

ETHICAL DISCRETION: THE COMPLEXITIES FOR A LAWYER REPORTING A CHILD IN NEED OF PROTECTION

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Everyone has an obligation to report when they have reason to believe that a child is in need of protection, including lawyers—except where that information is protected by solicitor-client privilege. If the information is confidential a lawyer is required to report their suspicion, but a lawyer can only report privileged information pursuant to an exception. In this paper, I examine the future harm exception and the debate about its permissiveness. I consider reporting in the context of three lawyer-client relationships, namely, when the client is (i) the perpetrator, (ii) the other parent or guardian who is also a victim of intimate partner violence, and (iii) the child who is at risk. The overriding consideration throughout is safety. In most cases, if the future harm exception is met, the decision to report will be straight-forward; however, I argue that discretion is helpful where there is family violence or where the lawyer’s safety is at risk too.

Quiconque a des raisons de croire qu’un enfant a besoin de protection est dans l’obligation de signaler la situation. Cette obligation s’applique aussi aux juristes, sauf si l’information entourant la situation est protégée par le secret professionnel. Dans ce cas, le juriste est tenu de signaler son soupçon, mais ne peut communiquer aucun renseignement confidentiel, à moins d’une exception. L’auteure présente sa réflexion sur l’exception relative au préjudice potentiel et le débat autour de la permissivité s’y rattachant. Elle examine trois situations où l’obligation de signaler s’applique à la relation avocat-client, à savoir i) le client est l’agresseur; ii) l’autre parent ou le tuteur est victime de violence conjugale; iii) l’enfant court un risque. Le critère primordial est toujours la sécurité. Dans la plupart des cas, la décision de signaler la situation est simple à prendre quand l’exception relative au

* Thank you to Shelley Kierstead, Jennifer Koshan, Malcolm Mercer, and Amy Salzyn for their thoughtful comments on an earlier version of this paper and thank you to my anonymous peer reviewers for their insightful comments on a previous draft.

This paper is adapted from my Slaw column, see Deanne Sowter, “[A Lawyer’s Duty to \(Sometimes\) Report a Child in Need of Protection](#)” (26 February 2020), online (blog): Slaw <www.slw.ca> [perma.cc/R7BQ-4TAR].

The use of gendered pronouns is not meant to exclude non-binary persons or hide violence in lesbian and gay relationships or that the majority of trans and gender nonconforming adults have experienced IPV. I use gendered pronouns throughout this paper because in addition to child abuse, the paper focuses on IPV which is most often perpetuated against women.

préjudice potentiel s'applique; elle soutient toutefois que la discrétion est chose utile en contexte de violence familiale ou quand il existe aussi un risque pour la sécurité du juriste.

Contents

Introduction	41
1. The Duty to Maintain Client Confidences	45
2. The Duty to Report a Child Who May Be in Need of Protection	48
3. The Future Harm Exception	53
A) The Exception is Discretionary	56
4. Why Would a Lawyer Decide Not to Report?	58
A) Perpetrator	59
B) Other Parent/Guardian (Victim)	61
C) The Child (Victim)	63
Conclusion	65

Introduction

Everyone has an obligation to report when they have reason to believe that a child is in need of protection, including lawyers¹—except where that information is protected by solicitor-client privilege.² If the information is confidential, a lawyer is required to report just like anyone else; but if the information is protected by solicitor-client privilege, a lawyer can only report pursuant to an exception. The future harm exception applies when there is an “imminent” risk of “death or serious bodily harm,”³ narrowly allowing a lawyer to disclose protected information to prevent harm;⁴ however, the exception is discretionary, providing the possibility that a lawyer may choose not to report that a child is in need of protection.

¹ See e.g. *Child, Family and Community Service Act*, RSBC 1996, c 46, s 14(1) [CFCSA]. See generally Pamela C Cross et al, “[What You Don’t Know Can Hurt You: The importance of family violence screening tools for family law practitioners](#)” (February 2018) at 9–10, online (pdf): *Department of Justice* <www.justice.gc.ca> [perma.cc/69WW-8672] [Cross, “Luke’s Place Report”]. See generally Shana Conroy, “[Family violence in Canada: A statistical profile, 2019](#)” (2 March 2021) at 5, 29, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/2DYP-LSHJ] [Conroy, “Family violence in Canada”].

² See e.g. CFCSA, *supra* note 1, s 14(2)(a).

³ *Smith v Jones*, [1999] 1 SCR 455 at para 35, 169 DLR (4th) 385 [Smith].

⁴ See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2019, r 3.3-3 [Model Code].

For the first time, the newly amended federal *Divorce Act* includes family violence⁵ considerations.⁶ The impact of family violence is a factor to be considered in the best interests of the child analysis, including “whether the child is directly or indirectly exposed to the family violence.”⁷ The *Divorce Act* elevates safety concerns to the primary consideration including a “child’s physical, emotional and psychological safety, security and well-being.”⁸ Lawyers are also required to “encourage” their clients to “attempt to resolve” their issue through a “family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.”⁹ The *Divorce Act* does not specify that a family dispute resolution process would be inappropriate where there is family violence, despite submissions by anti-violence and equality advocates for an explicit exemption.¹⁰ However, between the *Divorce Act* and the recent Supreme Court of Canada decision in *Colucci*,¹¹ it is suggested that “complying with this duty requires an assessment by the legal advisor to determine whether family violence is an issue and if there are any significant power imbalances.”¹² In other words, family violence is legally relevant when children are involved, and moreover, lawyers are required to screen their clients for family violence to comply with their statutory obligations;¹³ therefore, perhaps now more than ever, family lawyers may have information that requires them to consider whether a child is in need of protection.

⁵ Family violence is an umbrella term and tends to refer to violence within the family, meaning it includes intimate partner violence, sibling abuse, senior abuse, child abuse, and abuse committed by extended family members.

⁶ *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*].

⁷ *Ibid*, s 16(4)(c). See also Government of Canada, “[The Divorce Act Changes Explained](#)” (1 March 2021) online: *Department of Justice* <www.justice.gc.ca> [perma.cc/N5QW-JT54].

⁸ *Divorce Act*, *supra* note 6, s 16(2).

⁹ *Ibid*, s 7.7(2)(a).

¹⁰ See generally Luke’s Place Support and Resources Centre & National Association of Women and the Law, “[BILL C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act](#)” (2019), online (pdf): *NAWL* <nawl.ca> [perma.cc/6U6F-K3V2].

¹¹ See *Colucci v Colucci*, 2021 SCC 24 at para 69.

¹² The Honourable Donna Martinson & Dr Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)” (June 2021) at 5, online (pdf): *FREDA Centre* <fredacentre.com> [perma.cc/3E2P-RG4A].

¹³ See Deanne Sowter, “[If It Wasn’t Required Before, It Is Now: All Family Lawyers Must Screen for Family Violence](#)” (2 November 2021), online (blog): *Slaw* <slaw.ca> [perma.cc/Q5TN-E5P7].

There is significant overlap between intimate partner violence (“IPV”)¹⁴ and child abuse. A child’s exposure to IPV is typically a type of maltreatment recognized by child protection legislation.¹⁵ This is because exposure to parental conflict and/or IPV can cause “long term emotional and developmental harm to children.”¹⁶ Children who witness parental violence are “more likely to have suffered the most severe forms of physical abuse” themselves,¹⁷ and they are more likely to experience “chronic diseases and disorders” as adults.¹⁸ In 53% of substantiated cases of child maltreatment the primary caregiver was a victim of IPV, and in 14% of cases they were the perpetrator.¹⁹ Moreover, IPV and child maltreatment are both examples of trauma.²⁰ According to Sarah Katz and Deeya Haldar, a “traumatic experience occurs when an individual subjectively experiences a threat to life, bodily integrity or sanity.”²¹ Victims may suffer from PTSD, or complex-PTSD if they suffered “multiple severe and frightening events”.²² People who suffer a traumatic experience may lose

¹⁴ Intimate partner violence includes physical, psychological, financial, and sexual abuse by an intimate partner. Coercive control is a type of intimate partner violence.

¹⁵ See e.g. *CFCSA*, *supra* note 1, ss 13(1)(e)(ii), 13(1.2).

¹⁶ Linda C Neilson, “[Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?](#)” (2018) at 32, 39, online (pdf): *FREDA Centre* <fredacentre.com> [perma.cc/489W-X47J] [Neilson, “Alienation”].

¹⁷ Haley Hrymak & Kim Hawkins, “[Why Can’t Everyone Just Get Along?: How BC’s Family Law System Puts Survivors in Danger](#)” (January 2021) at 38, online (pdf): *Rise Women’s Legal Centre* <womenslegalcentre.ca> [perma.cc/W2NS-X2JM] [Hrymak & Hawkins, “Rise Report”].

¹⁸ Shannon M Monnat & Raeven Faye Chandler, “Long Term Physical Health Consequences of Adverse Childhood Experiences” (2015) 56:4 *Sociological Q* 723 at 724 [Monnat & Chandler, “Long Term Health”]. See also Heather A Turner & Kathleen Kopiec, “Exposure to Interparental Conflict and Psychological Disorder Among Young Adults” (2006) 27:2 *J Family Issues* 131 at 151–53; Marika Morris, “[Acting on Violence Against Women is a Blueprint for Health](#)” (May 2016) at 2, online (pdf): <endvaw.ca> [perma.cc/8LXE-RLS8] [Morris, “Acting”]; Linda C Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed (CanLIIDocs, 2020), ch 3.1.2, 6.2.5, 6.2.6, 6.3, online: *CanLII* <canlii.org/> [perma.cc/9J4Q-KFTX] [Neilson, *Responding*].

¹⁹ See Barbara Fallon et al, “[Ontario Incidence Study of Reported Child Abuse and Neglect—2018: Major Findings](#)” (2020) at 11, online (pdf): *Child Welfare Research Portal* <cwpr.ca> [perma.cc/8LK3-RZUM] [Fallon et al, “Ontario Child Abuse 2018”].

²⁰ Sarah Katz & Deeya Haldar, “The Pedagogy of Trauma-Informed Lawyering” (2016) 22:2 *Clinical L Rev* 359 at 365 [Katz & Haldar, “Trauma-Informed Lawyering”].

²¹ *Ibid* at 364. See also Sarah Katz, “Trauma-Informed Practice: The Future of Child Welfare?” (2019) 28:1 *Widener Commonwealth L Rev* 51.

²² Melanie Randall & Lori Haskell, “Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping” (2013) 36:2 *Dal LJ* 501 at 511 [Randall & Haskell, “Restorative Justice”]. See also Cross, “Luke’s Place Report”, *supra* note 1 at 14; Charlotte Bishop & Vanessa Bettinson, “Evidencing domestic violence”, including behaviour that falls under the new offence of ‘controlling or coercive

their “belief in a just world” and be unable to “trust”, particularly children who are abused by the very people entrusted to care for them and keep them safe.²³

During the first eight months of the COVID-19 pandemic, calls to the police related to child welfare checks were up 17% compared to the same period the previous year, and calls related to domestic disturbances were up 8%.²⁴ In 2018, there were 148,536 child-maltreatment-related investigations in Ontario, and in 6% of them the worker “concluded there was a significant risk of future maltreatment.”²⁵ When maltreatment is substantiated, there may be “child functioning” concerns including depression, anxiety, withdrawal, academic and learning difficulties, ADHD, aggression and conduct issues.²⁶ Adverse childhood experiences such as physical, sexual, and verbal assault have been found to negatively impact the child’s health as an adult.²⁷ Moreover, prolonged childhood abuse “affects brain development, attachment patterns, and the development of self-capacities, most especially affecting regulation skills which are essential to coping with life’s challenges and stresses.”²⁸

It seems unfathomable that anyone would fail to report their suspicion that a child may be in need of protection, especially given a child’s vulnerability and the effects of child maltreatment. Moreover, in some jurisdictions it is an offence to breach the duty.²⁹ However, in this paper, I argue that when the information is protected by solicitor-client privilege, the discretion to disclose is helpful where there is family violence or where the lawyer’s safety is also at risk. In the first part, I provide a brief overview of lawyers’ professional obligations to maintain client confidences,

behaviour” (2018) 22:1 Intl J Evidence & Proof 3 at 11; Emma Williamson, “Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control” (2010) 16:12 Violence Against Women 1412 at 1416; Kristy Candela, “Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes” (2016) 54:1 Fam Ct Rev 112 at 115; Christina M Dardis, Melissa E Dichter & Katherine M Iverson, “Empowerment, PTSD and revictimization among women who have experienced intimate partner violence” (2018) 266 Psychiatry Research 103.

²³ Randall & Haskell, “Restorative Justice”, *supra* note 22 at 514. See also Neilson, “Alienation”, *supra* note 16 at 40.

²⁴ See Conroy, “Family violence in Canada”, *supra* note 1 at 6.

²⁵ Fallon et al, “Ontario Child Abuse 2018”, *supra* note 19 at 7.

²⁶ *Ibid* at 10–11. See also Monnat & Chandler, “Long Term Health”, *supra* note 18.

²⁷ See Monnat & Chandler, *supra* note 18 at 746.

²⁸ Randall & Haskell, “Restorative Justice”, *supra* note 22 at 512.

²⁹ See *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, s 125(5)–(6), being Schedule 1 to the *Supporting Children, Youth and Families Act* [CYFSA]; *CFCSA*, *supra* note 1, s 14(3); *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 4(6) [CYFEA]; *Children and Family Services Act*, SNS 1990, c 5 at ss 23(3)–24(6) [CFSA]; *Children, Youth and Families Act*, SNL 2018, c C-12.3, s 11(9) [CYFA].

followed by an overview of the obligation to report a child who may be in need of protection in Part II. In Part III, I discuss the future harm exception and examine the debate about whether the exception should be mandatory or permissive. Finally, in Part IV, I consider reporting in the context of three lawyer-client relationships, namely, when the client is (i) the perpetrator, (ii) the other parent or guardian who is also a victim of IPV, and (iii) the child who is at risk. The overriding consideration throughout this paper is safety. In most cases, if the future harm exception is met, the decision to report will be straight-forward. However, there are circumstances where there may be another option that takes a broader view of safety while preserving the solicitor-client relationship. In my view, the discretion provided by the exception allows counsel to prioritize safety, often in consultation with her client.

1. The Duty to Maintain Client Confidences

A lawyer must keep her client's confidences indefinitely, and only disclose protected information in the most extraordinary circumstances pursuant to an exception,³⁰ client consent, or waiver.³¹ There is no exception for instances where the ultimate purpose is to determine the best interests of a child.³² The obligation to maintain client confidences springs from the lawyer's duty of loyalty which is grounded in the law governing fiduciaries.³³ A lawyer has an almost unwavering duty to her client's cause, matched only by her duty to the administration of justice. There are two sources of the lawyer's obligation to keep a client's confidences: the common law doctrine of solicitor-client privilege, and the ethical duty of confidentiality found in law societies' codes of professional conduct.³⁴ The distinction between solicitor-client privilege and the duty of confidentiality is crucial for determining whether a lawyer can disclose protected information when a child may be in need of protection; I will briefly discuss each one.

³⁰ Exceptions include the following: innocence at stake exception to solicitor-client privilege; future harm exception; and, in the lawyer's self-defence or to collect legal fees. See generally *R v Brown*, 2002 SCC 32; *Smith*, *supra* note 3; *R v McClure*, 2001 SCC 14 at para 35 [*McClure*]; *Model Code*, *supra* note 4, rs 3.3-1[c], 3.3-3 to 3.3-7.

³¹ See *Model Code*, *supra* note 4, r 3.3-1(a)-(b). See generally Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at 189-256 [Dodek, *SCP*].

³² See *Re TSZK*, 2017 ABPC 270 at paras 45-51 [*TSZK*].

³³ The following duties spring from the duty of loyalty: avoid conflicting interests, commitment to the client's cause, candour, and keeping a client's confidence. See *Model Code*, *supra* note 4, rs 3.2-2, 3.3, 3.4-1[5] to 3.4-1[9]; *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at paras 19-26; *R v Neil*, 2002 SCC 70 at para 16.

³⁴ See e.g. Law Society of Ontario, *Rules of Professional Conduct*, Toronto, ON: LSO, 2019, r 3.3 [RPC].

Solicitor-client privilege began as a rule of evidence but it has evolved into a “quasi-constitutional right”,³⁵ and a principle of fundamental justice under section 7 of the *Charter*.³⁶ The Supreme Court of Canada has described solicitor-client privilege as “one of the most ancient and powerful privileges known to our jurisprudence.”³⁷ Solicitor-client privilege protects communications between the lawyer and client made for the purpose of giving and receiving legal advice.³⁸ Communications made for the purpose of facilitating the commission of a crime or fraud are not protected.³⁹ Solicitor-client privilege protects the full continuum of lawful communications between the lawyer and client, including written and verbal communications as well as demeanor, tone and volume of speech, facial expressions, and gestures.⁴⁰ Communications between third parties and the lawyer are not typically protected (except a lawyer’s agent).⁴¹ Where a lawyer works in multiple capacities (e.g., as in-house counsel) legal advice may be distinguished from other types of advice.⁴² All lawful communications between a family lawyer and her client are protected by solicitor-client privilege.

The ethical duty of confidentiality is distinct from solicitor-client privilege, and it is broader. The duty of confidentiality can be found in professional codes of conduct. The Federation of Law Societies of Canada, *Model Code of Professional Conduct* (“*Model Code*”),⁴³ which is almost mirrored by most provincial and territorial law societies, provides that “a lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship.”⁴⁴ This captures all oral and

³⁵ Dodek, *SCP*, *supra* note 31 at 3, 18–21. The following cases elevated solicitor-client privilege from a rule of evidence to a quasi-constitutional right: *R v Campbell*, [1999] 1 SCR 565 (SCC), 171 DLR (4th) 193; *Lavallee, Rackel & Heintz v Canada (AG)*; *White, Ottenheimer & Baker v Canada (AG)*; *R v Fink*, 2002 SCC 61; *Smith*, *supra* note 3; *McClure*, *supra* note 30.

³⁶ See *McClure*, *supra* note 30 at para 41.

³⁷ *R v National Post*, 2010 SCC 16 at para 39 [*National Post*].

³⁸ See John H Wigmore, *Wigmore on Evidence*, ed by John T McNaughton (Boston: Little Brown, 1961) vol 8, s 2292; *Howley v R*, [1927] SCR 529 at para 11, [1927] DLR 265; Dodek, *SCP*, *supra* note 31 at 48–49.

³⁹ See *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, 141 DLR (3d) 590 [*Descôteaux*]; Dodek, *SCP*, *supra* note 31 at 54.

⁴⁰ See *R v Amsel*, 2017 MBPC 52 at para 27 [*Amsel*]; Dodek, *SCP*, *supra* note 31 at 49–53.

⁴¹ See *Smith*, *supra* note 3 at paras 9–18; Dodek, *SCP*, *supra* note 31 at 38.

⁴² See Dodek, *SCP*, *supra* note 31 at 391–93.

⁴³ See *Model Code*, *supra* note 4.

⁴⁴ *Ibid*, rs 3.3-1 to 3.3-7; Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) at 183 [Woolley, *ULEC*] (the duty of confidentiality

written information and communications between the lawyer and client throughout the solicitor-client relationship.⁴⁵ The duty of confidentiality protects information a lawyer receives about the client from a third party, and it applies regardless of whether others know the information.⁴⁶ In other words, if a client's child divulged information to their parent's lawyer, that information is not privileged, only confidential.

The need for a client to be able to make “full and frank” disclosure to his lawyer so the lawyer can competently represent him, is cited as the purpose of a lawyer's obligation to keep the client's confidences.⁴⁷ The rationale often provided is that a client will not disclose all the relevant facts to his lawyer unless he is “secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed.”⁴⁸ The idea is that a lawyer cannot competently represent a client without all of the information, which a client will not disclose unless he trusts his lawyer to keep it confidential.⁴⁹ Empirical evidence has not supported that claim, however, so the argument may not be as strong as its historical reliance suggests it ought to be.⁵⁰

If a lawyer discloses protected information absent a court order and she is wrong about whether an exception applies, or if she discloses because she thinks it is in the public interest despite no exception permitting the disclosure, she may be held liable. Her client may sue her

likely also excludes communications made for the purpose of committing a crime or fraud).

⁴⁵ See Dodek, *SCP*, *supra* note 31 at 118–19.

⁴⁶ See *Model Code*, *supra* note 4, r 3.3-1[2].

⁴⁷ *Solosky v R*, [1980] 1 SCR 821 at 834, 16 CR (3d) 294. See also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 26; *McClure*, *supra* note 30 at para 33; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9; *ibid*, rs 3.3-1[1], 3.3-3[1]; Adam M Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 *Queen's LJ* 493 at 508–11; Dodek, *SCP*, *supra* note 31 at 7–8. But see William H Simon, “Attorney-Client Confidentiality: A Critical Analysis” (2017) 30:3 *Geo J Leg Ethics* 447 at 449 (trust does not rationalize confidentiality, lawyers can breach it in self-interest re. claiming fees and in self-defence).

⁴⁸ *Smith*, *supra* note 3 at para 35. But see Cross, “Luke's Place Report”, *supra* note 1 at 15.

⁴⁹ See also Wayne N Renke, “Secrets and Lives—The Public Safety Exception to Solicitor Client Privilege: *Smith v Jones*” (1999) 37:4 *Alta L Rev* 1045 at 1053 [Renke, “Secrets and Lives”].

⁵⁰ See Adam M Dodek, “Doing Our Duty: The Case for a Duty of Disclosure to Prevent Death or Serious Harm” (2001) 50 *UNBLJ* 215 at 222 [Dodek, “Duty”]. See also Fred C Zacharias, “Rethinking Confidentiality” (1989) 74:2 *Iowa L Rev* 351 at 364–66; Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 5th ed (Durham, NC: Carolina Academic Press, 2016) at 138–40.

for damages,⁵¹ citing breach of confidentiality⁵² and breach of fiduciary duty.⁵³ The lawyer may also be subject to disciplinary action by her law society for professional misconduct.⁵⁴ That said, Nicholas Bala, Rachel Birnbaum and Lorne Bertrand found that 20% of children's lawyers admitted to having disclosed a "child's secret" to prevent harm to that child.⁵⁵ Their study did not focus on the future harm exception or child protection legislation, so it's possible that the respondents interpreted "harm" broadly; however their findings do suggest lawyers' willingness to disclose a child's confidences in order to do what is perceived to be best for the child.

2. The Duty to Report a Child Who May Be in Need of Protection

Provincial and territorial child protection legislation provides that everyone who has a reasonable suspicion that a child is in need of protection must report it to a child protection agency, or in some provinces, the police.⁵⁶ This obligation also applies to lawyers, except when the information is protected by solicitor-client privilege.⁵⁷ Most people who report a child who may be in need of protection are professionals such as employees in community agencies and schools, health professionals, day care providers, and mental health professionals.⁵⁸ Research does not capture how many

⁵¹ See *Descôteaux*, *supra* note 39 at 871.

⁵² Legal action for breach of confidentiality tends to occur when a client seeks to disqualify a lawyer where there is potential for misuse of confidential information. This occurs more often than a client suing a lawyer for actual misuse of confidential information. See generally Woolley, *ULEC*, *supra* note 44 at 195–98; Brooke MacKenzie, "Explaining Disqualification: An Empirical Review of Motions for the Removal of Counsel" (2020) 45:2 *Queen's L J* 199.

⁵³ See e.g. *Szarfer v Chodos* (1986), 27 DLR (4th) 388 (Ont H Ct J), aff'd [1988] 66 OR (2d) 350 (Ont CA). See generally Alice Woolley, "The lawyer as fiduciary: Defining private law duties in public law relations" (2015) 65:4 *UTLJ* 285.

⁵⁴ See e.g. *Law Society of Upper Canada v A Member*, 2005 CanLII 16408 (Ontario Law Society Tribunal); *Law Society of Upper Canada v Anber*, 2014 ONLSTH 143 (Ontario Law Society Tribunal); *Re McCarthy*, 2016 LSBC 23 (Law Society of British Columbia).

⁵⁵ See Nicholas Bala, Rachel Birnbaum & Lorne Bertrand, "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (2013) 51:4 *Fam Ct Rev* 681 at 692 [Bala, Birnbaum & Bertrand, "Controversy"].

⁵⁶ See e.g. *CYFSA*, *supra* note 29, s 125(1); *CFCSA*, *supra* note 1, s 14; *CYFEA*, *supra* note 29, s 4; *CFSA*, *supra* note 29, ss 23–25; *CYFA*, *supra* note 29, s 11.

⁵⁷ See e.g. *CFCSA*, *supra* note 1, s 14(2)(a).

⁵⁸ See Public Health Agency of Canada, "[Canadian Incidence Study of Reported Child Abuse and Neglect—2008: Major Findings](#)" (2010) at 25–26, online (pdf): *Canadian Child Welfare Research Portal* <cwrrp.ca> [perma.cc/X44C-9NCX] [Public Health Agency

lawyers report; however, they may be represented in two small categories (“other” or “anonymous”).⁵⁹

The Public Health Agency of Canada has tracked five types of maltreatment, namely, physical abuse, sexual abuse, neglect, emotional maltreatment, and exposure to IPV (meaning “direct witness to physical violence, indirect exposure to physical violence, and exposure to emotional violence”).⁶⁰ In 2008 there were 235,842 child-maltreatment-related investigations conducted in Canada; 74% focused on incidents that may have already occurred, and 26% were concerns about a “risk of future maltreatment”.⁶¹ More recently, Ontario statistics show that in 2018 36% of investigations were concerns about a “risk of future maltreatment”⁶² and of the substantiated investigations, the majority involved exposure to IPV (45%).⁶³ Incidents of child maltreatment seem to have increased since the COVID-19 pandemic began,⁶⁴ but by exactly how much is currently unclear.⁶⁵

of Canada, “Canadian Child Abuse 2008”]; Fallon et al, “Ontario Child Abuse 2018”, *supra* note 19 at 28–29.

⁵⁹ See Fallon et al, “Ontario Child Abuse 2018”, *supra* note 19 at 28–29 (other: 3%; anonymous: 4%); Public Health Agency of Canada, “Canadian Child Abuse 2008”, *supra* note 58 at 25–26 (other: 5%; anonymous: 3%).

⁶⁰ See Public Health Agency of Canada, “Canadian Child Abuse 2008”, *supra* note 58 at 30–31 (physical abuse includes shaking, pushing, grabbing, throwing, hitting, punching, kicking, biting, hitting with an object, choking, poisoning, stabbing; sexual abuse includes penetration, attempted penetration, oral sex, fondling, sex talks or images, voyeurism, exhibitionism, exploitation; neglect includes failure to supervise, permitting criminal behaviour, physical neglect, medical or dental neglect, failure to provide psychiatric or psychological treatment, abandonment, educational neglect; emotional maltreatment includes terrorizing or threat of violence, verbal abuse, isolation, confinement, inadequate nurturing or affection, exploiting or corrupting behaviour, exposure to physical violence; exposure to IPV includes direct and indirect exposure to physical abuse, and exposure to emotional abuse).

⁶¹ *Ibid* at 1.

⁶² Fallon et al, “Ontario Child Abuse 2018”, *supra* note 19 at 7 (there were 148,536 child-maltreatment-related investigations).

⁶³ *Ibid* at 35. See also Tara Black et al, “[Intimate Partner Violence Investigations in Ontario in 2018](#)” (April 2020), online (pdf): *Canadian Child Welfare Research Portal* <cwpr.ca> [perma.cc/Q94H-26QS].

⁶⁴ See Conroy, “Family violence in Canada”, *supra* note 1 at 6. See also Jennifer Koshan, Janet Mosher & Wanda Wieggers, “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2020) 57:3 Osgoode Hall LJ 739.

⁶⁵ See Conroy, “Family violence in Canada”, *supra* note 1 at 6; Andrea Gonzalez, Tracie O Afifi & Lil Tonmyr, “[Completing the picture: a proposed framework for child maltreatment surveillance and research in Canada](#)” (27 September 2021), online (pdf): *Canada* <www.canada.ca> [perma.cc/9FTQ-4ZN2].

I reviewed child protection legislation from Ontario,⁶⁶ British Columbia,⁶⁷ Alberta,⁶⁸ Nova Scotia,⁶⁹ and Newfoundland.⁷⁰ The legislation varies in how they define what suggests a child is at risk, but they all include physical, sexual, or emotional harm that has occurred or is likely to occur.⁷¹ The duty to report does not indicate that the reporter must be certain of the harm, or risk of harm, only that they have a “reason to believe”⁷² or a “suspicion” that the child is in need of protection.⁷³

There is overwhelming evidence that children who are exposed to family violence suffer from physical, developmental, and psychological harm.⁷⁴ Where there is coercive control, a child is commonly a tactical pawn in the abuse towards their mother, and may also experience abuse alongside their mother.⁷⁵ Research suggests that coercive control “extends to children in a sizeable proportion of cases.”⁷⁶ A child’s exposure to IPV is typically a type of maltreatment recognized by child protection legislation. That said, none of the legislation I reviewed explicitly included “IPV” or “coercive control” as a specific circumstance, but they typically

⁶⁶ See *CYFSA*, *supra* note 29.

⁶⁷ See *CFCSA*, *supra* note 1.

⁶⁸ See *CYFEA*, *supra* note 29.

⁶⁹ See *CFSA*, *supra* note 29.

⁷⁰ See *CYFA*, *supra* note 29.

⁷¹ See e.g. *CYFSA*, *supra* note 29, s 125(1); *CFCSA*, *supra* note 1, s 13; *CYFEA*, *supra* note 29, ss 1(2)–(3); *CFSA*, *supra* note 29, s 22; *CYFA*, *ibid*, s 10.

⁷² *CFCSA*, *supra* note 1, s 14(1). See also *CYFEA*, *supra* note 29, s 4(1).

⁷³ *CYFSA*, *supra* note 29, s 125(1). See also *Children’s Catholic Aid Society of Metropolitan Toronto v N (J)*, [2000] OJ No 5093, 12 RFL (5th) 278 (Ont Ct J) at para 43 [*Catholic*].

⁷⁴ See generally *LAR v EJ R*, 2014 BCSC 966; *Jackson v Jackson*, [2008] 50 RFL (6th) 149, OJ No 342 (Ont Sup Ct J) at paras 12–24; *Divorce Act*, *supra* note 6, ss 16(3)(j), 16(4); Linda C Neilson & Susan B Boyd, “[Interpreting the new Divorce Act, Rules of Statutory Interpretation & Senate Observations](#)” (8 March 2020) at 6–7, online (pdf): *Women’s Legal Education and Action Fund* <www.leaf.ca> [perma.cc/9XLQ-BZ82]; Peter Jaffe et al, “[Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce](#)” (February 2014) at 14–19, online (pdf): *Department of Justice* <www.justice.gc.ca> [perma.cc/7XZE-Z9DV]; Department of Justice, “[Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act \(Bill C-78 in the 42nd Parliament\)](#)” (29 August 2019) at B, online: *Department of Justice* <www.justice.gc.ca> [perma.cc/CZY2-9WZH]; Monnat & Chandler, “Long Term Health”, *supra* note 18; Morris, “Acting”, *supra* note 18 at 2; Neilson, “Alienation”, *supra* note 16 at 6–7; Neilson, *Responding*, *supra* note 18 at 3.1.2, 6.2.5, 6.2.6, 6.3.

⁷⁵ See Evan Stark & Marianne Hester, “Coercive Control: Update and Review” (2019) 25:1 *Violence Against Women* 81 at 96–98 [Stark & Hester, “Coercive Control”].

⁷⁶ *Ibid* at 96.

incorporated exposure to family violence.⁷⁷ For example, legislation in both British Columbia and Alberta specify “domestic violence”⁷⁸ or “family violence”⁷⁹ as a factor indicating a child is in need of protection. British Columbia specifies that “a child needs protection” when “the child is emotionally harmed by ... living in a situation where there is domestic violence by or towards a person with whom the child resides,”⁸⁰ and that “likelihood of physical harm to a child increases” in those circumstances.⁸¹ Alberta defines “emotional injury” to include both “exposure to family violence” and being subjected to “inappropriate criticism, threats, humiliation, accusations or expectations of or toward the child.”⁸² Both Nova Scotia and Newfoundland legislation specify that a child may be in need of protection if they are “exposed to or made aware of violence,”⁸³ or where they are subjected to “inappropriate criticism, humiliation or expectations.”⁸⁴ Ontario jurisprudence confirms that emotional harm includes harm caused by exposure to IPV.⁸⁵

Child protection legislation requires that if a lawyer has confidential information and a reasonable suspicion that a child is in need of protection, the lawyer must report it.⁸⁶ For example, if a lawyer learns about a situation from a third party the information will be confidential but not privileged, so a lawyer is required to report what she knows. In other words, if a lawyer learns something directly from her client’s child, or her client’s spouse, she is required to report her concern, including any information about past

⁷⁷ Ontario is the only province that does not specify family violence as a reason a child is in need of protection; however, “the police and child protection agencies ... consider spousal violence an important factor in reporting and investigation of cases, and a serious risk factor for emotional harm to a child”, see Berend Hovius, Mary-Jo Maur & Nicholas C Bala, *Family Law: Text, Cases, Materials and Notes*, 9th ed (Toronto: Thomson Reuters, 2017) at 105.

⁷⁸ *CFCSA*, *supra* note 1, ss 13(1)(e)(ii), (1.2).

⁷⁹ *CYFEA*, *supra* note 29, ss 1(3)(a)(ii)(C), (D).

⁸⁰ *CFCSA*, *supra* note 1, s 13(1)(e)(ii).

⁸¹ *Ibid*, s 13(1.2).

⁸² *CYFEA*, *supra* note 29, ss 1(3)(a)(ii)(C), (D).

⁸³ *CFSA*, *supra* note 29, s 22(2)(i). See also *CYFA*, *supra* note 29, s 10.

⁸⁴ *CFSA*, *supra* note 29, s 3(1)(la), 22(2)(f). See also *CYFA*, *supra* note 29, s 10(3)(e).

⁸⁵ Examples of emotional harm include when the child is exposed to a pattern of IPV, and/or where there is a high level of parental conflict, see generally *Windsor-Essex Children’s Aid Society v EW*, 2020 ONCA 682, leave to appeal to SCC refused, 39521 (20 May 2021); *Children’s Aid Society of the Region of Municipality of Waterloo v DB*, 2021 ONSC 5252 at para 163; *Children’s Aid Society of Oxford County v EMT*, 2019 ONCJ 767 at paras 26–27; *Family Children’s Services of St Thomas and Elgin v MM*, 2019 ONSC 4649 at para 64; *Children’s Aid Society of Toronto v RS*, 2019 ONCJ 866 at para 108.

⁸⁶ See *CYFSA*, *supra* note 29, s 125(10); *CFCSA*, *supra* note 1, s 14(2)(b); *CYFEA*, *supra* note 29, s 4(2); *CFSA*, *supra* note 29, ss 23(1), 24(3), 25A; *CYFA*, *supra* note 29, s 11(7).

abuse. Similarly, government lawyers and in-house counsel may learn of a situation involving a child in the course of their employment. The information would be confidential but not privileged if it has nothing to do with the provision of legal advice, and so a lawyer must report it.

Child protection legislation is typically clear that the duty to report “does not apply to information that is privileged as a result of a solicitor-client relationship.”⁸⁷ The Ontario legislation does not “abrogate” solicitor-client privilege.⁸⁸ However, Newfoundland requires that a lawyer report regardless of whether the information is confidential or privileged.⁸⁹ Where the legislation does not impose a duty, reporting requires that an exception to privilege be met. Justice Zuker called this tension between the duty to report and solicitor-client privilege an “apparent conflict”.⁹⁰ Our society recognizes the “pernicious effects of child abuse” and therefore imposes a statutory duty on “anyone” to report suspected abuse.⁹¹ However, a lawyer’s duty of loyalty is to her client, not third parties. If she were to have an obligation to a third person, that may risk her ability to be loyal to her client and may amount to a conflict of interest.⁹² Solicitor-client privilege assists in making the justice system work and is a principle of fundamental justice,⁹³ and it needs to be as “close to absolute as possible”.⁹⁴ The idea that a lawyer can violate the solicitor-client relationship by divulging protected information contrary to her client’s interests is in direct tension with the lawyer’s role. Thus, it makes sense that the legislation distinguishes solicitor-client privilege and allows exceptions, further supporting the solicitor-client relationship while making recognized allowances. When a child’s safety is the issue, the most relevant exception to solicitor-client privilege is the future harm exception.⁹⁵

⁸⁷ *CYFEA*, *supra* note 29, s 4(3). See also *CFCSA*, *supra* note 1, s 14(2)(a); *CFSA*, *supra* note 29, s 25A. See also Dr Margaret McCallum, “Mandatory Child Abuse Reporting and Confidentiality in the Lawyer-Client Relationship” (2001) 50 *UNBLJ* 263 [McCallum, “Mandatory Reporting”].

⁸⁸ *CYFSA*, *supra* note 29, s 125(11).

⁸⁹ See *CYFA*, *supra* note 29, ss 11(9), 96(3).

⁹⁰ *Catholic*, *supra* note 73 at para 34.

⁹¹ *Ibid* at para 34.

⁹² See *Model Code*, *supra* note 4 at r 3.4.

⁹³ See *National Post*, *supra* note 37 at para 39; *McClure*, *supra* note 30 at para 41.

⁹⁴ *McClure*, *supra* note 30 at para 35.

⁹⁵ See *Smith*, *supra* note 3. See also McCallum, “Mandatory Reporting”, *supra* note

3. The Future Harm Exception

The future harm exception has a higher threshold than the duty to report a child in need of protection, which only requires reasonable suspicion.⁹⁶ As a result, when the information is protected by solicitor-client privilege, it is not about identifying whether harm or the risk of harm might meet the low threshold of child protection legislation. The future harm exception allows disclosure of privileged and confidential information when there is an “imminent risk of serious bodily harm or death.”⁹⁷ The Supreme Court of Canada established the exception to solicitor-client privilege in *Smith v Jones*,⁹⁸ which is codified in the *Model Code* at Rule 3.3-3.⁹⁹ A commonly used example of where the exception applies is if a lawyer learns there is a bomb in a central train station set to explode at rush hour;¹⁰⁰ a singular event that is imminent, huge, and so disastrous that it would be immoral for a lawyer to remain silent. There is limited jurisprudence dealing with the future harm exception and child protection.¹⁰¹

To be excepted, the information must indicate that there is a clear, serious and imminent threat to the child.¹⁰² In *Smith v Jones*, a man was charged with aggravated sexual assault of a sex worker.¹⁰³ The expert, a psychiatrist (whose communications were protected by solicitor-client privilege¹⁰⁴) wanted to reveal that the accused had plans to kidnap, rape, and murder sex workers, and that he was likely to act on those plans if he did not have treatment.¹⁰⁵ To determine whether public safety outweighs solicitor-client privilege, *Smith* provides that there must be “an imminent risk of serious bodily harm or death”.¹⁰⁶ The three prongs of the test—“seriousness, clarity, and imminence”—may “overlap and vary in their

⁹⁶ See *CYFSA*, *supra* note 29, s 125(1).

⁹⁷ *Smith*, *supra* note 3 at para 78. See also *Model Code*, *supra* note 4 at r 3.3-3.

⁹⁸ See *Smith*, *supra* note 3 at para 78.

⁹⁹ See *Model Code*, *supra* note 4 at r 3.3-3.

¹⁰⁰ See Monroe H Freedman, “The Life-Saving Exception to Confidentiality: Restating Law without the Was, the Will Be, or the Ought To Be” (1996) 29:4 *Loy LA L Rev* 1631 at 1632.

¹⁰¹ I noted up *Smith v Jones* on CanLII and found 331 cases, of those, 9 cases use the phrase “child protection”, 2 cases use the phrase “family violence” or “domestic violence”, and no cases use the phrases “child in need of protection” “coercive control” or “intimate partner violence” (17 December 2021). See e.g. *TSZK*, *supra* note 32.

¹⁰² See *Smith*, *supra* note 3.

¹⁰³ *Ibid* at para 36.

¹⁰⁴ The protection extends to agents and experts retained by a lawyer, see *ibid* at paras 9–18; Adam M Dodek, “The Public Safety Exception to Solicitor-Client Privilege: *Smith v Jones*” (2000) 34 *UBC L Rev* 293 at 314; Dodek, *SCP*, *supra* note 31 at 38.

¹⁰⁵ See *Smith*, *supra* note 3 at paras 9–18, 36–41.

¹⁰⁶ *Ibid* at para 78.

importance and significance” and their weight may vary depending on the context.¹⁰⁷

To determine whether there is a “clear” risk, Justice Cory, writing for the majority, held that the intended victim(s) must be an “identifiable person or group of persons”.¹⁰⁸ In the context of child abuse, the source of the risk and the “identifiable person” are typically obvious. The identifiable victim is the child, and the source of the risk is the parent, guardian, or a close contact.

The test requires consideration of whether there is a method of attack and “long range planning”, a “prior history of violence or threats of violence”, and prior assaults or threats “similar” to what is “planned”.¹⁰⁹ If there is a “history of violence”, a question is whether it has “increased in severity”.¹¹⁰ In the context of family violence there is often a history of violence, especially where there is coercive control which involves a pattern of abuse over a prolonged period of time.¹¹¹ Research shows that family violence can change over time; in particular, post-separation abuse often changes and increases in severity.¹¹² As a result, the history of violence is important but it may not be indicative of the current abuse, or the type of abuse to come. Indeed, “risks to children increase” post-separation, “once the targeted parent is no longer available” as the “buffer” between

¹⁰⁷ *Ibid* at paras 78, 85.

¹⁰⁸ *Ibid* at paras 79–80.

¹⁰⁹ *Ibid* at para 79.

¹¹⁰ *Ibid*.

¹¹¹ See generally Evan Stark, “[Re-presenting Battered Women: Coercive Control and the Defense of Liberty](#)” (Paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World Conference, Montreal, 2012), online (pdf): *Stop Violence Against Women* <www.stopvaw.org> [perma.cc/884Y-LK88]; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007); Dr Jane Wangmann, “Different Types of Intimate Partner Violence—An Exploration of the Literature” (2011) 22 *Australian Domestic & Family Violence Clearinghouse* 1 [Wangmann, “Intimate Partner Violence”]; Kristin L Anderson, “Gendering Coercive Control” (2009) 15:12 *Violence Against Women* 1444; Stark & Hester, “Coercive Control”, *supra* note 75.

¹¹² See Stark & Hester, “Coercive Control”, *supra* note 75 at 90; Wangmann, “Intimate Partner Violence”, *supra* note 111 at 14–15; Janet E Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners” (2015) 32:2 *Windsor YB Access Just* 149; Susan L Miller & Nicole L Smolter, ““Paper Abuse”: When All Else Fails, Batterers Use Procedural Stalking” (2011) 17:5 *Violence Against Women* 637 [Miller & Smolter, “Paper Abuse”]; Lesley Laing, “Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System” (2017) 23:11 *Violence Against Women* 1314; Heather Douglas, “Legal systems abuse and coercive control” (2018) 18:1 *Criminology & Crim Justice* 84.

the abuser and children.¹¹³ Moreover, the exception is only concerned with preventing future abuse. The history of abuse is relevant to whether the test is met but ought not be disclosed unless it is necessary to prevent the future harm.¹¹⁴ In one of the rare cases discussing the exception in the context of child abuse, Justice Zuker observed that the child's "history of abuse or other parental misdeeds" remain protected absent consent to disclosure.¹¹⁵

The "imminence" prong does not demand immediacy. Justice Cory emphasized that "context" is critical.¹¹⁶ The harm can be imminent even if it does not manifest for a period of time as long as it "creates a sense of urgency" that is "applicable [at] some time in the future."¹¹⁷ A "sense of urgency" and clarity are more important than establishing the specific time when the threat will be carried out or the harm will be inflicted.¹¹⁸ Thus, past harm does not qualify. However, as Adam Dodek argued, where there is ongoing child abuse and a "strong likelihood of future child abuse" it suggests that the imminence prong is met.¹¹⁹ Although the test was conceived for a new threat, it does not omit an ongoing harm provided there is urgency.

Finally, to constitute a "serious" threat, there must be danger that the victim(s) will be "killed" or suffer "serious bodily harm",¹²⁰ or "serious psychological harm".¹²¹ The Court in *Smith* did not define psychological harm, only that it "substantially interferes" with a person's "health or well-being", and it may be more "pervasive and permanent ... than ... physical harm".¹²² The Court did not hinge seriousness on a criminal act. Instead, they focused on the harm caused, which is helpful for child abuse because emotional abuse, such as coercive control, is not criminalized.¹²³ In contrast, however, child protection legislation does not require a *serious* risk of harm as a threshold for triggering the duty to report, only a suspicion of past or future harm.¹²⁴ It is the Children's

¹¹³ Neilson, "Alienation", *supra* note 16 at 38.

¹¹⁴ See *Smith*, *supra* note 3 at para 86; Dodek, *SCP*, *supra* note 31 at 266.

¹¹⁵ *Catholic*, *supra* note 73 at para 29.

¹¹⁶ *Smith*, *supra* note 3 at para 84.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Dodek, *SCP*, *supra* note 31 at 264.

¹²⁰ *Smith*, *supra* note 3 at para 82.

¹²¹ *Ibid* at para 83, citing *R v McCraw*, [1991] 3 SCR 72 at 81 (SCC).

¹²² *Ibid* at para 83.

¹²³ See generally Bill C-247, *An Act to amend the Criminal Code (controlling or coercive conduct)*, 2nd Sess, 43rd Parl, 2020 (first reading 5 October 2020).

¹²⁴ See *CYFSA*, *supra* note 29, s 125(1).

Aid Society's duty to investigate and substantiate the concern.¹²⁵ In other words, even if a lawyer has a suspicion that may trigger the duty to report, if the information is protected by solicitor-client privilege the future harm exception demands that there be threat of "serious bodily harm" or death to meet the threshold.¹²⁶ Suspicion that a child is being neglected is not going to fit within the future harm exception unless the neglect amounts to an imminent threat of serious bodily or psychological harm, or death, and there is no other way to prevent the abuse.

A) The Exception is Discretionary

Justice Cory did not clearly state whether a lawyer is *required* to disclose if the test is met,¹²⁷ he uses both "must" and "may" in his reasons.¹²⁸ Adam Dodek argues that the decision was confusing that way, Cory used "the logic of duty but the language of discretion."¹²⁹ Wayne Renke calls the lack of clarity about whether the exception is permissive or mandatory a "remarkable weakness" of the decision.¹³⁰ Despite this uncertainty, the consensus seems to be that the test is permissive—it does not impose a positive obligation.¹³¹ (The *Model Code* and most Canadian law societies also provide discretion.¹³²) However, there is debate about whether the exception *should be* mandatory or permissive. The debate's distinguishing feature seems to implicitly turn on who should decide; meaning, whether a lawyer can rightly be tasked with making a decision that turns on morality not the law, or whether such a decision needs to be preempted or directed by the law.

¹²⁵ See *ibid*, s 126(1); *CFCSA*, *supra* note 1, s 16; *CYFEA*, *supra* note 29, s 6.

¹²⁶ *Smith*, *supra* note 3 at para 82.

¹²⁷ See Renke, "Secrets and Lives", *supra* note 49 at 1059–61; Woolley, *ULEC*, *supra* note 44 at 216; David M Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dal LJ 267 at 297 [Tanovich, "Law's Ambition"]; Dodek, "Duty", *supra* note 50 at 216–19.

¹²⁸ See *Smith*, *supra* note 3; Dodek, "Duty", *supra* note 50 at 218.

¹²⁹ Dodek, *SCP*, *supra* note 31 at 265.

¹³⁰ Renke, "Secrets and Lives", *supra* note 49 at 1059.

¹³¹ See e.g. *ibid*; Dodek, "Duty", *supra* note 50; Woolley, *ULEC*, *supra* note 44 at 216–17; Tanovich, "Law's Ambition", *supra* note 127.

¹³² See *Model Code*, *supra* note 4 at r 3.3-3; *RPC*, *supra* note 34 at r 3.3-3; Law Society of Alberta, *Code of Conduct*, Calgary, AB: LSA, 2020, r 3.3-3. The law societies of Saskatchewan and Manitoba rules are mandatory, with an exception if the lawyer believes disclosure will risk their safety, or the safety of their family or colleagues. See Law Society of Saskatchewan, *Code of Professional Conduct*, Regina, SK: LSK, 2016, rs 3.3-3A [LSS]; Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg, MB: LSM, 2011, rs 3.3-3A [LSM]. The Law Society of New Brunswick rule is mandatory except where there is "risk of substantial financial injury", see Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton, NB: LSNB, 2018, rs 3.3-3A, 3.3-3B.

Adam Dodek suggests that given the sanctity of the protection and the extraordinary nature of the exception, a lawyer *should be* required to disclose in order to protect public safety.¹³³ Such a duty is a “moral imperative” that flows from the privileged responsibility of being a member of a self-regulated profession.¹³⁴ He argues that consistency between professionals who are otherwise required to report also maintains the rule of law, in that “no one is above the law”—all professionals are treated equally.¹³⁵

Positivist legal ethicists ground their theories in political philosophy,¹³⁶ arguing that the law allows a democratic and pluralist society to function and grow, despite disagreements about what is moral.¹³⁷ The law has value, providing stability and allowing the peaceful coexistence of its citizens, working to settle disagreements about what is morally right and wrong.¹³⁸ Alice Woolley argues that since we, as a society, have decided that trying to prevent a serious threat to public safety outweighs a lawyer’s duty to keep a client’s confidences, and the law reflects that decision, it suggests the exception ought to be mandatory when the test is met.¹³⁹ Moreover, when the client is doing something or is about to do something that we have decided is morally wrong, she argues that the client has less of a “claim” to the “lawyer’s silence”.¹⁴⁰ The lawyer’s only job should be to determine whether the test is met, the lawyer should not be required to determine whether to disclose.¹⁴¹

In contrast, David Tanovich argues in favour of a Dworkinian justice-seeking ethic or what William Simon posited as the “Contextual View”.¹⁴² The Dworkinian approach intentionally gives discretion to a lawyer so she can avoid perceived injustices. To achieve that goal, Simon

¹³³ See generally Dodek, “Duty”, *supra* note 50.

¹³⁴ *Ibid* at 224–27.

¹³⁵ *Ibid* at 227.

¹³⁶ See David J Luban & W Bradley Wendel, “Philosophical Legal Ethics: An Affectionate History” (2017) 30 *Geo J Leg Ethics* 337 at 352–54.

¹³⁷ See W Bradley Wendel, “The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations” (2017) 30:2 *Can JL & Jur* 443 at 443–44, 449–50 [Wendel, “Positivist”]; Alice Woolley, “Is Positivist Legal Ethics an Oxymoron?” (2019) 32 *Geo J Leg Ethics* 77 at 79 [Woolley, “Positivist”].

¹³⁸ See Wendel, “Positivist”, *supra* note 137 at 449; Woolley, Positivist, *supra* note 137 at 84–85.

¹³⁹ See Woolley, *ULEC*, *supra* note 44 at 236–37.

¹⁴⁰ *Ibid* at 236.

¹⁴¹ See *ibid* at 237–38.

¹⁴² William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics*, revised ed (Cambridge: Harvard University Press, 2000) at 9 [Simon, *Justice*]. See also Tanovich, “Law’s Ambition”, *supra* note 127.

posits that a lawyer ought to consider the “relevant circumstances” of the case and take actions that are “most likely to promote justice”.¹⁴³ In that sense, the discretion provided by the exception is “consistent” with the contextual view.¹⁴⁴ Even though Tanovich found it “hard to imagine when it would be just not to exercise the discretion to disclose”, he observed that “circumstances will arise that were perhaps not contemplated by the drafters and which require some flexibility”, positing that discretion supports the contextual view in such circumstances.¹⁴⁵ Similarly, Wayne Renke conceptualized the exception from the perspective of the client-perpetrator, but in doing so he suggests there is a “small residual area for the exercise of discretion.”¹⁴⁶ For him, the exception ought to be mandatory except where “there are good reasons for not making disclosure arising from the particular facts of the case.”¹⁴⁷

It seems obvious that between the statutory duty to report and the importance society places on protecting vulnerable citizens, especially children, there should be an obligation for a lawyer to disclose when the test is met. However, imagining the privilege-holder is also a victim and not the perpetrator of the harm was not the concern for the future harm exception, but it is a concern where there is family violence. The law provides discretion and I suggest it is helpful where there is family violence or where the lawyer’s safety is also at risk. It is not clear to me that law can reasonably prioritize safety of one citizen over another without also providing for a contextual analysis of the facts, especially given the complexities of family violence.

4. Why Would a Lawyer Decide Not to Report?

There are three common scenarios where a lawyer may learn from a client that a child may be in need of protection and the duty to report question is engaged. The lawyer’s client could be (a) the perpetrator, (b) the child’s other parent (potentially also a victim), or (c) the child. My motivating concern throughout this paper is safety, and for each client I suggest considerations that support the permissiveness of the exception.

¹⁴³ William H Simon, “Ethical Discretion in Lawyering” (1988) 101:6 Harv L Rev 1083 at 1090. See also Simon, *Justice*, *supra* note 142 at 9, 138.

¹⁴⁴ Tanovich, “Law’s Ambition”, *supra* note 127 at 297.

¹⁴⁵ *Ibid.*

¹⁴⁶ Renke, “Secrets and Lives”, *supra* note 49 at 1061.

¹⁴⁷ *Ibid.*

A) Perpetrator

Debates about whether the exception should be discretionary often turn on the threat coming from the lawyer's client, including when information flows from an expert or witness. This is consistent with *Smith v Jones* and therefore the exception itself.¹⁴⁸ Child protection legislation makes past harm relevant, but the exception is only concerned with preventing future harm. If a client confesses to harming a child, for example in the context of that lawyer defending the client from a criminal charge, and that harm has passed, then the exception does not apply. Most child protection legislation supports the benefit of a client's full transparency to his lawyer for the purpose of his defence by distinguishing solicitor-client privilege. However, if the client confesses to ongoing harm, or intended future harm, suggesting a child is currently at risk, the confession seems consistent with Dodek's and Woolley's arguments above. A lawyer should be required to report what she knows. Moreover, the lawyer cannot turn to her client for instructions as to whether to disclose because the client is the one who poses the threat. In the absence of instructions, given the strength of the protection and the statutory obligation, it suggests that disclosure ought to be mandatory when the test is met in those circumstances.

However, I suggest that discretion is still necessary. When a lawyer's client is the one posing the threat, disclosure of his protected information, contrary to his interests, could put the lawyer (and her family and colleagues) at risk. The law societies of Manitoba and Saskatchewan provide that if disclosure of confidential information will "bring harm upon the lawyer or the lawyer's family or colleagues" the lawyer is not obligated to disclose.¹⁴⁹ For example if the "the lawyer expects that the client is likely to retaliate or has threatened retaliation."¹⁵⁰ In the context of family violence, if an abuser's lawyer were to violate her client's trust by disclosing protected information it would sever the trust the solicitor-client relationship depends on, and the betrayal may provoke him. Family lawyers are in the middle of a highly emotional and sometimes volatile environment where parties may experience strong feelings such as "fear, anger", "betrayal" and "shame", which may be "strong enough to overcome rational thinking".¹⁵¹ American studies have shown that family lawyers disproportionately receive more threats and are subjected to more

¹⁴⁸ See *Smith*, *supra* note 3.

¹⁴⁹ LSS, *supra* note 132 at r 3.3-3A[5]. See also LSM, *supra* note 132 at r 3.3-3A.

¹⁵⁰ LSS, *supra* note 132 at r 3.3-3A[5].

¹⁵¹ Janet Weinstein & Ricardo Weinstein, "'I Know Better Than That': The Role of Emotions and the Brain in Family Law Disputes" (2005) 7 *JL & Fam Stud* 351 at 364-65 [Weinstein & Weinstein, "I Know Better"].

violence than other lawyers.¹⁵² A 2005 Canadian study showed that 86% of family lawyers in the Lower Mainland of British Columbia had received threats,¹⁵³ 28% of which were at their place of business or residence (presumably putting others at risk too).¹⁵⁴ The source of a threat may be the client or more often, the client's spouse.¹⁵⁵ For example, in 1978, a Toronto family lawyer was murdered by his client's husband during divorce proceedings.¹⁵⁶ More recently in Manitoba, a client's spouse sent a letter bomb to his former spouse and her family lawyer with the intent to kill them. The lawyer lost her right hand when the bomb sent to her office exploded.¹⁵⁷ In short, family law practice is regarded as "dangerous" because of the focus on "hot-button issues: love, money, sex, children."¹⁵⁸ Regardless of which family member is the client, discretion allows the lawyer to weigh the risk to her own safety (and the safety of her family and colleagues) in making the decision to report.

The duty imposed on other professionals does not provide discretion, including for personal safety reasons. This raises the question, as Dodek did, of why lawyers ought to be treated differently, suggesting instead that all professionals should be treated equally.¹⁵⁹ However, the combination of the pre-existing risk of violence for family lawyers, and the volatility

¹⁵² See Kelly McMurry, "Family lawyers face threats, violence, survey says" (1998) 34:2 Trial 91; Lorelei Laird, "[The job is killing them: Family lawyers experience threats, violence](#)", *ABA Journal* (1 September 2018), online: <www.abajournal.com> [perma.cc/L245-265L].

¹⁵³ See Karen N Brown, "[An Exploratory Analysis of Violence and Threats Against Lawyers](#)" (MA Thesis, Simon Fraser University, 2005) at 68, online (pdf): <summit.sfu.ca> [perma.cc/C455-SUCD] [Brown, "Exploratory Analysis"]. See also Marie-Yosie Saint-Cyr, "[Violence and Threats Against Lawyers is a Growing Concern in Canada](#)" (28 February 2013), online (blog): *Slaw* <www.slaw.ca> [perma.cc/Z4C4-REHV]; CBC News, "[Violent attacks, threats against lawyers not uncommon, Toronto lawyer says](#)", *CBC News* (21 September 2016), online: <www.cbc.ca> [perma.cc/NB6E-2DKK].

¹⁵⁴ Brown, "Exploratory Analysis", *supra* note 153 at 72.

¹⁵⁵ See James N Bow, Michael C Gottlieb & Hon Dianna J Gould-Saltmann, "Risks from Clients and Opposing Parties for Family Law Attorneys" (2015) 53:2 Fam Ct Rev 317.

¹⁵⁶ See Zoe McKnight, "[Canada's history of court shootings mercifully short](#)", *Toronto Star* (30 March 2014), online: <www.pressreader.com>.

¹⁵⁷ See *R v Amsel*, 2017 MBPC 58; *Amsel*, *supra* note 40; *R v Amsel*, 2018 MBPC 19; *R v Amsel*, 2018 MBPC 46; Katie Dangerfield, "[A bitter, lengthy divorce and a homemade bomb. How Guido Amsel cost a Winnipeg lawyer her hand](#)", *Global News* (22 November 2018), online: <globalnews.ca> [perma.cc/y6L3-TWGH].

¹⁵⁸ Weinstein & Weinstein, "I Know Better", *supra* note 151 at 377. See generally Law Times, "[Family law can be a dangerous job](#)", *Law Times* (13 July 2015), online: <www.lawtimesnews.com> [perma.cc/Y7S6-HSD3]. See also Pamela Cross, "[How lawyers can stay safe in family violence cases](#)" (17 March 2020), online (blog): *Luke's Place* <lukeplace.ca> [perma.cc/S5H8-KZT5].

¹⁵⁹ Dodek, "Duty", *supra* note 50 at 224–27.

of some family law matters and the lawyer's role in that process, has the potential to intensify risk for some family lawyers. I am not suggesting this consideration is unique to lawyers, only that its existence supports the permissiveness of the exception.

B) Other Parent/Guardian (Victim)

The future harm exception was conceptualized in response to a threat posed by a would-be serial killer.¹⁶⁰ The exception does not consider a situation where the privilege-holder reveals the threat but is not the perpetrator of the harm. Where there is IPV, the client may be a victim of abuse along with her child. Discretion allows the lawyer to fully examine the potential consequences with her client and potentially refrain from reporting, if necessary. Considerations flow from concerns about the client's safety—from the abuser and from revictimization. The legal consequences of family violence allegations in the context of family law disputes are also a problematic reality.¹⁶¹ I am in no way suggesting that not reporting a child in need of protection is the *right* response, only that IPV coupled with trauma-informed lawyering demand that counsel consider the full range of consequences with the client before deciding—which discretion allows her to do.

Calling the police or a children's aid society may provoke the abuser. It is a myth that IPV ends when the relationship does.¹⁶² Instead, the violence often gets worse in the months following relationship breakdown, when the abuser wants to "reassert their power and control".¹⁶³ For example, nearly half (49%) of all spousal homicides occur within two months after separation.¹⁶⁴ A study recently conducted by Rise Women's Legal Centre in British Columbia found that in cases of IPV, for many victims, calling

¹⁶⁰ See *Smith*, *supra* note 3.

¹⁶¹ See generally Susan B Boyd & Ruben Lindy, "Violence Against Women and the BC *Family Law Act*: Early Jurisprudence" (2016) 35 Can Fam LQ 101 [Boyd & Lindy, "Violence Against Women"]; The Honourable Donna Martinson & Professor Emerita Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11 [Martinson & Jackson, "Judges"]; Elizabeth Sheehy and Susan Boyd, "Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases" (2020) 42:1 J Soc Welfare & Fam L 80 at 88 [Sheehy & Boyd, "Penalizing Women's Fear"].

¹⁶² See Martinson & Jackson, "Judges", *supra* note 161 at 34; Miller & Smolter, "Paper Abuse", *supra* note 112 at 637; Neilson, "Alienation", *supra* note 16 at 38.

¹⁶³ See Cross, "Luke's Place Report", *supra* note 1 at 12–13.

¹⁶⁴ See Tina Hotton, "[Spousal Violence after Marital Separation](#)" (2001) at 7, online (pdf): *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/THE4-4QBW] (length of separation at the time of the murder: 49% (2 months or less), 32% (2 months to 1 year), 19% (1 year or more)).

the police caused “harmful and violent consequences”.¹⁶⁵ Presumably the involvement of a children’s aid society would have similar implications. In essence, reporting a child in need of protection may increase the level of risk for the lawyer’s client.

In addition, the justice system is still rooted in patriarchal and gendered assumptions, and research shows that women who claim there is family violence in the context of family law matters are “negatively impacted” and in a “worse position” legally as a result.¹⁶⁶ Research shows that family violence is often misunderstood by the judiciary, including through gender bias.¹⁶⁷ Linda Neilson found that a mother who claims family violence is in a “horrifying double bind” because she risks her abuser using the claim to argue alienation, and as a result the victim may lose primary care or contact with her child; the child may be put into the care of the abuser.¹⁶⁸ Elizabeth Sheehy and Susan Boyd found that courts are “more likely to focus on alienating behaviours than IPV when determining custody and access. IPV is rarely condemned or related to children’s best interests in the way that alienation is.”¹⁶⁹

If a lawyer reports information without her client’s consent, she may revictimize her client. Victims of family violence often suffer from trauma, including after the relationship has ended.¹⁷⁰ Working with victims of violence requires that a lawyer be trauma-informed¹⁷¹—meaning, they should understand “the impact of interpersonal violence and victimization.”¹⁷² A “trauma-informed approach strives to deliver services and interventions in a way that avoids inadvertently retraumatizing people and doing further harm.”¹⁷³ As a result, a trauma-informed lawyer needs to be mindful of any “reminder of the traumatic event” to avoid triggering PTSD responses such as “re-experiencing phenomena,

¹⁶⁵ Hrymak & Hawkins, “Rise Report”, *supra* note 17 at 40 (examples included being arrested, being removed from her home, or threatening to have her children taken away if she calls again).

¹⁶⁶ *Ibid* at 51.

¹⁶⁷ See generally Boyd & Lindy, “Violence Against Women”, *supra* note 161; Martinson & Jackson, “Judges”, *supra* note 161; Sheehy & Boyd, “Penalizing Women’s Fear”, *supra* note 161; Neilson, “Alienation”, *supra* note 16 at 9–17, 35, 46.

¹⁶⁸ Neilson, “Alienation”, *supra* note 16 at 33–35. See also Hrymak & Hawkins, “Rise Report”, *supra* note 17 at 45.

¹⁶⁹ Sheehy & Boyd, “Penalizing Women’s Fear”, *supra* note 161 at 88.

¹⁷⁰ See Cross, “Luke’s Place Report”, *supra* note 1 at 14; Katz & Haldar, “Trauma-Informed Lawyering”, *supra* note 20 at 366; Randall & Haskell, “Restorative Justice”, *supra* note 22.

¹⁷¹ See Randall & Haskell, “Restorative Justice”, *supra* note 22 at 517–19.

¹⁷² Katz & Haldar, “Trauma-Informed Lawyering”, *supra* note 20 at 369.

¹⁷³ Randall & Haskell, “Restorative Justice”, *supra* note 22 at 518. See also *ibid*.

avoiding or numbing responses, and hyper-arousal responses.”¹⁷⁴ If the victim suffers from complex-PTSD, her potential responses are also more complex, including alterations in relations with others, somatization (i.e., “manifestation of psychic pain in the body and in physical illness”) and a sense of “overwhelming hopelessness”.¹⁷⁵ Victims also suffer from stigma associated with the violence, and research shows professionals involved with the justice system can cause them to feel further stigmatized—to feel that they are blamed.¹⁷⁶ If a victim’s lawyer were to behave paternalistically, asserting control over her by betraying her confidence, the act could revictimize the client.¹⁷⁷ Discretion allows a lawyer to maintain her loyalty to her client, preserves the client’s autonomy and well-being, and permits a discussion between them so the lawyer can obtain instructions. Survivors of family violence know best how to keep themselves safe.¹⁷⁸ It may be that the safest option for all is not to report, especially if the client believes she can prevent the harm to her child. That said, I recognize that things do not always work out so neatly. A client may be unwilling or unable to do what seems objectively safest. The discretion provided does give a lawyer the ability to disclose, if necessary. Discretion places the lawyer in the uncomfortable position of determining a course of action absent client instructions and direction from the law, but family violence complicates established norms in many ways, and this is one of them.

C) The Child (Victim)

A child may have representation because they are a party to the proceeding or when a legal issue has a direct impact on them.¹⁷⁹ For example, in family law a child may have legal representation when their parents are involved in a parenting dispute, or when they are the subject of child

¹⁷⁴ Randall & Haskell, “Restorative Justice”, *supra* note 22 at 511. See also Talia Kraemer & Eliza Patten, “Establishing a Trauma-Informed Lawyer-Client Relationship (Part One)” (2014) 33:10 Child L Practice 198 [Kraemer & Patten, “Establishing”].

¹⁷⁵ Randall & Haskell, “Restorative Justice”, *supra* note 22 at 512 (other responses include “affect dysregulation, changes in consciousness” (i.e., “dissociation” or “altered self-perception”).)

¹⁷⁶ See Allison Crowe & Christine E Murray, “Stigma From Professional Helpers Towards Survivors of Intimate Partner Violence” (2015) 6:2 Partner Abuse 157 at 170–71.

¹⁷⁷ *Cf* Katz & Haldar, “Trauma-Informed Lawyering”, *supra* note 20 at 375; Kraemer & Patten, “Establishing”, *supra* note 174 at 199; Margaret Drew, “Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)” (2017) 32 Ohio St J Disp Resol 373 at 413–15 [Drew, “Collaboration”].

¹⁷⁸ See Drew, “Collaboration”, *supra* note 177 at 413–15.

¹⁷⁹ See e.g. *Courts of Justice Act*, RSO 1990, c C43, s 89; CYFSA, *supra* note 29, s 78. See generally Debra Lovinsky & Jessica Gagne, “[Legal Representation of Children in Canada](#)” (2015), online (pdf): *Department of Justice* <www.justice.gc.ca> [perma.cc/67MT-CWCB] [Lovinsky & Gagne, “Representation”].

protection proceedings. There is no universal understanding of the role of a child's lawyer, and no consistency between provinces and territories as to when child's counsel will be appointed.¹⁸⁰ The Federation of Law Societies of Canada does not have practice guidelines for representing children. There are three distinct approaches (amicus curiae—friend of the court, best interests guardian, or traditional advocate) and a debate about which approach is correct.¹⁸¹ Nicholas Bala, Rachel Birnbaum, and Lorne Bertrand conducted a study on children's counsel that showed a "substantial number of lawyers" have their own approach to their role, regardless of official policies or professional obligations;¹⁸² but research also shows that most often the lawyer acts as a traditional advocate.¹⁸³ For the purpose of this paper, the traditional solicitor-client relationship is the only relevant model; the traditional relationship exists and communications are protected by solicitor-client privilege.¹⁸⁴

Children know adults may disclose their secrets, especially children who are already involved in legal proceedings.¹⁸⁵ As a result, children keep "secrets" relevant to legal proceedings because they fear they will "disappoint, anger, or lose the love of the most important people in their lives."¹⁸⁶ When a lawyer is considering divulging a child's secret, the trust integral to the lawyer-client relationship and the ability to effectively

¹⁸⁰ See Lovinsky & Gagne, "Representation", *supra* note 179 at 6–8.

¹⁸¹ The amicus curiae and best interests approaches are both untraditional roles whereby the lawyer will provide the court with evidence. The amicus curiae will do this through a neutral and direct role by ensuring the court has all the relevant evidence, including through cross-examination and reply evidence. In contrast, the best interests model is not neutral; a lawyer will investigate the matter, present evidence, and advocate for what she believes is in her client's best interests, even if it is contrary to her client's express wishes.

See Bala, Birnbaum & Bertrand, "Controversy", *supra* note 55 at 682–86; Jennifer Shaften, "Representing Children" (delivered in the Advanced Family Law course at the University of Calgary, Faculty of Law, February 12, 2019) [unpublished] at 4–5 [Shaften, "Representing Children"]; Office of the Child and Youth Advocate Alberta, "[Legal Representation for Children and Youth: Policy Manual](#)" (1 April 2021), online (pdf): OCYA <www.ocya.alberta.ca> [perma.cc/LG4R-TZTH] [OCYA, "Alberta Policy"]; Lovinsky & Gagne, "Representation", *supra* note 179 at 6–7.

¹⁸² Bala, Birnbaum & Bertrand, "Controversy", *supra* note 55 at 682.

¹⁸³ See Joanne Paetsch et al, "[Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights](#)" (2009) at 23, online (pdf): *CanLII* <canlii.ca> [perma.cc/5C29-ELK5].

¹⁸⁴ *Cf Re W*, 27 OR (2d) 314 at para 5, 1980 CanLII 1958; Bala, Birnbaum & Bertrand, "Controversy", *supra* note 55; Shaften, "Representing Children", *supra* note 181; OCYA, "Alberta Policy", *supra* note 181 at 67–74.

¹⁸⁵ See Emily Buss, "'You're My What?' The Problem of Children's Misperceptions of Their Lawyers' Roles" (1996) 64:4 *Fordham L Rev* 1699.

¹⁸⁶ *Ibid* at 1715.

represent the child is at issue. Moreover, betrayal could reinforce the child's conclusion that adults are not to be trusted,¹⁸⁷ which is already an issue for a victim of child abuse.¹⁸⁸ Children who have been traumatized "need to be in responsive and secure environments that restore their sense of safety, control and predictability."¹⁸⁹ The betrayal of trust risks revictimization.

Finally, the imminence prong of the test would not be met if there was another way to avert the harm. As such, the test requires that counsel consider whether there are any options.¹⁹⁰ Child protection legislation does not include this caveat. When the client is the child, it may be that disclosure to someone other than a children's aid society or the police, with the consent of the child, is enough to preserve their trust and involve someone—their other parent, another family member, a social worker—who is able to protect the child or report that a child may be in need of protection.

Conclusion

A lawyer's role is to provide access to the law and pursue her client's interests within the bounds of legality.¹⁹¹ A lawyer's role is not to make decisions based on her own morality, but to preserve the client's autonomy by helping the client access the law. It is only in the rarest and most extreme circumstances that a lawyer may betray the trust the solicitor-client relationship is built on in favour of another priority; in this case, because a vulnerable member of society needs protection. The future harm exception provides a lawyer with discretion, and in my view, given the risks posed by family violence, permissiveness is correct. That said, no lawyer should make this decision alone; what is missing from the profession is clear guidance and training for lawyers to ensure they can navigate the discretion competently and safely.

¹⁸⁷ See *ibid.*

¹⁸⁸ See Randall & Haskell, "Restorative Justice", *supra* note 22 at 511; Neilson, "Alienation", *supra* note 16 at 39.

¹⁸⁹ Neilson, "Alienation", *supra* note 16 at 40.

¹⁹⁰ Cf *Model Code*, *supra* note 4 at r 3.3-3(b).

¹⁹¹ See Gerald J Postema, "Moral Responsibility in Professional Ethics" (1980) 55 *NYUL Rev* 63 at 73; Woolley, "Positivist", *supra* note 137 at 88; W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) at 176.