INTIMATE PARTNER VIOLENCE AND ETHICAL LAWYERING: NOT JUST SPECIAL RULES FOR FAMILY LAW

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Should family lawyers be subject to special rules of professional conduct? This debate has resurfaced because of the 2021 amendments to the federal Divorce Act ("Act"), which imposed new professional obligations on lawyers. The suggestion is that the Act now conflicts with the Federation of Law Societies Model Code of Professional Conduct ("Model Code"), such that the Model Code needs to be amended to comply with family lawyers' legislative professional obligations. There are also questions about whether additional guidance is needed for lawyers when representing parties who are experiencing family violence. Against this backdrop, I review the question of whether family lawyers ought to be governed by a separate code of professional conduct, suggesting that there are questions about the lawyer's role which need to be answered before a comprehensive regulatory change can be considered. I also argue, however, that family violence concerns, specifically in relation to intimate partner violence, need to be central to discussions about professional rules and ought not wait. This paper concludes with recommendations for reform to the Model Code and questions for future debate and discussion.

Devrait-on assujettir les juristes en droit de la famille à des règles spéciales sur la conduite professionnelle? Ce débat a refait surface en 2021 en raison des modifications à la Loi sur le divorce canadienne (la Loi) qui ont imposé de nouvelles obligations professionnelles aux juristes. Ce que l'on observe, c'est que la Loi entre en conflit avec le Code type de déontologie de la Fédération des ordres professionnels de juristes du Canada (le « Code type »), tant et si bien qu'il faut modifier le code pour le rendre conforme aux obligations professionnelles imposées légalement aux juristes en droit de la famille. Il y a aussi lieu de se demander si des lignes directrices supplémentaires seraient nécessaires pour les juristes qui représentent des parties victimes de violence familiale. C'est dans ce contexte que l'auteure étudie la question de savoir si les juristes en droit de la famille devraient être régis par un code de

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déontologie distinct, ce qui indiquerait que des questions restent en suspens quant au rôle du juriste et qu'il faut y trouver réponse avant d'envisager une refonte complète des règlements. Cela dit, elle fait aussi valoir que les préoccupations relatives à la violence familiale, plus précisément en lien avec la violence conjugale, doivent être au cœur des discussions sur les règles professionnelles et qu'elles ne peuvent pas attendre. L'auteure conclut par des recommandations sur la réforme du Code type et par des questions en vue des débats et discussions à venir.

Contents

Introduction

The laws and rules of professional conduct governing lawyers fail to account for intimate partner violence ("IPV")[2]. The words *intimate partner violence, family violence* and variations thereof are not included in the Federation of Law Societies *Model Code of Professional Conduct* ("*Model Code*")[3]. There is no explicit regulatory requirement for lawyers

[2] IPV refers to abuse by an intimate partner and is inclusive of criminal offences (i.e. sexual assault) and non-criminal conduct (i.e. coercive control, psychological abuse).

[3] See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Canada: Federation of Law Societies of Canada 2022), [Model Code].

to be competent in relation to family violence. Lawyers do not routinely screen for IPV, and they can increase risk for survivors and their children as a result[4]. There is no legislative or regulatory requirement for lawyers to prioritize safety in relation to process or outcome. IPV is erroneously thought to occur rarely, and so the law treats it as an exception, and in the case of lawyers' regulation, such a rare one that its reality is omitted from professional codes.

As a result, lawyers may be ill-equipped to handle cases involving IPV. Lawyers representing survivors have been shown to ignore or dismiss claims of violence. Lawyers may perpetuate harmful myths and stereotypes about IPV, and they may pressure their clients into agreements with terms that increase risk. Lawyers representing abusers have been found to retraumatize survivors through harmful cross-examinations, needlessly aggressive communication and litigation tactics, and they have been shown to become a tool of their client's abuse by perpetuating systems abuse. This paper considers the *Model Code's* omission of IPV, and in doing so, the question of whether family lawyers ought to be subject to a separate code of professional conduct. I conclude that there are questions about their role that need to be answered before a comprehensive regulatory change can be considered. I also argue, however, that family violence concerns, specifically related to IPV, need to be central to discussions about professional rules and ought not wait. The *Model Code* must be amended to account for IPV.

In Part One, I explain why IPV is not an exceptional or rare event, and how survivors are disadvantaged because of this perception. In Part Two, I review problematic lawyering practices that have been revealed through empirical research conducted by family law scholars. Part Three provides background to the ongoing debate about reforming family law which has led to recommendations for a separate code of conduct. In Part Four, I review the academic and policy-based arguments for a separate code and challenge some of their implications. Finally, in Part Five I provide recommendations for reform to the *Model Code,* but strictly related to IPV. Although I provide comprehensive recommendations, given the questions raised, my hope is that this paper serves as a catalyst for discussion as opposed to a complete roadmap for change.

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[4] Throughout this paper I have intentionally used the terms *survivor* and *victim* interchangeably. Some people who have experienced abuse identify with the term survivor, others identify with the term victim, and some do not identify with either term. My terminology is meant to reflect the variation of experiences and to avoid stereotypes.

I. Intimate Partner Violence

IPV is often perceived as exceptional or as a rare event. Family laws are designed for two equally powered reasonable people with access to wealth who both have lawyers. Policies suggest most parties were in a good relationship, are emotional because of its breakdown and need help coming to an agreement about how they will live post-separation, including care for their children. The ideal is to divert most people out of court and leave judicial oversight for those who cannot agree. The idea that many people leave a relationship because of abuse is not reflected in these assumptions. The law provides few safeguards for victims, and the existing ones are often unavailable because victims' experiences are denied. Critiquing some of these inadequacies, Suzanne Zaccour posited that family laws should treat IPV "not as an exception, but rather as a paradigmatic case."[5] For her, survivors are marginalized and laws that do not help them "achieve fair and safe outcomes are complicit in their entrapment"[6]. Similarly, Joan S. Meier argued that family violence is routinely "denied", what she called, a form of "psychological denial"[7]. She suggested that family law scholarship and law seem to be "fueled" by "idealism", rather than "realism" and the "commonality" of abuse in failed relationships[8]. Recognizing survivors' intersectionality, Leigh Goodmark argued for IPV policies and laws to be reformed with an anti-essentialist feminist approach that looks for solutions capable of inclusivity[9]. These ideas of exceptionalism and the need for inclusivity serve as my springboard for rejecting the idea that IPV can be pushed to the edges of lawyers' regulation.

Moreover, it is a myth that IPV is rare. In August 2023, the Minister of Justice and Attorney General of Canada declared that gender-based violence is an "epidemic"[10]. According to a 2023 UN report on gender biases, "more than a quarter of the world's people" continue to believe that it is "justifiable for a man to beat his wife" and 26% of women over fifteen

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5 Suzanne Zaccour, "All Families Are Equal, But Do Some Matter More than Others? How Gender, Poverty, and Domestic Violence Put Quebec's Family Law Reform to the Test" (2019) 32:2 Can J Fam L 425 at 441.

6 *Ibid* at 442.

7 Joan S Meier, "Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law" (2021) 110 GEO L J 835 at 872 [Meier, "Denial"].

8 *Ibid* at 871.

9 See Leigh Goodmark, "Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal" (2009) 31 J L & Pol'y 39 at 41.

10 The Honourable Arif Virani, "Letter to David A Cameron, MD concerning the Inquiry into the femicides of Carol Culleton, Anastasia Kuzyk, and Nathalie Warmerdam" (14 August 2023) at 1, online (pdf): <http://tinyurl.com/54xr3d44> [perma.cc/FH5R-GV9C].

years old have experienced IPV[11]. In Canada, between 2011–2021, 738 women were killed by their male intimate partners,[12] and there is a direct link between coercive controlling violence and increased risk of fatality[13]. Justice Canada is currently considering criminalizing coercive control[14].

Complicating the consequences of exceptionalizing spousal violence is the fact that IPV is gendered. Women are disproportionately victimized by their male partners. In *Michel v Graydon,* Justice Martin (concurring) recognized that "women in relationships are more likely to suffer [IPV] than their male counterparts"[15]. Statistics Canada showed that IPV "affects people from all types of demographic and socioeconomic backgrounds; however, victims are most often women and the violence is commonly perpetrated by men"[16]. The type of abuse women experience is more severe, such as sexual assault, choking and death[17]. In 2022, there were 117, 093 victims of police-reported violence by an intimate partner—78% were female[18]. Women are also more likely to experience fear as a result[19]. Some women are at higher risk than others—girls and young women, Indigenous women, members of the LGBTQ2S+ community, disabled

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11 United Nations Development Program, *Breaking Down Gender Biases: Shifting Social Norms Towards Gender Equality* (New York: United Nations Development Programme, 2023).

12 See Statistics Canada, *Gender-Related Homicide of Women and Girls in Canada*, by Danielle Sutton, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2023) at 24 [Stats Canada, Gender].

13 See 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) [unpublished] at 4, online (pdf): <http://tinyurl.com/asrmyn9a> [perma.cc/SJU7-KJCG].

14 Individual tactics such as stalking and uttering threats are offences, but the cumulative pattern of abuse is not, see *Criminal Code*, RSC 1985, c C-46, ss 264 and 264.1. See generally Janet Mosher et al, "Submission to Justice Canada on the Criminalization of Coercive Control" (2023) Osgoode Legal Studies Research Paper No. 4619067 online (pdf): <http://tinyurl.com/4w23wsfe> [perma.cc/B3H4-T864].

15 *Michel v Graydon,* 2020 SCC 24 at para 95.

16 Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) at 29.

17 See Stats Canada, Gender, *supra* note 12; Statistics Canada, *Spousal Violence in Canada, 2019*, by Shana Conroy, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) at 7–10 [Stats Canada, Spousal Violence]; Statistics Canada, *Intimate Partner Violence in Canada, 2018: An Overview*, by Adam Cotter, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) [Stats Canada, IPV 2018].

18 See Statistics Canada, *Trends in Police-Reported Family Violence and Intimate Partner Violence in Canada, 2022* (Ottawa: Statistics Canada, 2023) at 1–2.

19 See Stats Canada, IPV 2018, *supra* note 17 at 6.

women and those living in rural and remote communities[20]. Indigenous women are twice as likely to experience IPV[21]. LGBTQ2S+ women are more likely to experience IPV than heterosexual women, and the type of violence is more severe and more frequent[22]. As Marie Gordon said, "the point is not to suggest that men are not victimized by spousal abuse, but rather to suggest that, both quantitatively and qualitatively, women tend to experience far greater victimization"[23].

Statistics are also under-reported. Under non-pandemic circumstances, 80% of victims do not report abuse to the police[24]. Victims do not report for reasons including embarrassment, fear the abuse will escalate, to avoid repercussions within their community, and the fear of not being believed[25]. According to a report published by the Rise Women's Legal Centre, Indigenous women fear calling the police because the police are "more likely to be a threat to them than to provide safety or protection"[26]. Black women and queer people may also fear the police, limiting their options[27]. Instead, victimization often leads women to separate from their spouses, and enter the family justice system.

Importantly, abuse does not end when the parties separate; it may change, get worse or sometimes the abuse starts after separation[28]. The period immediately following separation poses the highest risk to the

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20 See Jacqueline Harden et al, "The Dark Side of the Rainbow: Queer Women's Experiences of Intimate Partner Violence" (2020) 23:1 Trauma, Violence & Abuse 301 at 302; *ibid* at 8–9.

21 See Statistics Canada, *Intimate Partner Violence: Experiences of First Nations, Metis and Inuit Women in Canada, 2018*, by Loanna Heidinger, in *Juristat,* Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) at 5.

22 See Statistics Canada, *Intimate Partner Violence: Experiences of Sexual Minority Women in Canada, 2018*, by Brianna Jaffray, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) at 4–6.

23 Marie Gordon, "'What, Me Biased?' Women and Gender Bias in Family Law" (2001) 19 CFLQ 53 at 98.

24 See Stats Canada, Spousal Violence, *supra* note 17 at 3.

25 See Stats Canada, IPV 2018, *supra* note 17 at 8; Haley Hrymak & Kim Hawkins, *Why Can't Everyone Just Get Along?: How BC's Family Law System Puts Survivors in Danger* (Vancouver: Rise Women's Legal Centre, 2021) at 37–42 [Rise Report].

26 Rise Report, *supra* note 25 at 40.

27 See Patricia Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2022) 28:11 VAW 2765; Harden et al, *supra* note 20 at 302–303.

28 See Pamela Cross et al, *What You Don't Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners* (Ottawa: Department of Justice, 2018) at 11–12 [LP Report]; Department of Justice, *HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors* (Ottawa: Department of Justice, 2022) at 16–18 [Toolkit].

survivor[29]. Moreover, risk is not limited to intimate partners; children are also at risk[30]. Although many people self-represent in family law, the period of separation is when survivors and abusers may consult and retain a lawyer, often placing lawyers central to their decisions and post-separation lives. As a result, and especially given many survivors' hesitancy to discuss abuse, lawyers need to be skilled at understanding and seeing IPV.

II. Problematic Lawyering

It is well-recognized that the family justice system often fails survivors. They may experience retraumatization, struggle to have their interests met or become entrapped within siloed legal systems when their issues intersect with criminal law, immigration law, landlord and tenant law and so on[31]. Research shows that generalist judges are often ill-equipped to see IPV and they make orders that ignore safety concerns[32]. In April 2023, Bill C-233 received royal asset amending the *Judges Act* to require that federally appointed judges be trained in family violence[33]. As a result, there is hope that increased judicial education will improve outcomes in court, although this also requires that lawyers do not siphon off information about IPV. Indeed, little attention has been paid to understanding how and why some family lawyers are complicit in the justice system's failure to be responsive to IPV. In this part, I draw awareness to some harmful lawyering practices that researchers have identified empirically. To be sure, not all lawyers are complicit in such conduct; research also shows effective lawyering[34].

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29 See Statistics Canada, *Spousal Violence after Marital Separation*, by Tina Hotton, in *Juristat*, Catalogue No 85-002-XIE(Ottawa: Statistics Canada, 2001) at 7 (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)).

30 See Peter Jaffe et al, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce*"(Ottawa: Department of Justice, 2014) at 14–19.

31 See generally Jennifer Koshan, Janet Mosher & Wanda Wiegers, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Trevor Farrow and Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020); Janet Mosher, "Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law" (2023) 35:1 Can J Fam L 297.

32 See Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11 at 13; Wendy Chan & Rebecca Lennox, "'This isn't Justice': Abused Women Navigate Family Law in Greater Vancouver" (2023) 35:1 Can J Fam L 81 at 101.

33 See Bill C-233, *An Act to amend the Criminal Code and the Judges Act (violence against intimate partner),* 1st Sess, 44th Parl, 2022 (assented to 27 April 2023), SC 2023, c 7; *Judges Act,* RSC 1985, c J-1, ss 60(2–3) and 62.1.

34 See Zara Suleman, Haley Hrymak & Kim Hawkins, *Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System* (Vancouver: Rise Women's Legal Centre, 2021) at 8 [Rise Lawyers]; Robert Nonomura

According to Canadian and international studies from similar common law jurisdictions, lawyers engage in a range of harmful practices where there is IPV[35]. Perhaps the most challenging aspect of this review is harmful lawful conduct—meaning, the law and/or professional rules allow it, despite the harm caused. I have identified some common ways lawyers cause retraumatization or become a tool of their client's abuse, and how the regulation of lawyers may influence change. In doing so, I also identify conduct that regulation would be unhelpful against without law reform[36]. These practices fall into two broad categories, namely, those related to systems abuse, and the perpetuation of myths and stereotypes. First, however, it is important to recognize the ways survivors' fear and trauma may complicate how they present and respond to lawyers.

Some survivors may be experiencing PTSD or complex-PTSD, but not all survivors experience trauma, and not everyone experiences abuse or trauma the same way[37]. Marginalized victims who have experienced a lifetime of traumatic oppression (e.g., racism, homophobia, transphobia) may experience multiple layers of trauma[38]. For some, engaging with lawyers and the justice system, making impossible choices, is the source of ongoing trauma and/or retraumatization[39].

Briefly, trauma can result when an individual is unable to "integrate" an "emotional experience"[40]. Judith Herman describes trauma as an "affliction of the powerless," where the "victim is rendered helpless by overwhelming force" which can "overwhelm" the systems that give people "a sense of control, connection, and meaning"[41]. Traumatic events

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et al, *Survivors Views of Family Courts: Data from the Canadian Domestic Homicide Prevention Initiative with Vulnerable Populations*, (London: Centre for Research & Education on Violence Against Women & Children 2021) at 15–16.

35 See Dr. Jane Wangmann et al, "What is 'Good' Domestic Violence Lawyering?: Views from Specialist Legal Services in Australia" (2023) 00:0 IJLPF 1 at 5–6.

36 The *Model Code* generally reflects the law. Law reform is often necessary to support regulatory change otherwise it risks confusion.

37 See LP Report, *supra* note 28 at 14; Toolkit, *supra* note 28 at 43–44; Judith Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (New York: Perseus Books Group, 2015).

38 See Stephanie L Baird, Ramona Alaggia, & Angelique Jenney, "Like Opening Up Old Wounds": Conceptualizing Intersectional Trauma Among Survivors of Intimate Partner Violence" (2019) 36:17-18 JIV 8118 at 8134.

39 Thank you to Haley Hrymak for this point. See also Negar Katirai, "Retraumatized in Court" (2020) 62 Ariz L Rev 81 at 89.

40 Charlotte Bishop & Vanessa Bettinson, "Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of 'Controlling or Coercive Behaviour'" (2018) 22:1 IJE & P 3 at 11. See also Sarah Katz, "Trauma-Informed Practice: The Future of Child Welfare?" (2019) 28:1 Widener Commw L Rev 51 at 53.

41 Herman, *supra* note 37 at 33.

"generally involve threats to life or bodily integrity, or a close personal encounter with violence and death"[42]. However, the event does not have to be violent[43]. PTSD can be caused by a single traumatic event, whereas complex PTSD may be caused by "chronic and protracted traumatic experiences",[44] such as coercive control[45]. When a person experiences trauma, it can have a physiological impact on their brain, which may have a long-term impact on their behaviour[46]. PTSD, for example, can cause "re-experiencing phenomena" (e.g., "nightmares and flashbacks") and "hyper-arousal responses" (e.g., a "sense of being chronically on guard").[47] Complex PTSD, on the other hand, has a complex range of consequences[48]. This is why when survivors are triggered during family law meetings and proceedings, they may react in surprising ways–as though there is a threat to life. Coupled with the influence of harmful myths and stereotypes about IPV and women, trauma can influence survivors' credibility[49].

Survivors are often still experiencing abuse and managing their safety and the safety of their children during family law proceedings. It is common for survivors to avoid claiming financial support, to agree to reduce their claims or settle for less, because of the fear caused by ongoing abuse[50]. For others, the fear of leaving creates pressure to get the process over with quickly; they leave on the abusers' terms, including by capitulating or abandoning their claims[51]. Whereas other survivors refrain

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42 *Ibid* at 33.

43 See 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 507.

44 *Ibid* at 511.

45 See Bishop & Bettinson, *supra* note 40 at 10–12.

46 See Herman, *supra* note 37; Katz, *supra* note 40 at 56–57; Baird et al, *supra* note 38 at 8130.

47 Randall & Haskell, *supra* note 43 at 511–512.

48 *Ibid* at 512.

49 See Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399; Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35:1 Can J Fam L 33 at 41–51 [Koshan, Myths].

50 See Leigh Goodmark, "Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases" (2009) 37:1 Fla St U L Rev 1 at 19–20 [Goodmark, Autonomy]; Katherine Wright, "The Divorce Process: A View from the Other Side of the Desk" (2006) 18:1 CFLQ 93 at 100; Toolkit, *supra* note 28 at 45; Chan & Lennox, *supra* note 32 at 111–112.

51 See Chan & Lennox, *supra* note 32 at 111–112; Toolkit, *supra* note 28 at 45; Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection and & Child Protection Cases, 2nd ed." (2020) 2017 CanLII Docs 2 at 12.1 online: <http://tinyurl.com/bdewvmeh> [Neilson, Responding].

from pursuing their entitlements altogether[52]. The justice system may also have failed to protect victims in the past, and so they fear repeating those experiences. Inequality in bargaining power because of IPV, economic inequality and other disadvantages also complicate these dynamics.

A common example of how fear influences conduct is through *custody threats*[53]. In those instances, the abuser, who is not the primary parent, threatens to claim primary parenting unless the survivor relinquishes their financial claims–a threat that can be operationalized by a lawyer[54]. When fear is paramount, the victim's focus will be on protecting themselves and their children[55]. According to Pamela Cross, survivors will "trade away property rights and their own economic security in exchange for promises by the abuser (which he almost never keeps) not to fight for custody"[56]. Unfortunately, it is not improper for a lawyer to seek a parenting order provided their client believes it is in the best interests of their child[57]. Family violence concerns are relevant under the *Divorce Act*—but without screening, lawyers may not see the context. Moreover, custody threats are normalized by societal and relationship norms, the idea that all divorcing spouses will fight over their children, showing they care. The regulation of lawyers is unlikely to cure this issue. The law can remove the power of custody threats, for instance, by way of a presumption in favour of the primary caregiver[58].

Similarly, Canadian and international research shows that alienation claims are creating a powerful impediment to raising family violence concerns[59]. In those instances, the victim claims family violence; in

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52 See Katirai, *supra* note 39 at 96–97; Goodmark, Autonomy, *supra* note 50 at 19–20.

53 The *Divorce Act* no longer uses the term "custody", but I have used "custody threat" because it imports connotations of winning and losing which are implied with the threat.

54 See Rise Report, *supra* note 25 at 32; Robert Nonomura et al, *When the Family Court Becomes the Continuation of Family Violence after Separation: Understanding Litigation Abuse* (London: Centre for Research & Education on Violence Against Women & Children, 2022) at 7 [Nonomura et al, Court].

55 See Pamela Cross, *It Shouldn't Be This Hard: A Gender-Based Analysis of Family Law, Family Court and Violence Against Women* (Oshawa: Luke's Place, 2012) at 69.

56 *Ibid* at 26–27.

57 See *Divorce Act,* RSC 1985, c 3 (2nd Supp), s 16 [*Divorce Act*].

58 This is not to say there *should* be a primary caregiver presumption only that family law *can* remove the power from custody threats. Currently, there is no presumption, see *Divorce Act, ibid*, s 16.

59 See Reem Alsalem, *Custody, Violence Against Women and Violence Against Children* (Geneva: Special Rapporteur on Violence Against Women and Girls its Causes and Consequences, UN General Assembly, 2023) [UN Alienation]; Elizabeth Sheehy & Susan B Boyd, "Penalizing Women's Fear: Intimate Partner Violence and Parental

retaliation, the abuser counter-claims alienation, denying the abuse and suggesting the survivor has alienated the child, colluding with them to exclude the abuser. The concept of alienation is deeply controversial and is increasingly being seen as a legitimate defence by judges, despite its reliance on stereotypical reasoning instead of evidence [60]. The abuser will suggest the only way to repair the relationship is through remedies such as shared parenting, shifting primary parenting from the survivor to the abuser or reunification therapy. Elizabeth Sheehy and Susan Boyd have shown that women are twice as likely to be the subject of alienation claims as men[61]. Linda Neilson has shown that in 16% of cases where courts found alienation against mothers, the children were left in their care; this is in contrast to 35% of cases where the fathers retained primary care despite the court having found alienation against them[62]. These dynamics serve as a deterrent to claiming family violence[63]. Moreover, given that claims of alienation are not unlawful, it is not improper for lawyers to advise about their availability. Without screening and family violence training, lawyers may not understand why such a defence is problematic. Indeed, failing to advise a client on its availability could even be considered improper given that it would likely be in the abuser's interests to make the claim. Some problematic practices are permissible or even expected in an adversarial system. As such, relying on the regulation of the profession would have limited utility without family law prohibiting the use of alienation concepts and accusations altogether, which some scholars and

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Alienation in Canadian Child Custody Cases" (2020) 42:1 J Soc Welfare & Fam L 80; Joan Meier & Sean Dickson, "Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation" (2017) 35:2 Law & Ineq 311; Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2018) [Neilson, Alienation]; Suzanne Zaccour, "Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Quebec for Judges, Scholars and Policymakers" (2020) 33 Can J Fam L 301.

60 See Chan & Lennox, *supra* note 32 at 97; Neilson Alienation, *supra* note 59, at 2–7; Family Violence Family Law initiative, "Statement from FVFL about Concerns Related to Special Event 'Kiera's Legacy of Hope Part 2': Enhancing Judicial Education on Family Violence" (Special event delivered at the Centre for Research & Education on Violence Against Women & Children, 5 October 2023) [unpublished].

61 See Sheehy & Boyd, *supra* note 59 at 82.

62 See Neilson, Alienation, *supra* note 59 at 11.

63 See Chan & Lennox, *supra* note 32 at 96–97. See also Rosemary Hunter, Mandy Burton & Liz Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (London, UK: Ministry of Justice, 2020) at 62 [Hunter Report].

anti-violence advocates, including 250 feminist organizations from across Canada, have recommended[64].

In contrast, lawyers' perpetuation of myths and stereotypes is within the purview of professional regulation, provided they have been debunked by the law. Canadian and international studies have confirmed that lawyers rely on harmful myths and stereotypes about IPV while representing both survivors and abusers[65]. When representing survivors, lawyers routinely fail to listen their clients' experiences with violence[66]. They behave in ways that suggest they disbelieve the victim, minimizing the abuse[67]. Research conducted by Rise Women's Legal Centre found that survivors felt they were not "taken seriously" or that their lawyer was not a "safe person" to talk to because the lawyer "did not understand their experiences"[68]. Research shows lawyers deny the abuse could occur, ask why the victim stayed, trivialize their trauma or disregard safety concerns[69]. Some lawyers fail to believe their clients' experiences of psychological abuse because they had no physical evidence,[70] or because they were in a lesbian relationship[71]. Deborah Epstein and Lisa Goodman showed that survivors often want validation, they want to be believed and want to have their experience acknowledged[72]. When legal actors do the opposite, it causes survivors to feel powerless, worthless and to have "self-doubt"[73]. Their "experience" is denied the way it was at "home", but now it is done at

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64 See UN Alienation, *supra* note at 59 at 19; Meier, Denial, *supra* note 7 at 67; Suzanne Zaccour, *Addressing Intimate Partner Violence and Parental Alienation Accusations* (Ottawa: National Association of Women and the Law, 2022) at 9; Letter from Tiffany Butler and Suzanne Zaccour to the Right Honourable Justin Trudeau et al (23 January 2024), online (pdf): https://nawl.ca/wp-content/uploads/2024/01/Open-Letter-Ban-parental-alienation-accusations-NAWL-2.pdf.

65 See Rise Lawyers, *supra* note 34 at 8–10; Adrienne Barnett, "'Like Gold Dust These Days': Domestic Violence Fact-Finding Hearings in Child Contact Cases" (2015) 23 Fem Leg Stud 47; Rise Report, *supra* note 25 at 46–47 and 51–52; Hunter Report, *supra* note 63; Chan & Lennox, *supra* note 32 at 110.

66 See Rise Lawyers, *supra* note 34 at 8; Wangmann et al, *supra* note 35 at 5–6.

67 See Rise Lawyers, *supra* note 34 at 7–11; Rise Report, *supra* note 25 at 37–52; Wangmann et al, *supra* note 35 at 5–6.

68 Rise Lawyers, *supra* note 34 at 8.

69 See Wangmann et al, *supra* note 35 at 5–6; Rise Report, *supra* note 25, at 37–47.

70 See Rise Report, *supra* note 25 at 25–26.

71 See Leigh Goodmark, "When is a Battered Woman Not a Battered Woman? When She Fights Back" (2008) 20 Yale LJ & Feminism 75 at 107–113; Harden et al, *supra* note 20 at 306–310.

72 See Epstein & Goodman, *supra* note 49 at 447–448.

73 *Ibid* at 449.

an "institutional level"[74]. In short, the professionals' conduct "echoes" the IPV, causing retraumatization[75].

The perpetuation of harmful myths and stereotypes leads to harmful legal advice. As discussed above, some survivors capitulate during negotiations. Lawyers complicate this dynamic by imposing additional pressure. They suggest the abuse should not be revealed to the court, and they pressure survivors into settlements with unsafe parenting terms[76]. In doing so, lawyers may be relying on myths and stereotypes, believing the victim is lying, the abuse ended after separation or being overly optimistic that separated parties can cooperate for their children. They may fail to appreciate the impact of IPV on children and believe that violent husbands can be good fathers[77]. Combating reasoning reliant upon myths and stereotypes requires education[78]. However, this conduct can also be occurring because the lawyer knows the legal system is ill-equipped to provide protections, judges cannot be relied upon, and so settling, albeit imperfectly, is the lesser of two evils.

Abusers' lawyers may also perpetuate myths and stereotypes. In addition to retraumatization, the effect is to cause undue prejudice, confuse the legal issues and mislead the court. Whether through correspondence, pleadings, hallway bullying or directly in cross-examination, lawyers suggest the victim is lying about the abuse. The defence of fabrication rests on stereotypical reasoning, as seen in alienation claims. Stereotypes about women as manipulative, vindictive and deceitful in relation to their ex-partners are relied upon to suggest the survivor is lying[79]. Lawyers imply the survivor fabricated the abuse to gain an advantage in family law proceedings[80]. They suggest the claim is part of a "game playing" exercise

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74 *Ibid* at 448.

75 Katirai, *supra* note 39 at 88–89.

76 See Linda C Neilson, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor YB Access to Just 115 at 144–145; Neilson, Responding, *supra* note 51 at 12.1; Wangmann et al, *supra* note 35 at 5–6; Hunter Report, *supra* note 63 at 62 and 144–147.

77 See Rise Lawyers, *supra* note 34 at 9; Wangmann et al, *supra* note 35 at 5–6.

78 See Koshan, Myths, *supra* note 49 at 77–81.

79 See Epstein & Goodman, *supra* note 49 at 433–438; Rosemary Hunter, "Narratives of Domestic Violence" (2006) 28:4 Sydney L Rev 733 at 753–754 [Hunter, Narratives]; Rise Report, *supra* note 25 at 44–47; Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31 Can J Fam L 57 at 64–66 [Zaccour, Crazy]. See also *R v Seaboyer; R v Gayme,* 1991 CanLII 76, [1991] 2 SCR 577.

80 See Neilson, Responding, *supra* note 51 at 4.5.2; Epstein & Goodman, *supra* note 49 at 431–432; Rise Report, *supra* note 26 at 46; Wangmann et al, *supra* note 35 at 9–10; *Johnston v DaSilva,* 2023 ONSC 2710 at para 12 [*Johnston*].

to "frustrate contact" or for a financial gain[81]. They suggest the victim has mental health issues to explain the false allegation, suggesting they are unreliable and prone to exaggeration[82]. The claim of family violence is seen through the lens of legal strategy instead of safety[83]. In contrast, if the abuse is acknowledged, lawyers suggest it was partially the victim's fault. This can be seen when they use mutualizing language, for instance by calling the relationship "high conflict" or demanding mutual protection orders[84]. Some of these problems can be linked to outdated paternalistic ideas of marriage, the family and gendered roles within that institution. Despite most of those ideas being removed from the law, myths and stereotypes linger, and the adversarial nature of the justice system supports their perpetuation. This is not to say people never lie about abuse, but what is improper is lawyers' reliance upon stereotypical reasoning instead of evidence to make that argument.

Finally, systems abuse is perhaps the most difficult to regulate against. This occurs where the abuser uses the power of the justice system to control and punish their former spouse, including through their own lawyer[85]. Systems abuse is a tactic of coercive control[86]. Systems abuse is also known as litigation harassment, "legal bullying, paper stalking [or] paper abuse"[87]. I prefer the term *systems abuse* because the violence is continued through the justice system, inclusive of litigation, CDR and tactics employed before a process is chosen such as "conflicting out", unnecessarily self-representing, and changing lawyers[88]. The term also captures the manipulation of multiple legal systems against the survivor (e.g., immigration, child protection). Linda Neilson has identified thirty-

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81 Hunter Report, *supra* note 63 at 49.

82 See Hunter, Narratives, *supra* note 79 at 767–768; Zaccour, Crazy, *supra* note 79; Neilson, Responding, *supra* note 51 at 7.4.9; Epstein & Goodman, *supra* note 49 at 421–422. See e.g. *EJM v JRM,* 2019 BCSC 2466 at para 14; *Johnston, supra* note 80 at para 12.

83 See e.g. *Bassett v Magee*, 2020 BCSC 1994 at para 61.

84 See Jennifer Koshan, "Preventative Justice? Domestic Violence Protection Orders and their Intersections with Family and Other Laws and Legal Systems" (2023) 35:1 Can J Fam L 241; Rise Lawyers, *supra* note 34 at 10.

85 See Susan L Miller & Nicole L Smolter, "'Paper Abuse': When All Else Fails, Batterers Use Procedural Stalking" (2011) 17:5 VAW 637 [Miller & Smolter]; Neilson, Responding, *supra* note 51 at 7.4; Toolkit, *supra* note 28 at 34; Rise Report, *supra* note 25 at 30–36; LP Report, *supra* note 28 at 13.

86 See Nonomura et al, Court, *supra* note 54 at 5–8; Heather Douglas, "Legal Systems Abuse and Coercive Control" (2018) 18:1 Criminol Crim Justice 84 [Douglas, Systems Abuse].

87 Janet E Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32 Windsor YB Access Just 149 at 158.

88 Rise Report, *supra* note 25 at 30–34; Toolkit, *supra* note 28 at 34.

six different tactics used to maintain contact, harass and intimidate survivors[89]. Problematically, systems abuse may be "overlooked" by legal actors because the litigation may be wrongly justified as a "legitimate" exercise of "legal rights".[90] For instance, family law allows parenting and support matters to be repeatedly revisited through variations and reviews, obscuring cases that would otherwise be an abuse of process. Moreover, less obvious tactics can also be symptomatic, such as seeking an order that the survivor "report" to the abuser on the "education, health and welfare of children"[91]. In essence, the adversarial nature of family law coupled with its flexibility and the patriarchal blindness to women's experiences allows abusive spouses to weaponize the justice system.

A lawyer may facilitate systems abusive when they are delaying, making threats, employing hardball negotiation tactics, counter-claiming, during cross-examination, when making arguments with excessive zeal or based on myths and stereotypes and so on[92]. Conduct is normalized as typical of contentious family law issues. Research conducted by Dr. Jane Wangmann et al showed that "antagonistic approaches" by abusers' lawyers, through "aggressive" and "deliberately provocative" correspondence, are symptomatic[93]. International research has also shown the impact of lawyers' conduct on survivors. Heather Douglas's study showed that survivors felt their "ex-partner's lawyer was actively facilitating" "spurious litigation"[94]. Survivors are shown to feel bullied by opposing counsel[95]; this includes by being asked "humiliating and insulting questions" during cross-examination and being "compelled to look at the abuser during cross-examination"[96]. In these instances, the lawyer's conduct has become an extension of the abuse.

In sum, family lawyers have been shown to contribute to survivors' retraumatization through perpetuation of harmful myths and stereotypes.

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89 See Linda C Neilson, *Failure to Protect: Social & Institutional Factors that Prevent Access to Justice in Family Violence/Family Law Cases* (Fredericton, NB: Muriel McQueen Fergusson Center for Family Violence Research, 2023) at 8–13.

90 Miller & Smolter, *supra* note 85 at 641.

91 Neilson, Responding, *supra* note 51 at 7.4.1.3.

92 See also Wangmann et al, *supra* note 35 at 6–10; Heather Douglas, *Women, Intimate Partner Violence and the Law* (Oxford: Oxford University, Press 2021) at 168–170 [Douglas, IPV]; Nonomura et al, Court, *supra* note 54 at 5–8.

93 Wangmann et al, *supra* note 35 at 9–10. See also Douglas, IPV, *supra* note 92 at 168–170.

94 Douglas, IPV, *supra* note 92 at 169. See also Douglas, Systems Abuse, *supra* note 86 at 95.

95 See Wangmann et al, *supra* note 35 at 6–10; Douglas, IPV, *supra* note 92 at 168–170; Hunter Report, *supra* note 63 at 123.

96 Hunter Report, *supra* note 63 at 123–124.

They have been used as tools of abuse. Although education and professional regulation can make a difference, societal norms and the adversarial system are complicit in reinforcing these practices and normalizing them, suggesting that a comprehensive response to IPV also requires societal and systematic change.

III. Family Law Background

Before turning to the recommendations for specialized codes of professional conduct, it is important to situate that discussion within the broader context of family law's perceived brokenness beyond IPV. Throughout the last fifty years, various stakeholders have evaluated family law's problems[97]. Many of the reports that followed have called for a "fundamental overhaul", stating that "major change is urgently needed", citing the need for a "culture shift"[98]. They almost unanimously seek a transition from adversarial to consensual dispute resolution ("CDR"), diverting people out of court, and only resorting to litigation when negotiations have failed or rights need to be pursued[99]. The direst conclusion is that the family justice system is simply "broken"[100]. Many of the recommendations for family law reform within the last twenty years were in response to these findings.

The access to justice and family law reform reports consistently emphasize ways to make family dispute resolution easier and more accessible. In 2013, the Action Committee for Access to Justice in Civil and Family Matters ("A2J Committee") summarized the previous conclusions from these reports in "Beyond Wise Words" ("A2J Report")[101]. They found common rationales for change included the "built-in tendency for adversarial [processes] to polarize spouses and exacerbate conflict", the fact that "parental conflict can be very harmful to children", and "conflict tends to protract process" which increases the parties' financial cost[102].

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97 See generally Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (New Brunswick: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 2–9 [A2J Report].

98 *Ibid* at 3; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters2013) at 5–9, 17 [Roadmap].

99 See *A2J Report, supra* note 97 at 20–26; Roadmap, *supra* note 98 at 17–18; BC Justice Review Task Force, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (British Columbia: BC Justice Review Task Force, 2005) at 16–22 [BC Task Force].

100 Law Commission of Ontario, *Voices from a Broken Family Justice System: Sharing Consultation Results* (Toronto: Law Commission of Ontario, 2010).

101 A2J Report, *supra* note 97 at 2–3.

102 *Ibid* at 5–6.

They also emphasized that both types of dispute resolution are necessary options, yet there should be a push towards CDR for the majority[103]. Of note, family violence concerns were embedded within the principles they hoped would guide reform, but not given priority. It is well recognized that CDR brings unique risks for those experiencing IPV and power imbalances, and there was criticism at the time that emphasizing CDR would be at the expense of a just outcome for survivors[104].

In 2021, the federal *Divorce Act* was amended to reflect changes that had been discussed twenty years earlier[105]. Although there were provincial reforms, until recently, federal family law had stalled in its evolution after the introduction of the 1986 *Divorce Act* and subsequent polarization of debates about parenting laws[106]. The three primary areas of reform in 2021 were in relation to CDR, family violence and parenting[107]. These changes were long overdue, and some might argue reflective of existing norms and therefore not changing much. They were intended to respond to the access to justice crisis, recognize the impact of family violence on children, and promote children's best interests[108].

The *Divorce Act* also imposed an important new obligation on lawyers to identify family violence[109]. Lawyers have been required to encourage clients to consider negotiation or mediation since 1985, and that requirement now includes collaborative practice—unless it would

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103 See *ibid* 22–25.

104 See Laura Track, "Submission re. Meaningful Change for Family Justice—Beyond Wise Words" (1 February 2013) via e-mail [communicated to Jerry McHale].

105 See Bill C-22, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to Amend Other Acts in Consequence,* 2nd Sess, 37th Parl, 2003 (second reading 25 February 2003); Hon London Pearson & Roger Gallaway, *For the Sake of the Children: Report of the Special Joint Committee on Custody and Access* (Ottawa: Parliament of Canada,1998).

106 See generally Susan B Boyd & Claire F L Young, "Who Influences Family Law Reform? Discourses on Motherhood and Fatherhood in Legislative Reform Debates in Canada" (2002) 26 Stud L Pol & Soc'y 43.

107 See 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 A*ct, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 16.

108 See 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)" (June 2019) online (pdf): <http://tinyurl.com/92vbxu8m> [perma.cc/E9HG-P7HE] [Legislative Background].

109 See *Divorce Act, supra* note 57, s 7.7(2)(a); *Colucci v Colucci,* 2021 SCC 24 at para 69 [*Colucci*].

"clearly not be appropriate"—i.e., unless there is family violence[110]. Thus, for a lawyer to competently advise their client on CDR process options, they need to know whether there is family violence. The Act imposes a positive duty on lawyers to screen for IPV and adjust their legal advice accordingly.

The *Divorce Act* amendments did not, however, go far enough to protect survivors and their children from violence, confining the changes to heteronormative conceptions of IPV and the parenting sections of the Act. The family violence definition failed to include tactics of abuse that are unique to LGBTQ2S+ and gender diverse communities such as outing and cutting someone off from their community[111]. There are no protections for support recipients from ongoing financial control[112]. The amendments failed to explicitly require that lawyers screen for family violence.[113] It is unclear how often family lawyers' screen; the statistics and tools used vary. A 2018 national survey showed that only 50% of lawyers screen in 75% to 100% of their cases,[114] and a 2019/20 national survey showed that 70% of lawyers often or always screen for family violence.[115]

In sum, family law continues to be perceived as broken, although there is hope because of the recent amendments and the overdue recognition of family violence. The reforms have had a positive impact on the lawyer's professional obligations; however, they have also contributed to the disconnect between family law and the *Model Code*.

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110 *Divorce Act, supra* note 57, ss 2(1), 7.7(2)(a). See also *Colucci, supra* note 109 at para 69; Legislative Background, *supra* note 108 at 32–33.

111 But see *Divorce Act, supra* note 57, s 2(1) (they are implied as "psychological abuse").

112 Payors can maintain control by withholding access to financial disclosure and through periodic payments of support, requiring monthly contact, instead of support being automatically calculated, paid, and adjusted.

113 Lawyers from BC are legislatively required to 'assess' whether family violence is present, but it remains unclear what that assessment requires because there are no regulations. See *Family Law Act*, SBC 2011, c 25, s 8(1); *Family Law Act Regulation,* BC Reg 347/2012, ss 3–6.

114 See Department of Justice, *The Practice of Family Law in Canada: Results from Surveys for the 2018 National Family Law Program* (Ottawa: Department of Justice, 2021) at 4.

115 See Nadine Badets & Bianca Stumpf, *Identifying and Responding to Family Violence in Family Law Cases: Results from the 2019 Survey of Lawyers and Quebec Notaries on Family Law and Family Violence in Canada* (Ottawa: Department of Justice, 2023) at 3.

IV. A Separate Code of Conduct for Family Lawyers

Flowing from the conclusions that family law needs to be overhauled, researchers and policymakers have recommended reforming family lawyers' professional obligations[116]. They seek to enshrine non-adversarial lawyering, impose a duty to minimize conflict, and prioritize children's interests and/or create an obligation to the family. In this part, I review those recommendations, briefly considering their consequences were they to be implemented.

A) A Brief Historical Overview

Family law is often thought to be unique or different from other areas of law[117]. Family law was an afterthought to the civil justice system, no longer part of ecclesiastical courts but not fitting into civil or criminal frameworks either. Modern family law practice is relatively new. The influx of people divorcing after the introduction of comprehensive federal divorce legislation in 1968 provoked a new need for matrimonial lawyers; and since then, scholars have advocated for a unique code of conduct[118]. It was hoped that removing the requirement to prove fault would lead to less adversarialness and be beneficial for families. In the US, it was thought that this may require a different type of lawyering, reflected in a "special code"[119].

Canadian scholars have advocated for special rules. Nicholas Bala, Patricia Hebert and Rachel Birnbaum posited that the "partisan" advocate model is not "appropriate for family cases"[120]. Instead, they argued that the family lawyer's role should be to help "their clients to be good parents"[121]. They advocated for professional organizations to develop "ethical guidelines specifically for family lawyers" with an emphasis on

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116 See A2J Report, *supra* note 97 at 31–32; BC Task Force, *supra* note 99 at 104–108.

117 See Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Trebilcock, Michael, Lorne Sossin, Anthony Duggan eds, *Middle Income Access to Justice* (Toronto, ON: University of Toronto Press, 2012) at 273–276.

118 See *Divorce Act,* RSC 1967–68, c 24; Statistics Canada, *A Fifty-Year Look at Divorces in Canada, 1970 to 2020*, in *The Daily,* Catalogue No 11-001-X (Ottawa: Statistics Canada, 2022) at 1–2.

119 Walter Johnson, "A Special Code of Professional Responsibility in Domestic Relations Statutes" (1975) 9:4 Fam L Q 595.

120 Nicholas Bala, Patricia Hebert & Rachel Birnbaum, "Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer" (2017) 95:3 Can Bar Rev 557 at 559.

121 *Ibid* at 559–560.

being "child-focused"[122]. Similarly, John-Paul Boyd also advocated for a separate code of conduct supporting a more conciliatory approach[123]. Empirical research I conducted in 2016 also revealed that some family lawyers believe family law should be practiced according to a "higher" ethical standard[124].

These concerns and ideas echo arguments scholars have made about lawyering in CDR generally. Beginning in the 1980s, with the rise of mediation, new terms were being used for lawyers, including the "peacemaker", "problem solver"[125] and "conflict resolution advocate"[126]. These ideas implied a less adversarial role, one limited by something other than the law. Carrie Menkel-Meadow emphasized that the goal in a CDR process is to obtain a "joint gain or betterment of the condition of all parties" instead of a single "winner or loser"[127]. She argued that such a goal creates a different role for lawyers, that of "dispute resolvers and resolution facilitators"[128]. Similarly, Julie Macfarlane, whose work influenced the A2J Committee's recommendations, posited that the lawyer's role is to be a "conflict resolution advocate"[129]. For Macfarlane, there are two types of advocacy, and their differences stem from the process the lawyer is working in.[130]

Policymakers have made similar recommendations. In 2005, the BC Justice Review Task Force ("BCJRTF") reviewed the access to justice reports discussed above to make a "plan for change"[131]. They found the "practice of law and our understanding of what it means to be a lawyer are undergoing profound changes"[132]. Rejecting the traditional ideal of the lawyer, the BCJRTF argued that there is a "new ideal of the lawyer working with the client in a variety of ways towards a resolution of the client's real

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122 *Ibid.*

123 See John-Paul Boyd, "The Need for a Code of Conduct for Family Law Disputes" (29 April 2016) online (blog): <http://tinyurl.com/2jp8jfdz> [perma.cc/VR9L-CDNL]; John-Paul Boyd, "The Need for a Code of Conduct for Family Law Disputes, Part 2" (8 February 2019) online (blog): <http://tinyurl.com/mr2d7hnj> [perma.cc/Q5W3-XHJP].

124 Deanne Sowter, "Professionalism & Ethics in Family Law: The Other 90%" (2016) 6:1 J Arbitration & Mediation 167 at 183.

125 Carrie Menkel-Meadow, "Ethics and Professionalism in Non-Adversarial Lawyering" (1999) 27 Fla St U L Rev 153 at 154.

126 Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* (Vancouver, BC: UBC Press, 2017) at 115–116.

127 Carrie Menkel-Meadow, "The Evolving Complexity of Dispute Resolution Ethics" (2017) 30 Geo J Leg Ethics 389 at 401.

128 *Ibid* at 401.

129 Macfarlane, *supra* note 126 at 115. See also A2J Report, *supra* note 97 at 30.

130 See *ibid* at 117.

131 BC Task Force, *supra* note 99 at 5.

132 *Ibid* at 104.

problem"[133]. To help support a shift "from a strict focus on legal rights and obligations towards solutions that address the spectrum of family issues" they suggested that lawyers need to be "supported by the Law Society and its rules, and by the legal profession's governing statute"[134]. One of the BCJRTF's central concerns was the lawyer's duty of loyalty to the client. They worried that following such an obligation can sometimes cause "harm" to the "children, to the other spouse or to the family unit"[135]. They wanted "guidance" for lawyers about how to balance their role as advocate with the potential harm it may cause the family[136]. They were concerned about children and wanted an "obligation" to "minimize conflict and to promote cooperative methods of dispute resolution in all appropriate cases"[137]. The British Columbia Ministry of Attorney General supported the BCJRTF's recommendation that law societies "consider the benefits of a unique code of practice designed specifically to address family law issues"[138].

In 2011, the LSBC followed the BCJRTF's recommendation and is the only Canadian law society to have created voluntary guidelines for family law practice[139]. Similar common law jurisdictions have, however, introduced similar guidelines[140]. The LSBC's *Common-sense Guidelines for Family Law Lawyers* focus on minimizing conflict, reality-checking and prioritizing children's interests ("LSBC Guidelines")[141]. Lawyers are asked to "advise clients" to "put their children's interests before their own"[142]. This is in contrast to the *Model Code,* which law societies typically mirror, requiring lawyers to "advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client"[143]. What is *illegitimate* in that context

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133 *Ibid.*

134 *Ibid* at 106.

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 British Columbia Ministry of Attorney General, *Family Justice Reform Working Group Report: A New Justice System for Families and Children—Status of Recommendations* (British Columbia: Ministry of Attorney General September 2006) at 5.

139 See Law Society of British Columbia, "Common-sense Guidelines for Family Law Lawyers" (1 May 2013) online: <http://tinyurl.com/39d45z66> [perma.cc/5QVB-G2RU] [LSBC Guidelines].

140 See generally Lisa Webley, "Divorce Solicitors and Ethical Approaches—The Best Interests of the Client and / or the Best Interests of the Family?" (2004) 7:2 Leg Ethics 231; American Association of Matrimonial Lawyers, "Bounds of Advocacy: Goals for Family Lawyers" (2012) online (pdf): <http://tinyurl.com/zmrmnyu5> [perma.cc/295K-B3N5].

141 LSBC Guidelines, *supra* note 139.

142 *Ibid* at 8.

143 Model Code, *supra* note 3 at R5.1-1[4].

is unclear. In 2013, the A2J Committee supported the LSBC Guidelines, recommending that law society regulation should "explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files" by adopting similar guidelines[144].

Despite the suggestions that the involvement of children and the emphasis on CDR indicate a different approach to lawyering, the *Model Code* has not been reformed to account for family law. Rather the lawyer's role was not significantly altered until the *Divorce Act* amendments in 2021, leading to the Canadian Bar Association's proposal for reform[145].

B) The Canadian Bar Association's Proposal for Reform

After the *Divorce Act* was amended in 2021, the Canadian Bar Association ("CBA") submitted a recommendation to the Federation of Law Societies that the *Model Code* should include "standards" for family lawyers adapted from the LSBC Guidelines[146]. They suggested the *Model Code* does not "accurately reflect the contemporary duties and practices of Canadian family law lawyers"[147]. The CBA sought to bring the *Model Code* into alignment with the *Divorce Act*, Canada's ratification of the *United Nations Convention on the Rights of the Child* ("UNCRC"),[148] the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"),[149] as well as family law "practice guidelines"[150].

The CBA also recommended that the *Model Code* be amended to include non-adversarial advocacy[151]. They argued that the "practice of family law has evolved" and a lawyer's duties under the *Divorce Act* are "in contrast" with the advocacy rule which only applies to adversarial proceedings (Rule 5.1-1)[152]. They proposed adding commentary for

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144 A2J Report, *supra* note 97 at 31.

145 See Canadian Bar Association, "Model Code of Professional Conduct: Proposed Amendments for Family Law Lawyers" (2021) online (pdf): <http://tinyurl.com/nhe6u2x9> [perma.cc/42J8-YUS3] [CBA].

146 *Ibid* at 11–14.

147 *Ibid* at 1.

148 See *United Nations Convention on the Rights of the Child,* 20 November 1989 (entered into force 2 September 1990, ratified by Canada 12 December 1991).

149 See *United Nations Declaration on the Rights of Indigenous Peoples,* 13 September 2007 (entered into force 21 June 2021); *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14.

150 CBA, *supra* note 145 at 1–2.

151 See *ibid* at 8–11.

152 *Ibid* at 10.

"non-adversarial family law proceedings".[153] It is unclear why their recommendation was only for family law when all CDR processes have the same interest-based characteristics.

The CBA's proposed new "standard" is built on the LSBC Guidelines[154]. It includes suggestions to be "courteous and civil", to remain "objective" and not "be influenced by ill feelings and emotional factors that hinder a reasonable resolution", to avoid "delaying or bullying an opposing party," and to encourage "clients to reduce conflict"[155]. Several suggestions focus on the client's children.[156] Like the LSBC Guidelines, lawyers are asked to advise their clients to "place the child's interests before their own" because "failing to do so may have a significant impact on both the child's wellbeing and the client's proceedings"[157]. It is unclear what the latter portion of that recommendation is referring to. It may be referring to judicial requirements to make decisions in the best interests of children;[158] however, research consistently shows judges failing to do so where there is family violence[159]. The CBA also emphasized lawyers educating themselves about family violence, the UNCRC and the UNDRIP.[160]

In relation to family violence specifically, beyond a duty to educate themselves, the CBA also sought "guidance" on lawyers' duties "when representing clients affected by family violence"[161]. Unfortunately, they provided no further clarity about specific concerns; for instance, no questions about the competencies required to comply with their legislative duties, nor about how the duty of loyalty intersects with concerns about safety for individual family members.

C) The Unintended Consequences

The CBA recommendations do not directly conflict with the *Model Code* or existing professional obligations. Indeed, it could be argued that many of their recommendations articulate existing obligations and are already reflected in the *Model Code* and the *Divorce Act*. For example, lawyers

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153 *Ibid* at 11.

154 *Ibid* at 11–14.

155 *Ibid* at 12–13.

156 See *ibid*.

157 *Ibid* at 13.

158 See *Divorce Act, supra* note 57, s 16.

159 See Sheehy & Boyd, *supra* note 59 at 82–83; Susan B Boyd & Ruben Lindy, "Violence Against Women and the BC Family Law Act: Early Jurisprudence" (2016) 35 CFLQ 101; Neilson, Alienation, *supra* note 59.

160 See CBA, *supra* note 145 at 12–14.

161 *Ibid* at 4–5.

are already required to be courteous and civil[162]. Whereas others, such as reducing "conflict" and not participating in actions that are "misleading" or pursued for an "improper purpose" are vague, and problematic in the context of negotiations and IPV.

One consistent message is to impose a duty on lawyers to minimize conflict[163]. It is unclear whether the term *conflict* refers to IPV, but it seems to capture it. Sometimes the language around this idea includes a caveat, *if appropriate,* but not always[164]. Minimizing conflict is an obvious good where there are children. It is well-recognized that direct and indirect exposure to IPV is harmful for children[165]. Exacerbating conflict can sometimes heighten risk, and increasing adversarialness also increases financial cost and prolongs litigation. However, suggesting that a victim and their lawyer ought to be the ones to minimize conflict with the former abuser can be retraumatizing. When a survivor ought to be reclaiming their autonomy, capitulating on their interests to minimize conflict can be harmful. Moreover, an abuser may see such attempts as an opportunity to employ more aggressive control tactics, shifting the scales and increasing their power. Furthermore, a rule could not only apply to family lawyers. Parties may be engaged in multiple legal issues at once. Criminal lawyers, immigration lawyers and so on, could be necessarily increasing conflict. Lawyers cannot work to different standards without risking parties leveraging the more aggressive system against the family law matter, where a lawyer would be restrained.

Moreover, if a rule were adopted, it is unclear *how* a lawyer would minimize conflict. It is unclear whether such an objective means a lawyer must refuse to follow instructions if they believe doing so will increase conflict. It is unclear how that would be objectively determined. In the context of IPV, conflictual conduct is a spectrum, ranging from subtle tactics at one end, to systems abuse at the other. Preventing the latter is an important goal, but where there is coercive control, the former is just as critical. Pursuant to the *Model Code,* if a client wants their lawyer to do something that will increase conflict, the lawyer must follow their client's lawful instructions unless there is a loss of confidence between the two[166]. A lawyer's duty is to their client and the administration of justice, and that cannot be reduced based on a perception of what might increase conflict.

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162 See Model Code, *supra* note 3 at R5.1-5 and R7.2.

163 These paragraphs are adopted from my Slaw column, see Deanne Sowter, "A Family Lawyer's Role is (Not) to Minimize Conflict" (25 June 2020) online (blog): <http://tinyurl.com/yckwyk5m> [perma.cc/ZNQ2-4M4U].

164 See e.g. CBA, *supra* note 145 at 12–13; A2J Report, *supra* note 97 at 3–4.

165 See Jaffe et al, *supra* note 30 at 12–19; Neilson, Responding, *supra* note 51 at 3.1.2 and 6.2.5; *Barendregt v Grebliunas*, 2022 SCC 22 at para 143 [*Barendregt*].

166 See Model Code, *supra* note 3 at R3.7-2.

In addition, if a survivor's lawyer were tasked with paternalistic decision-making for their client, they risk behaving the same way the abuser did, controlling the survivor.

This does not mean a lawyer cannot advise their client on the wisdom of an obviously conflictual tactic or behaviour, and even advise against such conduct. Indeed, a lawyer should be honest with their client, and be firm, if necessary, about what they believe[167]. A lawyer can provide moral advice the same way anyone can; although, they need to be confident that their client can tell the difference between moral and legal advice[168]. A lawyer may "reality check" with their client to ensure they fully understand the consequences of their decisions—this may even be required in some CDR processes, such as collaborative practice[169]. In addition, pursuant to the *Divorce Act,* parties now have an obligation to "protect any child of the marriage from conflict arising from the proceeding" to the "best of their ability", assumedly an exception for family violence[170]. As a result, it is now proper for a lawyer to remind their client of that obligation.

To be sure, some conflictual conduct is already prohibited by the law and rules governing lawyers. In an adversarial process, a lawyer cannot institute proceedings that are "clearly motivated by malice", nor assist in something "dishonest or dishonourable"[171]. The question of what dishonourable means is, however, unclear. A lawyer must also encourage "compromise" or settlement where feasible, and "discourage the client from commencing or continuing useless legal proceedings"[172]. Costs consequences also temper zeal. Actions cannot be taken which would amount to an abuse of process, nor those contrary to the lawyer's duty to the administration of justice. However, there is a gulf between these guardrails and a positive obligation to minimize conflict. The client must be permitted to make fully informed decisions about how to live within what the law allows. Moreover, coercive control is not currently a criminal offence in Canada. A lawyer cannot refuse to follow lawful instructions because they think it is a bad idea or conflictual – especially in an adversarial system that is conflictual by design.

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167 *Ibid* at R3.2-2[2-3].

168 See W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 138–143.

169 Deanne Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor Y B Access Just 401 at 421–422 [Sowter, Advocacy].

170 *Divorce Act, supra* note 57, s 7.2.

171 Model Code, *supra* note 3 at R5.1-2(a-b).

172 *Ibid* at R3.2-4.

Finally, despite the clear benefits of singling out family law and emphasizing a gentler approach to dispute resolution, especially when children's interests are involved, in my view, these recommendations raise questions about the lawyer's role that need to be answered. The recommendations tend to prioritize children's interests over that of the client, which is appealing. Currently the *Model Code's* advocacy rule includes a provision requiring the lawyer to "advise" the client to "take into account the best interests of the child," but it is necessarily tempered because of the lawyer's duty of loyalty and their fiduciary obligation[173]. Some recommendations seem to want to change this rule so that the child's interests are paramount.

A central concern hinges on the lawyer's duty of loyalty. A lawyer cannot prioritize someone else's interests over their client's without acting in a conflict of interest and breaching their fiduciary obligation to their client[174]. There are questions about the lawyer's role when advising a parent who has a fiduciary obligations to a child[175]. Several of the recommendations suggest a duty to the family;[176] however, that would create significant tension with the law governing lawyers and fundamentally alter the lawyer's role. The family is not a subject that has actual interests and needs; it is comprised of individuals who have them and who sometimes have competing interests and needs[177].

Moreover, various academic and policy recommendations have not deeply considered IPV. A duty to the family cannot exist when one of the members holds significant power over another. How would a lawyer determine which person's interests prevail in a conflict. Thus, I suggest that unless the profession wants to make a fundamental change at the core of the lawyer's role, such as prioritizing a child's interests *over* that of the client, then it seems unnecessary to have different rules for family lawyers. In other words, unless the profession and legislature want to alter the existing legal framework governing lawyers, which arguably might require a shift away from the adversarial system, then providing voluntary guidance akin to the LSBC Guidelines does not seem helpful[178]. It also does not go unnoticed that guidelines can be ignored and do not serve as the basis for disciplinary action.

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173 *Ibid* at R5.1-1[4].

174 See *ibid* at R3.4; *Canadian National Railway v McKercher LLP,* 2013 SCC 39.

175 I am indebted to Malcolm Mercer for this point.

176 See also Sowter, Advocacy, *supra* note 169 at 416; Webley, *supra* note 140.

177 I am indebted to Amy Salyzyn for this point.

178 To my knowledge, there are no studies evaluating the impact (if any) of the LSBC Guidelines.

In the end, creating a separate code for family lawyers is premature. It may be that a time comes when a distinction is necessary, for instance, if family law were to create different professional obligations. In the meantime, there are too many questions about what the family lawyer's role ought to be within the system we have. There are questions about the duty of loyalty and how to prioritize safety. And there are questions about the purpose of family law, the influence of neoliberal policies and what obligations family law ought to create for lawyers. Without answers, the recommendations below apply to all lawyers and focus on IPV.

V. Amending the *Model Code* to be Responsive to Intimate Partner Violence

Lawyers' professional codes of conduct and the law governing lawyers in Canada reflects the prevailing understanding of the lawyer's role. The lawyer's role is to provide access to our system of laws and facilitate the client's accomplishment of their own goals[179]. The lawyer is the client's fiduciary, providing legal advice and pursuing the client's "legal entitlements"[180]. This view and the concept of the resolute advocate that flows from it were not created by the drafters of the law or *Model Code*. Rather, as observed by Amy Salyzyn and Penelope Simons, these ideas are "deeply rooted in dominant visions of lawyering in common law jurisdictions"[181]. The lawyer's role is not to provide something the law has not. As indicated above, lawyers do not have a legislative or professional obligation to prioritize safety. They have no legal obligation to divulge concerns about family violence,[182] and they are under no obligation to safety-plan with their clients[183]. This framework explains some of the problematic lawyering described above. It is not necessarily that lawyers are behaving improperly but rather that the law and professional rules governing their conduct do not account for IPV, and they need to.

The following recommendations should not be conflated with a goal of expanding the *Model Code* to respond to the various specificities that arise in practice. In my view, it is unhelpful, if not detrimental to

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179 See Alice Woolley, "Is Positivist Legal Ethics an Oxymoron?" (2019) 32 Geo J Leg Ethics 77 at 87–88.

180 Wendel, *supra* note 168 at 50. See also Alice Woolley, "Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:2 UTLJ 285.

181 Amy Salyzyn & Penelope Simons, "Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts" (2021) 24 Leg Ethics 24 at 29.

182 But see *Children, Youth and Families Act,* SNL 2018, c c-12.3, s 11(9) and 96(3) (except in Newfoundland when a child is in need of protection). See also Model Code, *supra* note 3 at R 3.3-2; *Smith v Jones,* 1999 CanLII 674, [1999] 1 SCR 455 [*Smith*].

183 See Chan & Lennox, *supra* note 32 at 89.

the development of professional reasoning to strive for a code that aims to provide an answer to every dilemma that may arise, or every skill or knowledge base necessary for competent practice. IPV, however, embeds risk of lifelong disadvantage and death, demanding a response. This is also not meant to replace best practice guidelines which are increasingly being developed by stakeholders and experts[184]. Regulatory frameworks cannot replace the expertise of family violence specialists who thoughtfully create tools for training and ongoing education. Rather, this is about ensuring all lawyers understand those tools, and ensuring the profession does not contribute to survivors' harm.

In my view, there are four primary areas of lawyers' professional ethics that require reform. First, education, coupled with guidance in relation to lawyer competence. Second, creating exceptions to some existing professional obligations to prioritize safety. Third, expanding the advocacy rule to include non-adversarial advocacy. Finally, fourth, introducing IPV concerns to both advocacy sections, including safeguards so it is more difficult for a lawyer to be used as a tool of systems abuse. I also recommend introducing a preamble that frames the entire *Model Code* through an intersectional and gender-based violence lens, so all the rules are read through it. The amendments discussed below are summarized in the appendix.

A) Establishing Competence

All lawyers may represent people experiencing IPV. People who have experienced abuse are more likely to endure legal problems, including criminal, employment, landlord tenant, and so on.[185] Conversely, abusers can use those other areas of law to manipulate survivors. As a result, all lawyers need to be educated in IPV.[186] Problems stem from the fact that lawyers routinely fail in this regard; they do not consistently screen for violence, they fail to listen to survivors about their experiences, and they make assumptions. The competence section of the *Model Code* should be amended in the following four areas: definitions, screening, cultural competence and trauma informed practice.

Including definitions of family violence, IPV, and coercive control in the *Model Code* would be necessary for interpretation, but also serve to educate lawyers. Comprehensive definitions should mirror the federal

184 See e.g. Wangmann et al, *supra* note 35; Toolkit, *supra* note 28.

185 See Wangmann et al, *ibid* at 2; Daphnee B Menard, Katja Smedslund & Genevieve Dominique et Lessard, *Contributing to the Health and Safety of Family Violence Survivors: Reducing the Risks of Secondary Victimization* (Quebec: Centre for Research & Education on Violence Against Women & Children, 2021) at 3.

186 See Koshan, Myths, *supra* note 49 at 76–81.

Divorce Act but expand to include systems abuse, and violence towards marginalized survivors such as those with disabilities, members of the LGBTQ2S+ community and those with vulnerable immigration status.

Lawyers are required to provide competent service to their clients. It is well-recognized that ongoing screening is essential to competent practice.[187] Pursuant to the *Model Code,* to be competent, a lawyer is required to know the applicable law and procedures, and have the skills necessary to conduct legal research, identify the relevant issues and understand their client's "objectives", as well as skills essential to "problem-solving" and "advocacy"[188]. Screening is necessary to identify the legal issues, understand client objectives and effectively represent them. Amending the *Model Code* to reflect this obligation would be consistent with lawyers' existing obligations and extend the requirement to screen to all lawyers, regardless of practice area.

Cultural competence refers to the idea that lawyers need skills, education and attitudes that allow them to provide services to diverse clients[189]. In relation to the profession's obligations pursuant to the *Truth and Reconciliation Commission of Canada's Report*, Pooja Parmar argued for a robust version of cultural competence that includes a critical examination of the legal profession in relation to Indigenous peoples[190]. Cultural competence is not included in the *Model Code*, but the Federation of Law Societies of Canada is currently considering related amendments in response to Call to Action 27[191]. In addition, for competent representation of people experiencing IPV, lawyers need a deep understanding of intersectional identities given the disproportionate impact IPV has on marginalized communities.

Representing survivors requires trauma-informed practice. Trauma-informed lawyering refers to the idea that lawyers understand how trauma impacts a person and their responses, and how the justice system responds, including causes of retraumatization[192]. This would also benefit

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187 See Rise Lawyers, *supra* note 34 at 16–17; LP Report, *supra* note 28; Toolkit, *supra* note 28.

188 Model Code, *supra* note 3 at R3.1-1 and R3.1-2.

189 See Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97 Can Bar Rev 426 at 434.

190 *Ibid*.

191 See Federation of Law Societies of Canada, *Consultation Report, Draft Amendments in Response to Call to Action 27: Model Code of Professional Conduct* (Ottawa: Federation of Law Societies, 2023) at 11–21 [Federation, Call to Action].

192 See Wangmann et al, *supra* note 35 at 7–8; Karla O'Regan et al, *Trauma-Informed Approaches to Family Violence in Family Law* (Fredericton: Centre for Research & Education on Violence Against Women & Children, 2021) at 6–9.

all clients who suffer from traumatic experiences (e.g., IPV, sexual assault, torture), also requiring that lawyers understand the ways layers of trauma intersect (e.g., homophobia, racism, etc.). Trauma informed lawyering is about the way services are delivered[193]. Lawyers are required to alter their approach to avoid retraumatizing their client; for instance, lawyers need to listen to their client's concerns about violence[194]. These critical skills are increasingly being called upon for lawyers[195] (including in relation to Call to Action 27),[196] and ought to be reflected in the competence rule, and be an "expected" practice under Rule 3.2 (Quality of Service)[197].

B) Creating Exceptions Because of Family Violence

As described above, family violence and IPV are often treated as an exception. This is a fundamental problem with how family law is structured, and at the risk of further perpetuating that issue, I suggest lawyers' professional obligations ought to include some exceptions for family violence. For instance, the *Model Code* should provide a clear exception to the lawyer's duty to encourage compromise or settlement where there is family violence.[198] Currently, the *Model Code* conflicts with the *Divorce Act* in that regard.[199]

That said, introducing other exceptions would be less straight forward. As described above, the lawyer's duty of loyalty is fundamental. It is a legal obligation informing basic regulatory duties such as the duty of confidentiality and the duty not to act in a conflict of interest[200]. A critical examination of the law informing that duty is needed, including whether it contributes to retraumatization of survivors, whether it facilitates abuse by perpetrators' lawyers, and whether it unhelpfully assists in upholding an adversarial justice system. That said, within the confines of this paper, I suggest that narrow exceptions should be implemented to prioritize safety. It is not unprecedented for lawyers to prioritize public safety over their client's interests[201]. Following that precedent, as I have argued elsewhere, when an abuser's lawyer has inflammatory information that their client does not have yet, lawyers need flexibility to delay disclosure to their own

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193 See: O'Regan et al, *ibid* at 6.

194 *Ibid* at 6–7.

195 See e.g. Wangmann et al, *supra* note 35 at 7; *ibid* at 6–9; Rise Lawyers, *supra* note 34 at 10–11.

196 See also Federation, Call to Action, *supra* note 191 at 11–14.

197 Model Code, *supra* note 3 at R3.2-1[5].

198 See *ibid* at R3.2-4.

199 See *Divorce Act, supra* note 57, ss 7.3, 7.7(2)(a).

200 See Model Code, *supra* note 3 at R3.3 and R3.4.

201 See *Smith, supra* note 182*; Ibid* at R3.3-3.

client, so the survivor can implement safety protocols first[202]. This would only be necessary where disclosure may increase risk, and likely only be possible where both lawyers can communicate effectively and cooperate in pursuit of safety. Similarly, to prevent harm or death, the future harm exception allows disclosure of protected information where there is imminent risk of "serious bodily harm", which includes psychological harm[203]. Stipulating that ongoing coercive control can indicate serious psychological harm would clarify the applicability of the exception to IPV[204]. In essence, the idea is to remove barriers that create unnecessary risk for survivors while not altering or diminishing the solicitor-client relationship.

To be clear, the idea is not to further exceptionalize family violence, but rather to bring lawyers' existing obligations into sync while removing unnecessary risk. This means ensuring lawyers' obligations under the *Model Code* and the *Divorce Act* are compatible. Similarly, the idea is to introduce or clarify narrow exceptions which are analogous to existing rules.

C) Introducing Non-Adversarial Advocacy

Non-adversarial advocacy is not reflected in the *Model Code,* and updating it is necessary to introduce comprehensive safeguards for IPV. Currently, Rule 5.1 (Advocacy) is for adversarial proceedings, requiring lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by the law"[205]. There are no rules governing advocacy in processes such as facilitative mediation and collaborative practice;[206] no safeguards designed for the intersection of negotiations and IPV. I recommend adding sections defining non-adversarial advocacy and expected practices.

There might be some concern that including a section on non-adversarial lawyering alters the lawyer's role. Sometimes the adversary system itself is relied upon to explain the lawyer's role, which could be why

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202 See Deanne Sowter, "Full Disclosure: Family Violence and Legal Ethics" (2020) 53:1 UBC L Rev 141.

203 Model Code, *supra* note 3 at R3.3-3. See also *Smith, supra* note 182, at para 83.

204 See Deanne Sowter, "The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers' Ethics" (2021) 44:2 Dal LJ 603.

205 Model Code, *supra* note 3 at R5.1.

206 Mediators are included in the definition of "tribunal" but given the adversarial framework, non-evaluative mediation is excluded. See *ibid* at R1.1-1.

the *Model Code* is currently silent on non-adversarial lawyering[207]. Instead of relying on the system to explain the role, Bradley Wendel posits that the solicitor-client relationship provides the "normative baseline"[208]. For him, the relationship provides the foundation for any style of advocacy, meaning that regardless of the process, advocacy must be conducted within the bounds of legality. He argues that what ""good lawyering" means varies by context, but it is always oriented toward the client's legal entitlements"[209]. In other words, the process does not determine the lawyer's role or level of adversarialness.

What follows from this is that non-adversarial advocacy does not change a lawyer's role. A lawyer representing a client in a CDR process is required to pursue a client's interests within the bounds of legality, just as in litigation. The role and responsibilities are informed by the lawyer-client relationship. When a lawyer is working as a problem-solver or peacemaker, they are doing something different than when they are arguing the law in front of a judge. They are using different skills; but the lawyer is still representing a client's interests. The difference with being a non-adversarial advocate in a CDR process is what constitutes the bounds of legality, those change depending on the process, and the *Model Code* is silent on many of those boundaries[210]. As a result, a section for non-adversarial advocacy needs to be introduced.

D) Creating Safeguards and Preventing Systems Abuse

The lawyer's obligation to pursue a client's interests within the bounds of legality creates limits on what a lawyer can do. Since the *Model Code* treats all advocacy the same, the omission of non-adversarial advocacy implies that objectionable behaviour that is not captured is permitted. Mirroring Rule 5.1-2 with a sister section for non-adversarial advocacy would create boundaries. In addition, the following recommendations relate to systems abuse, and the perpetuation of myths and stereotypes, and they apply to both adversarial and non-adversarial advocacy.

Systems abuse involves the abuser using legitimate tools of the justice system to coerce and control the survivor. Lawyers cannot be complicit

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207 See Murray Schwartz, "The Professionalism and Accountability of Lawyers" (1978) 66 Calif L Rev 669 at 671–674; David Luban, *Legal Ethics and Human Dignity* (Cambridge, UK: Cambridge University Press, 2007) at 19–64; David Luban & Bradley Wendel, "Philosophical Legal Ethics: An Affectionate History" (2017) 30 Geo J Leg Ethics 337 at 350–351.

208 Wendel, *supra* note 168 at 191.

209 *Ibid* at 191.

210 See Deanne Sowter, "The Bounds of Legality: An Exploration of the Limits on Ethical Advocacy in Family Law" (2023) 25:1-2 Leg Ethics 4.

in the manipulation of the justice system. The law has not provided an entitlement to coerce and control; that is something abusers manipulate the law to provide. The complication arises when a lawyer is unaware of IPV, and believes their conduct is good advocacy. A lawyer can mislead opposing counsel,[211] be manipulative and leverage emotional interests. They can delay or threaten to make the process difficult[212]. Lawyers can wear a vulnerable party down through prolonged negotiations. However, if those negotiations extend a pattern of control, then such conduct is contrary to the lawyer's duty to the administration of justice[213]. Findings of abuse of process and vexatious litigation often take years and exhaust the survivor's financial resources[214]. The *Model Code* (and family law) can and should be amended to create safeguards to prevent systems abuse.

As indicated, systems abuse can involve a lawyer unwittingly becoming a tool of abuse because they have failed to appreciate their client's motivations. The *Model Code* should prohibit lawyers from knowingly and unknowingly facilitating systems abuse. The Code already prohibits lawyers from knowingly assisting their client in any "dishonesty, fraud, crime or illegal conduct"[215]. In Ontario, that rule "applies whether the lawyer's knowledge is actual or in the form of wilful blindness or recklessness"[216]. In addition to mirroring the Ontario rule, the *Model Code's* commentary could be amended to explain that the rule applies to systems abuse and a lawyer should be alert, so they do not assist a client in systems abuse. The rule already requires that lawyers be "alert" to not become "unwittingly involved with a client or others engaged in criminal activities such as mortgage fraud" or other unlawful real estate transactions[217]. Extending the rule for systems abuse, hinged on the lawyer's duty to the administration of justice (again, coercive control is not a crime in Canada[218]) would be within the spirit of the existing rule. It would also reinforce the requirement to screen. To be sure, screening will not always reveal a party's intentions, but it could reveal enough to

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211 But see Law Society of Alberta, *Code of Conduct,* Calgary, AB: LSA, 2023 at R7.2-2.

212 See Neilson, Responding, *supra* note 51 at 7.4.

213 See Model Code, *supra* note 3 at R5.6-1.

214 See Esther L Lenkinski, Barbara Orser & Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 CFLQ 337; Rise Report, *supra* note 25 at 35.

215 Model Code, *supra* note 3 at R3.2-7.

216 Law Society of Ontario, *Rules of Professional Conduct*, (Toronto: LSO, 2022) at R3.2-7[1].

217 Model Code, *supra* note 3 at R3.2-7[2].

218 If coercive control were a crime, it could be unlawful for a lawyer to facilitate systems abuse.

doubt them (e.g., frequently changing counsel, bringing multiple claims, refusing to disclose information and so on).

Similarly, the *Model Code* includes a section prohibiting a lawyer from trying to gain a benefit for a client through threats of initiating "criminal or quasi-criminal charges" or making a "complaint to a regulatory authority"[219]. Making a threat to call the police about an opposing party, threating to involve child protective services without cause, and threatening to involve immigration authorities would all fall within the existing rule. That said, the section should be clear that such threats could also indicate IPV and are prohibited, including in CDR.

Lawyers should also be prohibited from making arguments based on myths and stereotypes about survivors and IPV.[220] Elaine Craig has argued that criminal defence counsel are "ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant"[221]. While family law has not been as responsive, as Jennifer Koshan has shown, the Supreme Court of Canada has discredited some relevant myths and stereotypes[222]. Given lawyers' obligation to the law, I suggest they are precluded from relying on myths and stereotypes that have been judicially rejected[223]. For instance, in *Barendtregt,* the Supreme Court recognized that a child's exposure to family violence, including indirectly, is harmful and that family violence is relevant to the "perpetrator's parenting ability"[224]. Thus, it is unwise for a lawyer to suggest otherwise because a judge should not accept such an argument. However, research consistently shows that judges fail to see

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219 Model Code, *supra* note 3 at R3.2-5.

220 See also Federation, Call to Action, *supra* note 191 at 22 (an amendment currently being considered would require that lawyers, in the context of adversarial proceedings, "consider the arguments and questions advanced and be mindful that they are not exploitative and do not reinforce systemic discrimination or stereotypes based on grounds protected by human rights legislation").

221 Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 Osgoode Hall LJ 427 at 427.

222 See Koshan, Myths, *supra* note 49.

223 The alternative ideal is to legislatively prohibit lawyers and judges from relying on myths and stereotypes, see: Luke's Place Support and Resource Centre and 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) at 6 online (pdf): <http://tinyurl.com/5wp2t6uw> [perma.cc/8C6F-TN67].

224 *Barendregt, supra* note 165 at para 143.

myths and stereotypes about IPV.[225] In the context of CDR, with no judge, the obligation to reject harmful myths and stereotypes falls to the lawyers. If the *Model Code* reflected this prohibition, then it is not only unwise, but unprofessional. Moreover, if the *Model Code* requires education and screening, then those requirements increase the likelihood that counsel will see harmful myths and stereotypes.

In sum, the *Model Code* should include safeguards so further guardrails exist. The goal of these changes is to help ensure the justice system is not manipulated by an abuser contrary to the lawyer's duty to the administration of justice, regardless of their area of practice and inclusive of adversarial and non-adversarial advocacy.

Conclusion

Family law still needs to be rethought, and the family lawyer's role continues to evolve demanding a theory that explains its shape and informs professional obligations. Family law and the lawyer's role need to place concerns about IPV at their core. Martha Fineman once said that "family law is an area of the law where the whole world is being rewritten."[226] The "trick" to understanding it, she said, is to "try to follow the plot inherent in the ongoing rewriting project by understanding both the scripts and motivations of all the various characters."[227] For my purpose, Fineman's framework also means understanding the competing narratives about IPV. IPV has always existed, yet narratives have evolved about its frequency and causes, about who is violent and who is victimized, and whether the law should play a role in prevention. There are questions about laws built on narratives that have excluded survivors' voices. Those narratives have influenced the laws development and thus the lawyer's role. In this paper I have tried to contribute to those debates, with a focus on IPV and practical amendments to the regulation of lawyers. The lawyer's professional obligations were never conceptualized to account for IPV, and it is time the *Model Code* were reviewed to do so.

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[225] See Zaccour, Crazy, *supra* note 79; Hunter Report, *supra* note 63; Koshan, Myths, *supra* note 49. But see *Judges Act, supra* note 33, ss 60(2–3) and 62.1.

[226] Martha Albertson Fineman, "Progress and Progression in Family Law" (2004) 2004 U Chic Legal F 1 at 1.

[227] *Ibid* at 1.

APPENDIX: SUMMARY OF *MODEL CODE* SECTIONS REQUIRING AMENDMENT

Section	Amendment
Preamble	Add a preamble that frames the entire *Model Code* through an intersectional and gendered based violence lens.
1.1 Definitions	Include definitions for family violence, IPV, coercive control, and systems abuse.
3.1-1 Competent Lawyer	Incorporate family violence training, screening, cultural competency, and trauma-informed practice, into the definition of a competent lawyer.
3.1-2 Competence	Include a section requiring that all lawyers engage in ongoing screening for family violence.
3.2-1[5] Quality of Service	Include screening, cultural competency, and trauma-informed practice into the examples of expected practice.
3.2-2 Honesty and Candour	Add flexibility for the lawyer to delay disclosure of information to their own client when there is a risk to safety so that person can implement safety protocols first; and advise the lawyer to consider safety when discussing consequences of instructions with a client.
3.2-4 Encourage Compromise or Settlement	Add an explicit exception for family violence cases.
3.2-5 Threatening Criminal or Regulatory Proceedings	Add commentary that unfounded threats to call the police about an opposing party, to involve child protective services, and to involve immigration authorities could each indicate IPV and are prohibited, including in CDR.
3.2-7 Dishonesty, Fraud by Client and Others	Extend the rule to include systems abuse, and add that it applies whether the lawyer's knowledge is actual or in the form of wilful blindness or recklessness.
3.3-3 Future Harm Exception	Add commentary making it clear that psychological harm that is ongoing or increasing in severity can indicate serious psychological harm.
3.7-7 Obligatory Withdrawal	Add commentary that "acting contrary to professional ethics" includes when a client is engaging in systems abuse.
5.1 Non-Adversarial Advocacy	Add a new section defining non-adversarial advocacy and expected practices, including by adding a sister section for 5.1-2.

Section (continued)	**Amendment**
5.1-1 Advocacy (Applicable to both Adversarial and Non-Adversarial Advocacy)	Add that a lawyer should be on guard against becoming the tool or dupe of an abusive spouse's scheme to engage in systems abuse.
5.1-2 An Advocate Must Not	Add that a lawyer must not permit a client to abuse the process of the tribunal, or the CDR process (i.e., systems abuse). Add a prohibition on lawyers from making arguments based on myths and stereotypes about survivors and IPV (applicable to both adversarial and non-adversarial advocacy).
6.3-2 Harassment	Include IPV considerations related to systems abuse.