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Lawyer (In)competence and Family Violence

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Legislation Commented On: 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*

Family Lawyers Are Not Required To Be Trained In Nor Screen For Family Violence

In Canada, family law lawyers are not professionally required to screen for family violence. The Federation of Law Societies of Canada (FLS) and provincial / territorial law societies make no reference to screening or family violence in their codes of conduct.

The British Columbia *Family Law Act*, SBC 2011 c 25 (BC FLA) contains an expansive definition of family violence to include physical, sexual, psychological or emotional abuse of a family member, as well as the direct or indirect exposure to family violence by a child (s 1). The definition includes attempted physical or sexual abuse of a family member, coercion, unreasonable restrictions on a family member's financial or personal autonomy, stalking, and intentional damage to property. There is no universally shared definition of family violence, domestic violence, intimate partner violence, or coercive control. What is important to note is that the BC FLA definition is expansive, and includes all forms of violence between family members. Section 8(1)(a) of the BC FLA, which is in the division devoted to out of court dispute resolution processes, requires family dispute resolution professionals to assess whether family violence may be present, the extent to which it may adversely affect the safety of the party or family member, and the party's ability to negotiate a fair agreement. The term "family dispute resolution professionals" is defined to include family justice counsellor, parenting coordinator, lawyer, mediator, or arbitrator. The assessment for family violence must be done in accordance with the regulations, which only provides guidance for family law mediators, arbitrators and parenting coordinators, not lawyers. (See *Family Law Act Regulation*, BC Reg 347/2012).The BC FLA therefore suggests that lawyers ought to screen for family violence in order to assess whether it is present and discuss with the client the advisability of using various types of family dispute resolution processes to resolve the matter.

The federal *Divorce Act*, RSC 1985 c 3 (2nd Supp) does not currently include any references to family violence, domestic violence, intimate partner violence, or coercive control. In May 2018, the federal government introduced Bill C-78, amending the *Divorce Act* (the changes have been commented on previously by ABlawg here.) One of the purposes of the amendments is to "assist the courts in addressing family violence". The amendments include a definition of family violence that is very similar to the BC FLA, and includes conduct "by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and

controlling behaviour or that causes that other family member to fear for their own safety or for that of another person" including a child who is exposed to such conduct (s 1(7)). If the Bill receives royal assent in its present form, family violence will be a factor in considering the best interests of the child when making parenting and contact orders, and in relocation applications.

Bill C-78 requires legal advisors to discuss reconciliation with their client, and to use a family dispute resolution process unless "it would clearly not be appropriate to do so" (s 7.7(1)). The Bill does not specify family violence as a reason that it would be inappropriate to recommend reconciliation or a dispute resolution process, but the language used implies it. Presumably it would be inappropriate to recommend reconciliation to a client who tells her lawyer that she is afraid of her husband. As a result, Bill C-78 implies that a family lawyer ought to be trained in family violence to be competent to know when they should discuss reconciliation and when to recommend various dispute resolution processes, and when they should not.

The BC FLA and Bill C-78 do not clearly state that a lawyer must be trained in family violence, nor do they state that a lawyer must always screen for family violence; however, in order to competently comply with the provisions both are required.

Policy-makers and academics often recommend that lawyers ought to be required to screen for family violence. For example, the most recent report prepared by Luke's Place for the Department of Justice, "What You Don't Know *Can* Hurt You" concluded that law societies ought to implement a requirement for universal family violence screening. Recently, the Law Foundation of Ontario provided funding to the Barbra Schlifer Commemorative Clinic to develop a new risk assessment tool for family court staff, mediators and lawyers to use, recognizing the importance of screening (see Zosia Bielski, "New Project Aims to Help Family Courts Protect Victims of Domestic Violence" *Globe and Mail* (January 24, 2019)).

Some professionals are required to screen. Family arbitrators practicing in Ontario must screen for family violence (see *Family Arbitration*, O Reg 134/07). If a mediator wishes to be accredited, then some organizations require that they screen for family violence. For example, in Ontario, the Ontario Association for Family Mediation requires training in and screening for family violence. Collaborative professionals in Ontario who wish to receive the Advanced Collaborative Professional Designation require training in family violence (see Ontario Collaborative Law Federation). In British Columbia, family mediators, arbitrators, and parenting coordinators must have family violence training to be accredited. They are required to have training on identifying, assessing and managing family violence and power dynamics in relation to dispute resolution process design. (See *Family Law Act Regulation*, above). The BC Law Society oversees accreditation (see British Columbia Law Society, "Family Law Alternative Dispute Resolution Accreditation"). In contrast, those practicing in Alberta are not required to have any training in nor screen for family violence. In a previous ABlawg post, Jennifer Koshan, Wanda Wiegers and Janet Mosher recommended that the Alberta government implement a requirement for arbitrators, mediators and other dispute resolution professionals to have training in and screen for family violence (see here). In summary, the requirement to screen is inconsistent.

If screening for family violence were to be included anywhere within the professional conduct rules, it would presumably be within the section devoted to lawyer competence.

To be competent, a lawyer must be able to apply relevant knowledge, skills and attributes in a manner that is appropriate to each matter undertaken on behalf of a client. The FLS *Model Code* Rule 3.1-1 (a) requires lawyers to know general legal principles and procedures and substantive law; and, (b) to investigate facts, identify issues, and ascertain client objectives to consider possible options and advise the client on appropriate courses of action (see here). The rule also requires lawyers to have a range of skills appropriate to lawyering and resolving conflicts.

The competence rule (FLS *Model Code* R 3.1-2) also requires lawyers to consider whether they feel competent to handle the matter, which implies a specific knowledge that could potentially be acquired in order to competently represent the client. For instance, a corporate lawyer may need to become knowledgeable in a specific area of tax law in order to negotiate and draft a deal. However, the rule does not imply an ongoing practice that the lawyer must use in order to provide competent service. Commentary 4 says that some circumstances may require "expertise in a particular field of law", but screening for family violence is not a "field of law". Commentary 5 reinforces the notion of honesty with the client, emphasizing that it is a duty to be honest with the client about a lawyer's knowledge. The honesty and expertise requirements capture lawyers who may take on a file in an area of law they have no experience in.

The rest of the rule focuses on being competent to handle specific tasks. Screening for family violence may be a task, but Commentary 6 and 7 state that a lawyer may be consulted about a task for which she lacks competence and provides the rules on what to do under those circumstances. Lawyers are not consulted by a client about the task of screening—it is part of what ought to be done in order to represent a client competently.

The spirit of the competence rule does, however, include screening for family violence. A lawyer is required to investigate the facts, identify issues and obtain her client's objectives, in order to give legal advice. She cannot competently give accurate legal advice if she does not have the critical information associated with family violence. Therefore, properly read, the competence rule does include screening for family violence, but given that family lawyers often do not screen, the spirit is not being recognized in practice.

Surprise! Lawyers Don't Screen

Since Canadian lawyers are not required to screen, they do not consistently do so. A survey of participants at the 2016 National Family Law Program by the Canadian Research Institute for Law and the Family (see here) showed that 69% of lawyers often or almost always screen for family violence, compared to 46.9% of judges. (It should be noted that judges are not required to be trained in family violence to hear family law matters. Justice Donna Martinson and Professor Emerita Margaret Jackson have raised questions about judicial competence as a result. See Donna Martinson and Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11). A study by the Calgary Domestic Violence Collective, "Examining Domestic Violence Screening Practices of Mediators and Lawyers" showed that lawyers who do not screen, do not do so for two main reasons: (1)

because it is not mandated by legislation; and, (2) cases involving family violence are messy, and it is not the role of the lawyer to manage it – it is beyond their expertise. Similarly, the report by Luke's Place (mentioned above), revealed that "not all lawyers screen every client". Instead of using a formal screening tool, they rely on the ongoing development of the relationship with their client to reveal "red flags". However, the same report showed that few lawyers have had formal education or training in family violence, and so they "may miss important red flags".

Screening is important because a lawyer needs to understand whether family violence is involved to be able to give competent legal advice with respect to parenting arrangements, safety protocols, necessity of experts, necessity of protection orders, child protection issues, structuring support, and the appropriate dispute resolution process. And, in BC and under Bill C-78, compliance with the law may require screening. Therefore, investigating the facts and client objectives, and applying the applicable law that is necessary for competent practice, can only be accomplished through screening; but, that is not the norm.

Not Screening is a Problem – And We Know It!

Failing to screen is also dangerous. The Ontario Domestic Violence Death Review Committee found that 73% of domestic violence-related homicide cases between 2003-2016 involved a history of domestic violence, and 67% of cases involved a couple with an actual or pending separation (see here). The Committee found that a history of domestic violence and an actual or pending separation are the top two risk factors of death at the hands of an intimate partner.

Research by Desmond Ellis shows that approximately half of couples who separate report that they have been a victim of physical violence at least once during their cohabitation, and 75% report being a victim of emotional abuse (see Desmond Ellis, "Divorce and the Family Court: What Can be Done About Domestic Violence?" (2008) 46 Family Court Rev 531). Given the statistics, it is more than likely that a family lawyer will represent either an abuser or a victim at some point in her legal career, if not more than once. The 2016 survey mentioned above found that lawyers report that family violence is an issue in 21.7% of their cases.

Family violence training is not typically taught in law schools and is not required to be by the FLS. The only way graduating law students would have any knowledge about screening for family violence is if they elected to take a family law course that was taught by an instructor who chose to include screening in the curriculum, or if they sought training outside of law school. Some law schools, like the University of Calgary, include screening for risk in their Negotiations course, a mandatory course for all second-year law students. I do not know if that is the norm, but a report by the Law Commission of Ontario (LCO), "Curriculum Modules in Ontario Law Schools: A Framework for Teaching About Violence Against Women" that called for law schools to include teaching about violence against women suggests it is not. As the LCO report states, the importance of understanding the impact of violence against women is not just important for family lawyers, but also for corporate lawyers, bankruptcy lawyers, tort lawyers, real property lawyers, criminal defense lawyers, policy-makers, and the judiciary. This is not an issue that just impacts the competence of family lawyers.

Once risk of violence is identified, there is a wide range of complexities that arise with respect to the lawyer's professional obligations (which are beyond the scope of this post but will be discussed in future posts). For example, there may be tension between the lawyer's duty of loyalty to her client and her moral desire to consider potential harm to the client's spouse and their children. The identification of risk also indicates best practice complexities, which the family law bar and academic research ought to provide educational guidance on.

The highest period of risk of harm to a spouse by her former partner is in the months following separation. Nearly half (49%) of all spousal homicides occur within two months after separation, and 32% occur two to twelve months after separation. It is during that period that she will likely come into contact with the judicial system, and maybe hire a lawyer (see Cynthia Chewter, Department of Justice, "Best Practices for Representing Clients in Family Violence Cases" (2015)). The legal profession has an obligation to the public to ensure lawyers are competent to represent those clients.

Revise the Model Code: Require Lawyers to Screen for Family Violence

There are two ramifications that flow from these observations. Lawyers need to be trained in and screen for family violence, and they need to be trained in how to handle files where there is risk. Given what is at stake for families experiencing family violence and the need to foster public confidence in the legal profession, the FLS, and provincial / territorial law societies ought to consider revising their codes of conduct to require screening for family violence for competent family law practice.

This recommendation should not be conflated with a goal of expanding the *Model Code* to respond to the various specificities that arise in practice. It is unhelpful, if not detrimental, to 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. Family violence, however, is different given the risk of harm to families and our obligation to the public. Family violence training is also applicable not only to family law matters, but also real estate, wills and estates, criminal law, immigration law, employment law, and some corporate law matters, where issues of family violence may be relevant.

The competence rule is the right place within the *Model Code* to address family violence. Amy Salyzyn has traced the introduction of the competence rule to the 1970s, in response to three things: (1) law societies were worried about too many incompetent lawyers, and the impact on malpractice insurance funds; (2) the American Bar Association had introduced a competence rule; and, (3) greater governmental scrutiny and an effort to ward off potential governmental incursion into the self-regulatory nature of the profession. The rule originally focused on traditional lawyering skills. More recently, law societies have taken a more holistic view of competence. The rule has been the subject of initiatives relating to cultural and technological competence, and lawyer wellness, which suggests that the rule of competence may be moving towards a broader definition (see Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence" (2016) Ottawa Working Paper Series 2016-43).

Presumably one of the concerns in imposing an obligation on family law lawyers to screen for family violence, is the threat of professional disciplinary proceedings or being sued for negligence if harm comes to one or both parties at the hands of the other. Any change would need to make clear that it imposes no duty on lawyers to prevent harm in cases involving family violence. (I recognize that is a much broader debate that is beyond the scope of this blog post. I am currently exploring it in further research.) The change would only require a lawyer to identify the presence of risk of family violence and then to tailor her legal advice accordingly.

Lawyers are rarely disciplined for incompetence, but that does not make the rule ineffectual. Amy Salyzyn's research on the competence rule revealed that, of the 264 reported discipline decisions in 2015 (in Alberta, BC, and Ontario), only 18 dealt with allegations relating to incompetence, and 8 of those were mortgage fraud cases. Her research showed that law societies are reluctant to pursue anything but the clearest cases of incompetence, but that it is difficult to get a complete picture because discipline can be effected under the quality of service rule, bundled with other issues, or not dealt with in a formal public disciplinary hearing (see Amy Salyzyn, "From Colleague to Cop to Coach", above).

When lawyers are disciplined for incompetence, the reasons are wide-ranging, but do not currently include failing to screen for family violence. Disciplinary proceedings for professional misconduct due to incompetence often involve other sorts of misconduct as well as the competence issue, suggesting that incompetence alone may not be enough to warrant disciplinary action. The cases tend to focus on failing to provide competent service in terms of knowledge of the law, practice management, communication with clients, and the lawyer's skills and diligence in bringing the matter forward (see Alice Woolley, *Understanding Lawyers' Ethics in Canada,* 2nd ed (Toronto: LexisNexis, 2016), which also includes reference to the decisions relied upon).

Even though lawyers are rarely disciplined for incompetence, it does not detract from the rule itself, or the movement towards a more holistic understanding of lawyer competence. It also does not detract from the law societies' role in maintaining public confidence in the profession. It is in the public interest for lawyers to screen for family violence. Emphasizing the requirement to screen by adding commentary to the *Model Code* would highlight the critical need to do so.

The *Model Code* could add commentary to Rule 3.1-1:

- [7C] Given the variety of cases that may involve family violence (which could be defined to mirror Bill C-78), it is impossible to set down guidelines that would anticipate every possible circumstance in which family violence may be relevant. Training in screening for family violence is a type of knowledge relevant to many areas of practice, and it is an important skill. Family violence may be a factor for family lawyers, corporate lawyers, bankruptcy lawyers, tort lawyers, real property lawyers, employment lawyers, immigration lawyers, and criminal lawyers. Family law lawyers are most likely to encounter matters involving family violence and therefore competence in the practice of family law includes the knowledge and skill required to screen for family violence. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

It's Just the First Step

A professional obligation to screen for family violence is not going to fix the problem alone. It will not change the adversarial nature of the judicial system (which is often credited with exacerbating risk of family violence). Nor will it change the reality that social workers are the real experts in family violence, not lawyers. Nor will it provide guidance to a lawyer on what to do once she identifies risk. Updating the *Model Code* would, however, bring a lawyer's professional obligations into sync with the BC FLA and Bill C-78, and emphasize the importance of screening given the critical need. Revision would also articulate what is within the spirit of the rule as is.

Ultimately, a lawyer needs to provide competent advice. In order to do that, she needs a full understanding of the client's situation, including whether the client is an abuser or victim of family violence. She needs to be able to see and respond to family violence complications that influence a matter. An abuser or a victim may not disclose this information for failing to appreciate the relevance, out of shame or due to fear. Lawyers need to know to ask the tough questions. They need to screen.

Maybe by requiring lawyers to screen for family violence, it would also serve to remind us that family violence is not an anomalous phenomenon, but rather a common occurrence that knows no cultural, racial, or socio-economic boundaries. Responding to the crisis requires efforts by social actors at all levels – FLS, provincial and territorial law societies, law schools, the judiciary, the judicial system, policy-makers, and lawyers. Updating the *Model Code* is a small thing we can do, and it may have a big impact.

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