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Coercive Control: What Should a Good Lawyer Do?

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Matter Commented On: *Federation of Law Societies Model Code of Professional Conduct*, Rule 3.3-3

I am currently conducting research to determine whether coercive control can be considered psychological harm for the purpose of the future harm exception to confidentiality and solicitor-client privilege. (FLSC Model Code R 3.3-3; *Smith v Jones*, [1999] 1 SCR 455 (SCC)) My research is supported by the OBA Fellowship in Legal Ethics and Professionalism Studies. In that research I'm determining whether a lawyer *can* disclose, but doing that research has provoked me to wonder whether a lawyer *should* disclose.

In December 2017, Andrew Berry murdered his children, six-year-old Chloe and four-year-old Aubrey. Berry was convicted of second degree murder. Sarah Cotton, the girls' mother, feared Berry, claiming that he had made threats in the past, had physically assaulted her, and had failed to protect their children (he took their 2 year old boating without a life jacket, left his 6-month old alone in a stroller, and drove erratically with the children in the car). (*Cotton v Berry*, 2017 BCSC 907 at paras 22-24) Ms. Cotton's lawyer did not ask the court to stop allowing overnights. Ms. Cotton's only request was that overnights not occur consecutively so she could address medical needs and care of the children when they returned. The Ministry of Children and Family Development were involved, but did not seek emergency orders. The court ordered overnight access allowing Mr. Berry unsupervised time with his children. It was during one of those visits that he killed both girls.

The *Cotton v Berry* case provoked criticism about judicial competence for handling cases involving family violence, particularly coercive control. The President of the Law Society of BC defended Justice Gray, saying she "applied the law based on the evidence before her". In contrast, in a thorough review of the decision, Lori Chambers, Deb Zweep and Nadia Verrelli criticized the court, arguing that the court did have enough information to see the pattern of coercive control. Justice Gray erred on the side of hope that Mr. Berry would change, instead of recognizing the signs and erring on the side of caution. Gillian Calder and Susan Boyd also wrote an op-ed criticizing the court's failure to recognize the seriousness of coercive control. The National Judicial Institute has launched training in family violence for federally appointed judges.

Mr. Berry was not represented in the family law matter creating additional challenges. Self-representation where there is family violence means the victim's lawyer is tasked with negotiating directly with her client's abuser. Indeed, self-representation can be another form of

abuse. If the parties litigate, the abuser may even cross-examine his spouse (a practice that is prohibited in some jurisdictions. i.e. the UK, and Australia).

I raise *Cotton v Berry* in order to illustrate the complexity of coercive control, the lack of understanding about it, and the difficulty in identifying it.

Coercive Control

There are no universally shared definitions of family violence, domestic violence, intimate partner violence, or coercive control. One definition of coercive control is that it is "an ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control." (Evan Stark, Re-presenting Battered Women: Coercive Control and the Defense of Liberty (2012) (Paper prepared for Violence Against Women: Complex Realities and New Issues in a Changing World Conference, Montreal, 2012) [unpublished] at 7) Although there is some overlap in these categories, they generally include coercive behaviour (i.e., physical violence, threats, intimidation, surveillance, stalking, gaslighting, cyber-stalking) and controlling behaviour (i.e., isolation, financial control, and micromanagement extending over everyday household tasks). It also includes use of the justice system to continue a pattern of abuse – filing frivolous claims, making false reports to child welfare authorities, claiming harassment, claiming sole custody, and prolonging the dispute. (See here and here.) The primary outcome is a condition of hostage-like entrapment. (Stark) It is a challenge to identify because there is often a long pattern of abuse – emotional, psychological, financial, and physical – and when viewed in isolation, some of the behaviours may look like a "bad marriage" to an outsider. (See here at 8.) Coercive control is overwhelmingly perpetuated by men against women. (Pamela Cross, et. al., Department of Justice, What You Don't Know *Can* Hurt You: The importance of family violence screening tools for family law practitioners (2018) at 9)

Coercive control can be just as dangerous as physical violence, and it has the potential for longer lasting effects. (Cross at 10) The Department of Justice has said that coercive control is the "most serious type of violence in family law". Separation and the presence of coercive control are linked to an increased risk of fatality.

In June 2019, the federal government amended the *Divorce Act* to introduce family violence, including coercive control, into divorce law. The change follows the British Columbia *Family Law Act's* emphasis on family violence. Once the amendments come into force, coercive control will be a factor in considering the best interests of the child when making parenting and contact orders, and in relocation applications.

The UK has criminalized coercive control. Their offence recognizes the pattern of psychological and emotional harm that can result from coercive control, but it does not define "coercive" or "controlling". In Canada, only some of the behaviours are criminal offences.

Coercive control is complicated, legally relevant, and fraught with challenges to identify. My question is whether coercive control should change a lawyer's professional obligations?

What is it that we want a good lawyer to do?

Consider the following questions:

- Should a lawyer representing either party betray her client's confidence to ensure the court has relevant information about coercive control?
- Should the victim's lawyer act contrary to her client's instructions and request that the court limit overnights?
- Should the abuser's lawyer decline to assist in asking for sole custody because she has a hunch her client's motives are immoral?
- Should the abuser's lawyer warn opposing counsel if she believes that her client's hostility is getting worrisome?
- Given that the abuser's lawyer may not be aware of the extent of the violence, should the victim's lawyer warn opposing counsel about coercive controlling behaviours so they can try to manage the case safely?

All of these questions trigger the lawyer's duty of loyalty to her client, her fiduciary obligation, her duty of confidentiality, and solicitor-client privilege. Absent client consent, an exception, or clearly unlawful conduct, the answer to each question I asked is "no".

A lawyer may only have one small piece of the pattern, a seemingly innocuous piece. And the lawyer could be wrong about what she thinks she knows. Even if she is right, and is representing the abuser, the most heinous criminal deserves competent legal representation.

If a lawyer betrayed her client's confidence, she could be subject to disciplinary proceedings or an action in negligence. She has violated lawyer-client trust. This is true even where she violates her fiduciary obligation in favour of the safety of a third party (assuming no exception applies). Legal ethics literature is filled with examples of exactly that problem – examples of lawyers keeping secrets for the benefit of their client at the detriment of a third party or the public interest. In that way, cases involving family violence are no different – though it feels like they should be.

The role of the lawyer is to pursue her client's interests within the bounds of legality. In doing so, she ought not allow her personal opinion on the moral merits of her client's ends interfere with her representation. In turn, the lawyer is insulated from any moral judgement or accountability for having helped her client achieve immoral ends. In essence, the only interests a lawyer ought to be concerned with are her client's as her client has identified them.

Some may say that considering the safety and well-being of a client's children and the victim are in the abuser's best interests. However, that omits the idea that the client is the one who gets to decide what is in his best interests, not his lawyer. And to be clear – I am not including a clear and direct threat to his spouse or child which would trigger the future harm exception. I am referring to the muddier examples, the cases where it is not as clear. The hard ones.

So there is tension between the challenge presented by coercive control, and the lawyer's duties. In my view, under a lawyer's duty of competence (R 3.1-1), a lawyer is required to screen for

family violence (see here). Under a lawyer's duty as an advocate (R 5.1-2) and pursuant to her duty to the administration of justice (R 5.6-1) a lawyer may not allow her client to use the justice system as a tool of abuse. A lawyer also cannot assist the client in achieving illegal ends.

A lawyer may counsel her client on the moral merits of his objective, but she may not impose her own views on the client or refuse to follow instructions on the basis that it conflicts with her own moral compass, or even what she perceives to be in the best interests of her client. She may not violate her client's confidence absent an exception. She must remember that lawyering is a service profession. A lawyer has a fiduciary obligation to her client. A lawyer provides access to our system of laws – for someone else. In order to do that well, a lawyer needs to be neutral on the moral merits of the client's lawful objectives.

Easier said than done. It is easy for me to say that, but I recognize the awful tension the lawyer faces when she has a hunch. The awful discomfort that flows from a veiled confession that the client will make life difficult for his spouse, without revealing when or how. That discomfort, those moments of trepidation, those are where legal ethics seem to fail us. The rules do not provide answers, beyond withdrawal. We say that's what professional judgement and expertise are for, even though family lawyers are not required to have training in family violence.

There are a lot of good people working on this problem. Screening tools are being developed. Clinics operate throughout Canada – Barbra Schlifer Clinic in Toronto and Luke's Place in Oshawa are examples. There are resources for families suffering from family violence. I'm not diminishing that good and important work. I'm acknowledging its importance.

I'm also acknowledging the important work people are doing in non-adversarial dispute resolution processes. They are developing alternative pathways to resolve family law matters so there are options for families who do not want to be confined to the adversarial context of family court.

But the lawyer's duty of loyalty is paramount. If we want to recognize the uniqueness of coercive control and respond to it, then there needs to be a conversation about what we want a good lawyer to do. We can't foist those decisions on individual lawyers and hope for the best.

This post originally appeared on Slaw (see here). Readers should note that the Alberta Family Law Act does not currently include coercive control in the definition of family violence. For resources on family violence in Alberta see here and here.

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