a third party (e.g., caregiver or parent) and in some cases, the caregiver may actually be their abuser. The *ABA Standards* remind us that an attorney's duty of loyalty requires that attorneys "refrain from sharing information with or taking direction from third parties claiming to represent the interests of the client, such as parents, adult children, or other caregivers, without the client's express and informed consent."<sup>20</sup>

Under California's DVPA, a minor age twelve and over may apply for restraining orders on his or her own.<sup>21</sup> When representing a teen whose

---

18. California Rule of Professional Conduct 3-100(A) states in pertinent part that "[A] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client." CAL. RULES OF PROF'L CONDUCT R. 3-100(A) (2004).

19. ABA Model Rule 1.14, which is not yet in effect in California but is expected to be in the future, permits attorneys to take certain protective steps if they feel a client with diminished capacity will suffer "physical, financial or other harm" unless protective action is taken. Protective action may include contacting a diagnostician; consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. Attorneys in Rule 1.14 jurisdictions who elect to take protective action must still balance their duty of confidentiality and only reveal client information to the extent necessary to protect the client's interests. Any attorney's decision to take such a step with a client who is a domestic violence victim would need careful consideration, given the tensions between client-centered representation, confidentiality and safety. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_14\\_client\\_with\\_diminished\\_capacity.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity.html).

20. *ABA Standards*, *supra* note 4, at 37.

21. Family Code section 6301(a) states, "An order under this part may be granted to any person described in Section 6211, including a minor pursuant to subdivision (b) of Section



parents may be involved in the formation of the attorney-client relationship, such as paying for the representation, the attorney must remember at all times that the client is the teen; that is whose direction must be taken.<sup>22</sup> When a teen client comes to an attorney's office with a parent or other third party, the attorney should be aware that ethical issues of confidentiality, conflicts of interest and scope immediately arise. Best practice is to determine at the outset who is the client and speak to the client in private to see what he or she wants, explaining the scope of confidentiality and attorney-client privilege when third parties are present. A teen client must explicitly consent for you to speak with his or her parent.<sup>23</sup> Sometimes a parent engages counsel for their teen and wants them to obtain a restraining order, but the teen, for reasons of their own, is reluctant. If the teen client fully understands the available legal options and decides that a restraining order is not what he or she wants, compliance with Rule of Professional Conduct 3.310(F) means it will be up to the teen to decide how his or her parent is informed of the decision, even if the parent is the one paying for the representation. Maintaining confidentiality is always essential unless client consent is obtained.<sup>24</sup>

Finally, attorneys must remain mindful it is the teen client's stated interests that direct the attorney's course of action in civil domestic violence representation, not what the attorney or any other involved adult may think is in the teen's best interests. Note this is different from the ethical duties that attach to court-appointed minor's counsel in California when there is a controversy between the child's parents. In that instance, the court looks to minor's counsel to represent the minor child's best interests and, if the child desires, to also convey the minor child's stated interests to the court.<sup>25</sup>

---

372 of the Code of Civil Procedure." Subdivision (b)(1) of that code section specifically permits minors twelve years of age or older to appear in court without a guardian, counsel, or guardian *ad litem*, for the purpose of requesting or opposing a request for restraining orders to prevent abuse, harassment or violence under several statutory schemes. CAL. FAM. CODE § 6301 (West 2012).

22. California Rule of Professional Conduct 3-310(F) states, in pertinent part, that "a member shall not accept compensation for representing a client from one other than the client unless: (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and (2) Information relating to representation of the client is protected as required by Business and Professions Code §6068(e)." CAL. RULES OF PROF'L CONDUCT R 3-310(F) (2003).

23. CAL. RULES OF PROF'L CONDUCT R 3-100(A).

24. CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2012).

25. California Rule of Court 5.242(j) states, "Counsel is charged with the representation of the child's best interest. The role of the child's counsel is to gather evidence that bears on the best interest of the child and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel must present the child's wishes to the court." CAL. R. CT. 5.242(j) (2012), *available at* [http://www.courts.ca.gov/documents/title\\_5.pdf](http://www.courts.ca.gov/documents/title_5.pdf).

#### D. DUTY OF CONFIDENTIALITY

The attorney's duty of confidentiality is near sacrosanct. Unlike many other states, California has only one narrow permissive exception to the duty to keep a client's confidences.<sup>26</sup> It is common that a client will be receiving services from a DV counselor or advocate while at the same time working with an attorney. Nonlawyer domestic violence resources are incredibly helpful to victims, and attorneys often partner successfully with DV advocates to jointly assist their mutual client. Coordinating with other professionals who assist the client is actually suggested in the *ABA Standards*, as a way to prevent undue stress on the client and facilitate the attorney-client relationship.<sup>27</sup> But attorneys must obtain client consent before sharing information with other professionals.

Many sources of information exist that can be of great help during representation of a client. In Santa Clara County, the District Attorney's victim advocate will provide information about the status of any criminal domestic violence case against the client's partner. To access this information, an attorney must obtain client consent first. An attorney must remember the victim advocate works for the District Attorney and may be bound to turn over to defense counsel information obtained in any conversation concerning the victim. For that reason, I do not give client address information unless authorized by the client. The amount of information the client wants an attorney to share on her behalf with any third party is best determined by the client, after a careful explanation of the risks and rewards of disclosing information.

Certain sources of assistance may be very helpful in cases of extreme high lethality—in those instances I ask my client to permit me to share her confidential information in order to advocate directly for her safety. This may mean reaching out the District Attorney, Probation or local law enforcement. Appropriate use of these law enforcement resources can help a client stay safe.

Similarly, it may be second nature to advise a client to seek medical treatment for injuries, obtain supportive therapy or work on safety planning with a community-based DV agency. When suggesting those resources an attorney should inform a client, whether adult or teen, that certain professionals are mandated by law to report abuse to law enforcement. This is an opportunity to distinguish your duty of confidentiality versus that of mandated child abuse reporters, who by law must disclose child abuse to

---

26. Business and Professions Code section 6068(e)(2) states, "Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." CAL. BUS. & PROF. CODE § 6068(e)(2) (West 2012).

27. *ABA Standards*, *supra* note 4, at 38.

child welfare authorities.<sup>28</sup> Clients should also know that health care professionals who provide them with medical treatment for injuries are mandated to report injuries due to domestic violence to law enforcement.<sup>29</sup>

As stated above in Part II.C “Issues of Client Capacity,” many clients come to meet their attorney with a third party present; this may be a double-edged sword. Having a third party providing emotional support to a client can be beneficial, but the presence of a non-client destroys privilege, though the attorney’s duty of confidentiality remains.<sup>30</sup> Attorneys should ensure that clients fully understand this before they consent to have a third party present. Attorneys also need to observe carefully and guard against any third party giving the client legal advice, applying coercive pressure or otherwise interfering in the attorney client relationship.

#### E. DUTY OF COMPETENCY

The duty of competency for a DV attorney requires more than knowledge of substantive law such as civil restraining order statutes, though that is certainly the starting point.<sup>31</sup> Competency must include an understanding of domestic violence. DV is widely understood to be about one partner in an intimate partner relationship maintaining a pattern of power and control over the other partner by utilizing any number of abusive behaviors, including physical, sexual, verbal, emotional, and

---

28. CAL. PENAL CODE § 11166 (West 2012).

29. Under California Penal Code section 11160(a), “Any health practitioner employed in a health facility, clinic, physician’s office, local or state public health department, or a clinic or other type of facility operated by a local or state public health department who, in his or her professional capacity or within the scope of his or her employment, provides medical services for a physical condition to a patient whom he or she knows or reasonably suspects is a person described as follows, shall immediately make a report in accordance with subdivision (b): (1) Any person suffering from any wound or other physical injury inflicted by his or her own act or inflicted by another where the injury is by means of a firearm, (2) Any person suffering from any wound or other physical injury inflicted upon the person where the injury is the result of assaultive or abusive conduct.” CAL. PENAL CODE § 11160(a) (West 2012).

30. Pursuant to California Evidence Code section 952, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. CAL. EVID. CODE § 952 (West 2012).

31. *ABA Standards*, Part III.A.1 states, “Before representing a client in a civil protection order case, the lawyer should have competent knowledge of the civil protection order laws in the relevant jurisdiction(s).” *ABA Standards*, *supra* note 4, at 3. One threshold issue in representation is whether the client and her abuser meet the requisite relationship requirement in the jurisdiction, e.g., married or formerly married; dating or formerly dating; cohabitant; have a child together; blood relative or related by marriage. California’s DVPA sets out the relationship requirement in Family Code section 6211. CAL. FAM. CODE § 6211 (West 2012).

psychological abuse to control, coerce, degrade or isolate the other.<sup>32</sup> This definition is an important contextual distinction beyond the statutory definitions of abuse under California criminal and civil laws.<sup>33</sup>

A contextual understanding of the constellation of behaviors that comprise abuse goes hand in hand with the attorney's need to understand differential assessment of domestic violence, since not all behavior is restrainable abuse, not all abuse is battering and interventions to remediate abuse depend on accurate assessment of the abusive conduct, including the intent of the abuser and the impact of the conduct on the victim.<sup>34</sup> In California, a permanent restraining order may issue in each of the following scenarios:

- after one physical altercation that caused a minor injury;
- after years of verbal and emotional abuse that never included physical violence or threat of physical violence;
- after one parent threatens to abduct the children and report the other parent to immigration authorities, causing the immigrant parent great fear; or
- after a "bad breakup" that included stalking conduct followed by dozens of unwanted text messages pleading for reconciliation.

Each example may meet the burden to obtain permanent orders<sup>35</sup> lasting up to five years, but each example is different in its nature,

---

32. *Domestic Violence*, WOMENSLAW.ORG, [http://womenslaw.org/simple.php?sitemap\\_id=39](http://womenslaw.org/simple.php?sitemap_id=39) (last updated June 21, 2012).

33. Under California Penal Code section 13700, "abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another. "Domestic violence" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. CAL. PENAL CODE § 13700 (West 2012). Under California Family Code section 6203, "abuse" means any of the following: (a) Intentionally or recklessly to cause or attempt to cause bodily injury, (b) Sexual assault, (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another, (d) To engage in any behavior that has been or could be enjoined pursuant to section 6320. Note that the Family Code definition of abuse is much broader than the Penal Code, as section 6320 includes conduct such as molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, making annoying telephone calls as described in section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party. CAL. FAM. CODE § 6203 (West 2012).

34. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 477 (2008) (discussing the departure from a one size fits all approach to domestic violence). Joan B. Kelly and Michael P. Johnson have done a great deal to bring clarity to conflicting data regarding domestic violence and the fact that it is not a "one size fits all" phenomenon.

35. Under the DVPA, "An order may be issued under this part, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit or, if necessary, an affidavit and any additional information provided to the court pursuant to Section 6306,

motivation, severity and impact on the victim. Differential assessment helps tailor interventions to remediate abusive conduct on a case by case basis.

Attorneys must also recognize the many crossover legal issues that arise in a domestic violence matter. These cases may simultaneously implicate family, criminal, immigration, dependency, probate, bankruptcy, employment, consumer, housing or tort law. Few attorneys are qualified to advise on all possible areas. Working with a DV client means you should recognize crossover legal issues and either provide competent legal advice or knowledgeable legal information, then refer the client accordingly.<sup>36</sup>

There is an extremely common crossover between criminal law and family law DV matters. Generally, a family court restraining order matter will not be heard until after the conclusion of any criminal domestic violence prosecution concerning the same parties. This enables a defendant to avoid making incriminating statements in family court while their criminal matter is pending. Concurrent criminal and family matters may fuel an abuser's aggressive defense of criminal charges, in order to prevent the negative impact a criminal conviction may have on child custody.<sup>37</sup> Victims may be particularly reluctant to testify in criminal court and may be under intense pressure from the defendant or family members to request the District Attorney drops the charges or to recant their allegations. These victims need a great deal of support and safety planning to take them through these court processes, as well as an understanding that a criminal conviction for domestic violence will result in a number of consequences that should be helpful to the victim and the family, including the issuance of Criminal Protective Orders that prohibit the possession or ownership of

---

shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." CAL. FAM. CODE § 6300 (West 2012). The burden of proof to obtain a restraining order is preponderance of the evidence. CAL. EV. CODE § 115 (West 2012).

36. See *ABA Standards*, Part III.A.2, which states, "The lawyer should screen for related legal issues arising from the incidence of domestic violence, sexual assault or stalking. If the lawyer is not competent or available to represent the client in related matters, the lawyer has a duty to refer the client to competent counsel." *ABA Standards*, *supra* note 4, at 12.

37. California Family Code section 3044(a) states, "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence." CAL. FAM. CODE § 3044(a) (West 2012). Under section 3044(d)(1), the requirement of a finding by the court "shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code." CAL. FAM. CODE § 3044(d)(1) (West 2012).

firearms or ammunition,<sup>38</sup> probation oversight of the defendant; and perhaps most importantly, mandatory treatment in the form of a fifty-two week Batterer's Intervention program.<sup>39</sup> Criminal convictions that do not include a grant of probation may still include Criminal Protective Orders.<sup>40</sup>

The attorney's duty of competency requires awareness of the potent mental health dynamics affecting all family members, especially victims. Attorneys require specialized training to understand the nuances of domestic violence from a mental health perspective, including the valid reasons that victims of domestic violence are often reluctant to leave their abusers, to report crimes, or to seek protection, and the way these decisions render them physically, emotionally, and legally vulnerable. Attorneys also need understanding of the impact of abuse on children and a degree of child development understanding in order to assist their teen and adult clients with advice regarding safe parenting plans. There is no guarantee that the mental health professionals involved in the case, including private and court-based child custody evaluators, will have a sophisticated understanding of domestic violence, even though licensing requirements mandate substantial training.<sup>41</sup>

Similarly, there is no guarantee judicial officers will have sophisticated understanding of domestic violence dynamics, statutes or precedents. A review of the limited number of published appellate cases construing the DVPA reveals errors made by judges who lacked requisite knowledge.<sup>42</sup> It must be said that domestic violence calendars are extremely demanding for bench officers, and no judicial officer wants to be the one who minimizes abuse, denies a restraining order and tragic consequences later ensue.

---

38. See CAL. PENAL CODE §§ 136.2(d)(1)–(3), 1203.097(a)(2) (West 2012).

39. See CAL. PENAL CODE § 1203.097(a) (West 2012). This section mandates a minimum of three years probation, some of which is formal and some of which is summary or "court" probation. *Id.* The formal probation period includes court reviews, the defendant having a probation officer, and the victim having the ability to contact probation to reports violations. *Id.* All of this is oversight that can increase victim safety.

40. See CAL. PENAL CODE § 136.2(i) (West 2012).

41. See CAL. R. CT. 5.230(d) (2005).

42. In *Quintana v. Guijosa*, 107 Cal. App. 4th 1077, 1080 (2003), a restraining order detailing severe physical abuse was denied when the court chose to focus not on the abuse but on the fact the Petitioner's children were still in Mexico. In *Monterroso v. Moran*, 135 Cal. App. 4th 732, 735 (2006), a self-represented Spanish-speaking petitioner alleged severe physical abuse by her husband, who was represented by counsel. The attorney informed the court the parties agreed to mutual restraining orders as a solution. *Id.* at 736. Despite the fact a criminal matter was pending against Respondent, and Family Code section 6305 prohibits the issuance of mutual orders unless both parties make written application and the court makes specific findings that both parties acted as aggressors, the trial judge asked the victim if she would agree to a mutual order, which she did. *Id.* In *Marriage of Nadkarni*, 173 Cal. App. 4th 1483, 1489 (2009), a victim applied for DVPA protection related to cyberstalking by her former husband, who had a prior criminal conviction for abusing her. The trial judge dismissed her case without a hearing, stating, "I think the complaint of conduct may very well be illegal, but I don't think it rises to the level of conduct that is amenable to the Domestic Violence Prevention Act." *Id.* at 1493.

Judicial training is vitally important, but attorneys can assist bench officers through competent presentation of allegations and evidence, and persuasive argument that educates on the need for orders, the risks of domestic violence, what conduct constitutes restrainable abuse, the fact that abuse need not include physical harm, the low burden to obtain protection, and the mandatory statutory considerations that must be part of the decision to grant or deny orders.

Victims of domestic violence may be traumatized as a result of ongoing or severe abuse, and this may affect how they present in court. Many have problems with remembering details. Many are ambivalent; they obtain temporary orders but do not want to obtain permanent orders. The stress of the court process or their proximity to their abuser while in the court process may “trigger” an extreme range of reactions, from “numbing” to outbursts. Their chaotic lives may make accessing the legal system problematic. Some victims even use violence reactively, and may be assessed to be a perpetrator of violence as a result. A trauma-informed perspective is necessary for attorneys and enables greater sensitivity and understanding of the way trauma has impacted their clients.<sup>43</sup> Understanding trauma helps an attorney effectively assist clients and their children. It provides a framework for explaining client behavior due to trauma to judges and mental health professionals who may be investigating custody issues. Understanding trauma also assists attorneys as they advocate for necessary services for our clients and their children, as well as visitation provisions that provide safe access. Understanding the challenges of trauma helps attorneys respond to clients appropriately and with sensitivity.

#### 1. Cultural Competency

A client’s culture may be a potent factor preventing a victim from leaving an abusive relationship. Thus, cultural competency is an important component of attorney competency. A culturally competent attorney utilizes tools and training to interact with his or her client in a way that is non-judgmental, respectful, and that avoids stereotypes. Cultural competence allows deeper understanding of the client and the client’s perspective, which goes to credibility, comprehension of advice, and understanding of the legal process sufficient to participate and assert their rights. Showing respect for culture facilitates building rapport and trust with the attorney, while knowledge of a client’s culture helps attorneys avoid cultural missteps.<sup>44</sup> The work of Professors Susan Bryant and Jean

---

43. *ABA Standards*, Part III.E.2 states, “Lawyers should be sensitive to the effects of trauma in their clients, and aware of the effects of vicarious trauma on themselves and their staff.” *ABA Standards*, *supra* note 4, at 34.

44. *ABA Standards*, Part III.C states, “The lawyer should be aware of the culture of the client and of how violence is understood within that culture. In particular, the lawyer should

Koh Peters is bringing cultural competence into today's law school curriculum.<sup>45</sup> Cultural competency is an important skill for law students to recognize and develop early in their careers, and is a critically important tool for competent domestic violence practice. We all must recognize that culture is ever-present in attorney-client relationships, both the client's culture and our own.

As a new practitioner, I defined successful outcomes for my clients in restraining order terms. How long was the order duration? How far was the stay away distance? Was "no contact" ordered? Was supervised visitation ordered? I believed imposing maximum separation between the abuser and the victim and children were safest and best. But for many of my Latina clients, such restraining orders were in direct conflict with their cultural identity as wife and mother and their duty to care for and keep their families together. I quickly learned a successful outcome must be defined in terms of what the client wants, and understanding the client's cultural perspective was crucial to achieving that outcome.

#### F. REPRESENTING THE ACCUSED

Civil attorneys representing those accused of domestic violence must be mindful that perpetrators of domestic violence often deny or minimize their abusive conduct, both to their attorneys and to the court. Attorneys defending alleged perpetrators are often caught between their duty to advocate for their client and the ethical struggle to avoid being a tool of litigation abuse wielded by a perpetrator. Representing alleged abusers requires domestic violence training as much as representing a victim does. Sometimes the alleged abuser is actually the true victim who simply lost the "race to the courthouse." An abuser may manufacture false allegations against their victim. Since restraining orders may be issued on the basis of *ex parte* applications to the court, abusers sometimes misuse the DVPA to obtain orders against the true victim.

It is challenging to represent a client accused of domestic violence who claims he or she is innocent. I often remind the attorneys and law students I mentor that they are not the finder of fact. That is the province of the court. Attorneys need not take up their client's position as one of "fact." Rather, this is their client's experience, the story they wish to tell, their version of events. I use those words when I negotiate with opposing counsel and when I advocate to the court. I also urge attorneys and law students to "believe your client until you have reason to believe otherwise." Factors that may cause you to believe otherwise include: incontrovertible

---

understand how the culture of the client may affect client-lawyer communication and trust, identification and presentation of evidence, and remedy selection. *ABA Standards*, *supra* note 4, at 26.

45. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33, 34 (2001) (discussing how to improve cross-cultural competence).



evidence contradicting your client's version of events; criminal history of past violence; refusal to comply with court orders; documentary evidence of abuse to support what the other side alleges; insistence on aggressive litigation for frivolous, embarrassing or destructive reasons; or, anything that gives rise to a major loss of client credibility.

Recognizing these factors helps guide how representation may proceed in light of information that will become known to the court, e.g., "I understand that you deny all allegations of domestic violence that have been made against you. The problem is that your recent criminal history for abuse against a former partner is a fact that will be known to the judge and under law, must be considered in this case. The victim also produces a photo of an injury she says was caused by you. Your denial may make you appear non-credible under these circumstances, and your desire to 'sling mud' at the victim does not help you respond to her allegations. It rather helps prove her point that you are an abuser. I suggest we consider other possible options."

Representing clients who deny the domestic violence allegations against them is also challenging due to the fact that the burden to obtain a civil restraining order is low. Under California's DVPA, the party seeking a restraining order must only show by a preponderance of evidence that abuse has occurred.<sup>46</sup> This "more likely than not" standard can be hard to defeat, especially in a "he said/she said" situation.

#### G. SAFETY AS AN ISSUE OF ATTORNEY COMPETENCY

Heightened attorney duties arise relative to the safety of victims and children. It is well understood that domestic violence matters can be extremely dangerous, especially as victims access legal remedies and other services in order to flee abuse. Attorneys must understand the importance of prompt firearms relinquishment, the importance of the client obtaining safety planning and the issues of risk to children.

High lethality cases are particularly challenging for attorneys. These cases may possess potent "red flags" including stalking; prior threats to kill;<sup>47</sup> threats of suicide or self-harm; attempted strangulation; deadly weapons in the home; kidnapping or false imprisonment attempts; untreated or undiagnosed mental health issues; physical abuse involving types of violence outside the norm (e.g. tying up, inflicting burn injuries); and pet abuse. Attorneys must pay attention when their instincts say, "This

---

46. California Evidence Code section 115 states, in pertinent part, that "except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." CAL. EVID. CODE § 115.

47. Threats to kill are especially serious, because while not all those who threaten will kill, research indicates the majority of femicides included prior threats to kill. See Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/pdf/0931089.pdf>.

case is dangerous.” Familiarizing oneself with lethality assessment tools may be helpful to an attorney, since the questions are so comprehensive and the client’s answers provide the attorney a more complete picture of the abuse dynamic the client faces.<sup>48</sup>

Attorneys bear special responsibilities for client safety at all times, but particularly at times of heightened danger and possible lethality. This means ensuring the client obtains comprehensive safety planning, informing the client how to effectively enforce orders of protection and treating the court-ordered relinquishment of firearms as a matter of life and death.<sup>49</sup>

Issues of risk to children can be particularly challenging. Some victims must make the difficult calculation whether it may be safer to return to the abuser than it is to flee with the children at this time. It is well known that leaving is a time of increased danger for victims. However, returning to the abuser, especially when children are involved, places the victim in a situation where her choice may actually be endangering her children. This tension is one of the most challenging for DV attorneys, especially in high lethality cases. Generally, attorneys should defer to the client’s judgment on what will be her safest course; however, some victims may minimize the danger. This is where working with professionals, including domestic violence advocates or law enforcement, may be beneficial, especially in cases where you believe high lethality risk factors are present. It should be mentioned that the attorney’s safety is always a factor in domestic violence representation, and particularly so in any case with potential for high lethality.<sup>50</sup> High lethality cases are extremely challenging for attorneys because domestic violence can result in serious injury or even death. Nationally, between 1,000 and 1,600 women are killed at the hands of their abusers each year.<sup>51</sup> In 2008, there were 113 domestic violence fatalities in California alone, accounting for 5% of all homicides in the state. Of these fatalities, 88% of the victims were women.<sup>52</sup> These sobering statistics

---

48. Jacquelyn Campbell’s Danger Assessment is an evidence-based tool used nationally by healthcare professionals, law enforcement and domestic violence advocates to help determine which victims of domestic violence are at highest risk of being killed by their partners. DANGER ASSESSMENT, <http://www.dangerassessment.org> (last visited Sept. 11, 2012).

49. *ABA Standards*, Part III.E.1 states, “The lawyer should ensure that comprehensive lethality assessment and safety planning occur with the client.” *ABA Standards*, *supra* note 4, at 33.

50. *See infra* note 64.

51. James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the U.S.: Intimate Homicide*, BUREAU OF JUSTICE STATISTICS (2005), <http://bjs.ojp.usdoj.gov/content/homicide/intimates.cfm>.

52. California Department of Justice, *HOMICIDE IN CALIFORNIA 2008*, at 20, 70 (Mar. 2010), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/homicide/hm08/preface.pdf>.

provide further information about attorney professional responsibility as we review the tragedy of domestic violence related deaths.

### III. DEATH REVIEW AND PROFESSIONAL RESPONSIBILITY

My participation in Santa Clara County's Death Review Team helps illuminate many of the professional responsibility issues discussed herein.

In 1995, all California counties were statutorily authorized to establish a Domestic Violence Death Review Team. The goal of a Death Review Team is "to ensure that incidents of domestic violence and abuse are recognized and that agency involvement is reviewed to develop recommendations for policies and protocols for community prevention and intervention initiatives to reduce and eradicate the incidence of domestic violence."<sup>53</sup> Part III discusses local findings and offers some specific lessons they provide to domestic violence practitioners.

#### A. FINDINGS FROM SANTA CLARA COUNTY'S 2011 DEATH REVIEW REPORT

Santa Clara County's 2011 Final Death Review Report<sup>54</sup> reaffirms much of what was already known—that no one is immune from domestic violence. Lethal domestic violence can affect the wealthy and middle class as well as the indigent. It affects young and old. It can strike any ethnic group as well as heterosexual or same sex couples. While the great majority of perpetrators are male, women also perpetrate lethal violence.

Ten incidents took place in Santa Clara County in 2011, resulting in sixteen domestic violence-related deaths.<sup>55</sup> Eleven deaths resulted from gunshots; three from stabbings; one from physical beating and one from use of a machete.<sup>56</sup> Disturbingly, murders were accompanied by the suicide of perpetrators in five of the ten lethal incidents that took place in 2011.<sup>57</sup>

- In one case, the perpetrator murdered his adult son then committed suicide, using a firearm that should have been relinquished under a recently issued Domestic Violence Prevention Act Temporary Restraining Order. The killings took place the day before the husband and wife's first hearing date in family court. The

---

53. See CAL. PENAL CODE § 11163.3.

54. SANTA CLARA COUNTY DOMESTIC VIOLENCE COUNSEL, DEATH REVIEW COMMITTEE FINAL REPORT (2011), <http://www.sccgov.org/sites/owp/Domestic%20Violence%20Council/Domestic%20Violence%20Reports/Documents/Death%20Review%20Reports/Death%20Review%20Report%202011.pdf> (last visited Sept. 2, 2012) [hereinafter DEATH REVIEW REPORT].

55. *Id.* at 5.

56. *Id.* at 8.

57. *Id.*

- perpetrator made sure the family court papers would be found, prominently on display, before he killed his son and himself;<sup>58</sup>
- Another murder-suicide involved a sixty-six year old man who had recently filed bankruptcy. He shot his wife in the head, and then killed himself. There was no prior history of domestic violence in this family;<sup>59</sup>
  - Another murder-suicide occurred shortly after a wife had divorce papers served on her husband. She was preparing to move out of the home when her husband bludgeoned her to death then shot himself;<sup>60</sup>
  - A double murder-suicide occurred when a husband suspected his wife was having an affair. He waited for her in a university parking lot, shot her and a school friend at point blank range, then killed himself;<sup>61</sup>
  - In another murder-suicide, the perpetrator was a local law enforcement officer. Newspaper accounts indicated police were previously called to the home in March 2007, after the victim alleged the officer had hit a stepson while “in a rage.” Police reports indicated she did not want further police action taken;<sup>62</sup> and
  - Another death occurred as a result of domestic violence between a lesbian couple who married during the window when same sex marriage was legal in California. The couple was having problems and the perpetrator knew that her wife intended to end the relationship. The perpetrator went to her mother-in-law's home and killed her mother-in-law using a machete.<sup>63</sup>

#### B. LESSONS FOR PRACTITIONERS

These tragic deaths are disturbing on a number of levels, but they contain important professional responsibility lessons for Family Law practitioners and other legal professionals.

Several of these deaths validated the well-understood risk factor that the potential for lethal violence increases when a relationship is or may be ending. Much of Family Law practice occurs as parties separate and our work is designed to legally impose separation between parties. Often separation is desired by only one of the parties, thus creating an “engine” that heightens conflict. Attorneys should remember that domestic violence, while not always acknowledged or reported, still exists in a high number of

---

58. DEATH REVIEW REPORT, *supra* note 54, at 6.

59. *Id.*

60. *Id.*

61. *Id.*

62. Lori Preuitt, *Veteran of SJPD Kills Wife, Self: Police*, NBC BAY AREA (Nov. 28, 2011, 3:35 PM), <http://www.nbcbayarea.com/news/local/Veteran-of-SJPD-Kills-Wife-Self-Cops-134632498.html>.

63. DEATH REVIEW REPORT, *supra* note 54, at 7.

cases. Therefore, it is part of the ethical duty of competency that when handling any Family Law case (both DV and non-DV), attorneys find appropriate ways to inform clients about the heightened risk factors for violence that may exist at times of separation and high conflict.<sup>64</sup> For example, attorneys may be asked to advise on the wisdom of both parties remaining together in the marital home after a dissolution has commenced, since (1) it may be economically challenging to establish a second residence, and (2) neither parent wishes to leave the home if the children continue to reside there. In such cases, it would be important for counsel to ensure appropriate screening for domestic violence and advise clients about the potential for conflict or violence that could arise as a result of cohabiting when it is clear the relationship is ending.<sup>65</sup>

The murder-suicide that occurred during bankruptcy proceedings, as discussed above, suggests that legal professionals who observe a client experiencing tremendous financial pressure may do well to advise supportive mental health counseling for that client, especially if they see signs a client is unable to cope with the extreme pressure. Recognizing when a client is “decompensating” (falling apart), knowing what to do about it and how it affects the attorney-client relationship are issues of attorney competency. When the California Supreme Court approves new ethics rules for attorneys and proposed Rule 1.14 finally goes into effect, practitioners will have additional ethics guidance for dealing with clients with diminished capacity.<sup>66</sup>

The murder-suicide that occurred when a temporary restraining order had just gone into effect, as discussed above, highlights the attorney’s duty to ensure any client who is the restrained party must comply with firearms relinquishment requirements immediately. It also highlights that if an attorney for a protected party has not seen proof of proper relinquishment, this issue must be a priority issue until the firearm is surrendered. That may mean repeated calls to opposing counsel or the opposing party to insist upon compliance; filing an *ex parte* request to come before the court and

---

64. In 2011, the Family Law community in Fresno was shocked and saddened by the murder of prominent attorney Judith Soley, who was gunned down by her client’s estranged husband in the parking lot of a restaurant, just hours after they were in court. Jim Williamson then chased his wife Sandy into the restaurant, killed her, and later turned the gun on himself in a standoff with law enforcement. See Corin Hoggard & Gene Haagenon, *Bass Lake Double Murder-Suicide Prompts Protection Concerns*, ABC LOCAL (Feb. 17, 2011), <http://abclocal.go.com/kfsn/story?section=news/local&id=7967780>.

65. The ABA’s Commission on Domestic Violence created a helpful free tool for screening clients for domestic violence. COMM’N ON DOMESTIC VIOLENCE, AM. BAR ASS’N, TOOLS FOR ATTORNEYS TO SCREEN FOR DOMESTIC VIOLENCE (2005), available at <http://www.americanbar.org/content/dam/aba/migrated/domviol/screeningtoolcdv.pdf>.

66. *Proposed Rules of Professional Conduct*, STATE BAR OF CAL., <http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx> (last visited Sept. 11, 2012); BD. OF GOVERNORS, STATE BAR OF CAL., PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT 69–71 (July 23–24, 2010), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000007703.pdf>.

alert the judge about the lack of compliance; or suggesting that the client notify local law enforcement that the restrained party still possesses a weapon in violation of the current restraining order in effect.

In response to this tragedy, law enforcement agencies in Santa Clara County quickly agreed to change local protocols and now ask individuals whom they serve with restraining orders to voluntarily surrender their firearms and weapons immediately, rather than do so within statutorily required twenty-four hours. Additionally, the Santa Clara District Attorney worked with State Senator Elaine Alquist to create legislation designed to strengthen existing firearms relinquishment statutes.<sup>67</sup> Attorneys who handle matters that involve firearms relinquishment issues must remember that the majority of domestic violence-related deaths are caused by firearms and that the safety of all individuals in a family may depend on the prompt removal of these deadly weapons.

The 2011 murder-suicide involving a police officer as perpetrator, as discussed above, will be a particularly challenging case to review. Officer-perpetrated domestic violence is a distinct and dangerous subset of domestic violence. Research shows that spouses of law enforcement are often at high risk for domestic violence for several reasons.<sup>68</sup> First, they believe they have no safe avenues to report abuse; the spouse of an officer is unlikely to call 911 to make a report to her partner's coworkers. Second, abusers who are law enforcement professionals can be extremely dangerous, by virtue of their professional training. "Batterers in blue" know how to control a situation using their training in "command presence;" they know how to interrogate, intimidate and surveil. They usually know the location of domestic violence shelters. They possess many weapons on the job and often bring those weapons home.<sup>69</sup> Finally,

---

67. SB 1433 was signed into law on September 29, 2012. It strengthens existing firearms relinquishment laws by amending Family Code sections 6306 and 6389 and Penal Code section 18250. Courts must now conduct a record search for registered firearms before issuance of a protective order. When a record search shows ownership of a firearm, police officers serving a protective order must now request immediate surrender of the firearm at the time of service of the order. Also, any person ordered to relinquish a firearm must now provide proof of relinquishment within forty-eight hours of service to the law enforcement agency that served the order. 2012 Cal. Legis. Serv. Ch. 765 (S.B. 1433) (West).

68. The National Center for Women and Policing publishes a comprehensive fact sheet on officer-perpetrated domestic violence, available at <http://www.womenandpolicing.org/violenceFS.asp>. For an adaptation of the Duluth, Minn., Domestic Abuse Intervention Project's "power and control wheel," see *Police Perpetrated Domestic Violence*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE (2004), <http://www.idvsa.org/assets/files/policedv.pdf> (describing characteristics of police-perpetrated domestic violence).

69. Diane Wetendorf is a consultant to the Battered Women's Justice Project. Her website contains a variety of resources regarding officer-involved domestic violence. See, e.g., Diane Wetendorf, *Orders of Protection*, ABUSE OF POWER.INFO, [http://www.abuseofpower.info/Legal\\_ProtectiveOrders.htm](http://www.abuseofpower.info/Legal_ProtectiveOrders.htm) (last visited Sept. 11, 2012); DIANE WETENDORF, BATTERED WOMEN'S JUSTICE PROJECT, *WHEN THE BATTERER IS A LAW ENFORCEMENT OFFICER: A GUIDE FOR ADVOCATES* (Feb. 2004), [http://www.abuseofpower.info/Wetendorf\\_AdvGuide.pdf](http://www.abuseofpower.info/Wetendorf_AdvGuide.pdf); Diane Wetendorf, *Police Domestic Violence: A*

spouses or partners of law enforcement officers know that seeking a restraining order or criminal prosecution can jeopardize, if not ruin, an officer's career, because under state and federal law, the issuance of a permanent restraining order or a criminal conviction for domestic violence means the officer must not possess a firearm.<sup>70</sup>

Domestic violence involving a law enforcement officer can be an extremely high-stakes matter, as the 2012 case involving Sheriff Ross Mirkarimi in San Francisco makes abundantly clear.<sup>71</sup> Attorneys must ensure victim clients always have appropriate safety planning resources as well as supportive counseling to assist them in difficult decision-making. It may also be necessary to understand whether local law enforcement protocols for officer-involved DV exist in the county, enabling the spouse of a police officer to safely report abuse. If protocols do not exist, are other safe options available, such as the Independent Police Auditor or making a report to a different law enforcement jurisdiction? Attorneys representing clients in such cases should consider reaching out to mentor attorneys or

---

*Handbook for Victims*, ABUSE OF POWER.INFO (2006), [http://www.abuseofpower.info/Book\\_Index.htm](http://www.abuseofpower.info/Book_Index.htm).

70. A person subject to a qualifying protective order must not possess a firearm. 18 U.S.C. § 922(g)(8) (2006). *See also* CAL. FAM. CODE § 6389(a) (West 2012); CAL. PENAL CODE § 136.2 (West 2012). A person convicted for misdemeanor domestic violence must not possess a firearm. 18 U.S.C. § 922(g)(9) (2006); CAL. PENAL CODE § 12021(c)(1) (West 2012). A person convicted for felony domestic violence must not possess a firearm. 18 U.S.C. § 922(g)(1) (2006); CAL. PENAL CODE § 12021(a)(1) (West 2012). There are no federal exceptions available to law enforcement officers who have been convicted of qualifying domestic violence crimes. State law enables peace officers to petition for exemptions to firearms relinquishment provisions. *See* CAL. FAM. CODE § 6389(h) (West 2012); CAL. PENAL CODE § 12021(c)(2) (West 2012).

71. Newly elected San Francisco Sheriff Ross Mirkarimi was charged with domestic violence days after taking the oath of office, stemming from an incident on New Year's Eve. Julia Probus Sulek, *Suspended S.F. Sheriff Ross Mirkarimi, Reunited with Wife and Son, Makes Last-Ditch Campaign To Save His Job*, SAN JOSE MERCURY NEWS (Oct. 10, 2012 3:43 PM), [http://www.mercurynews.com/bay-area-news/ci\\_21545217/suspended-s-f-sheriff-ross-mirkarimi-reunited-wife](http://www.mercurynews.com/bay-area-news/ci_21545217/suspended-s-f-sheriff-ross-mirkarimi-reunited-wife). His wife, Venezuelan telenovela star Eliana Lopez, was reluctant to participate in the criminal prosecution and repudiated the charges, despite the fact that she asked her neighbor to videotape an injury on her arm she said was caused when her husband grabbed her. *Id.* The criminal case resolved with Sheriff Mirkarimi pleading to one count of misdemeanor false imprisonment and receiving three years of probation, one year of Batterer's Intervention, parenting classes and community service. *SF Supervisors Vote To Reinstate Ross Mirkarimi*, FUTURES WITHOUT VIOLENCE, <http://www.futureswithoutviolence.org/content/features/detail/2171> (last visited Oct. 23, 2012). He refused Mayor Ed Lee's request to resign and was suspended without pay on March 21, 2012. *Ross Mirkarimi, Embattled San Francisco Sheriff, To Keep His Job*, CBS NEWS (Oct. 10, 2012 7:38 AM), [http://www.cbsnews.com/8301-504083\\_162-57529418-504083/ross-mirkarimi-embattled-san-francisco-sheriff-to-keep-his-job](http://www.cbsnews.com/8301-504083_162-57529418-504083/ross-mirkarimi-embattled-san-francisco-sheriff-to-keep-his-job). In August 2012, the San Francisco Ethics Commission determined Mirkarimi's abuse of his wife constituted official misconduct. *Id.* It was then up to the San Francisco Board of Supervisors to determine whether he would keep his job, and nine votes would be needed to oust him. *Id.* In October 2012, Sheriff Mirkarimi was reinstated after only seven members of the Board of Supervisors voted to uphold official misconduct charges. *Id.*

other authorities for guidance in these difficult and potentially dangerous situations.

#### IV. CONCLUSION

In order to provide competent, safe and compassionate representation in civil domestic violence matters, attorneys must learn as much as they can about the complex dynamics of abuse, how our clients are affected by abuse, and the many ways ethical duties are implicated in our representation, especially in those cases where factors indicate the potential for high lethality. These are challenging situations for any attorney, and the potential for injury or even death heightens our responsibilities. The *ABA Standards* provide excellent ethical guidance, which can be further expanded through lessons we learn from reviewing the tragedy of domestic violence-related deaths in Death Review.

Attorneys have an important role to play, both in the court system and in other institutions that respond to domestic violence in the community. Well-informed attorneys enable domestic victims to safely access justice, reduce family conflict, help contain violence, prevent injury and future violations of orders, and perhaps most importantly, assist in healing and the transition from victim to survivor.