

February 28, 2020

A Lawyer's Duty to (Sometimes) Report a Child in Need of Protection

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Everyone has an obligation to report when they have reason to believe that a child is in need of protection, including lawyers – except where that information is protected by solicitor-client privilege. If the information is confidential a lawyer is required to report it just like anyone else; but if the information is protected by solicitor-client privilege, a lawyer can only report it pursuant to an exception. The future harm exception provides a lawyer with the discretion to disclose a limited amount of qualified information to try to avert serious physical or psychological harm, or death.

The Duty to Maintain Client Confidences

There are a couple of theories underlying a lawyer's duty to maintain her client's confidences. The most frequently cited idea is commonly called the "full and frank" disclosure argument. ([*Blank v Canada \(Minister of Justice\)*, 2006 SCC 39 at para 26](#); Adam Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis, 2014) at 7-8.) The idea is that a lawyer cannot competently represent her client without all of the information, which a client will not disclose unless he trusts his lawyer to keep it confidential. The duty works to ensure a client feels secure disclosing sometimes embarrassing information, ensuring his lawyer has all of the information she needs to provide accurate legal advice. The Supreme Court of Canada has said the duty needs to remain as "close to absolute as possible to ensure public confidence". ([*R v McClure*, 2001 SCC 14 at para 35](#)) It is essential to the administration of justice and a lawyer's ability to provide access to justice.

Confidentiality and solicitor-client privilege often get lumped together as if they're the same thing, but they are not. (For a fantastic overview of their respective histories and their differences, see Malcolm Mercer's Slaw post [here](#).) The ethical duty of confidentiality can be found in professional codes of conduct. (R 3.3-1) Confidentiality captures all information about the client's interests, including information known to third parties, and all oral and written communication between the lawyer and her client. Confidentiality is wider in scope than solicitor-client privilege; not everything that is confidential is privileged, but everything that is privileged is confidential.

In contrast, solicitor-client privilege began as a rule of evidence, but it has been recognized as a principle of fundamental justice under section 7 of the Charter. It is the "strongest privilege

protected by law.” (Dodek at 1) Solicitor-client privilege only protects communications between the lawyer and client made for the purpose of giving and receiving legal advice. Where a lawyer works in multiple capacities, it is necessary to distinguish legal advice from other types of information and advice. Where the lawyer’s sole purpose is to provide legal advice, solicitor-client privilege will protect the full continuum of communications between the lawyer and client, including written and verbal communications as well as demeanor, tone and volume of speech, facial expressions, and gestures. ([R v Amsel, 2017 MBPC 52 at para 27](#); Dodek at 49)

When a client’s intention is to commit a crime or fraud, and he tries to use his lawyer to do so, that communication is excluded from protection, as are communications that are criminal in themselves. ([Descoteaux v Mierzwinski, \[1982\] 1 SCR 860 \(SCC\)](#)) A lawyer’s role is to assist her client to access the law and pursue his interests; communications that are intended to further a crime do not form part of that relationship. (Dodek at 54)

There are very few exceptions to confidentiality and solicitor-client privilege, and they typically reflect a decision that we have made as a society that a competing public policy interest takes priority over the client’s interests. The near absolute nature of the protection demonstrates the emphasis we place on the sanctity of the lawyer-client relationship and the obligation to pursue a client’s lawful objectives free from competing interests. That said, it seems obvious that a competing public policy interest would be to investigate a child in need of protection.

Reporting a Child in Need of Protection

Provincial and territorial child protection legislation provides that everyone who has a reasonable suspicion that a child is in need of protection must report it to a child protection agency, or in some provinces, the police. The legislation varies in how they define what type of threat triggers the duty, but the commonality is if the child has or is likely to suffer physical, sexual, or emotional harm. (See for example: [Ontario’s Child, Youth and Family Services Act at s 125\(1\)](#), [BC’s Child, Family and Community Service Act at s 13](#), [Alberta’s Child, Youth and Family Enhancement Act at s 1\(2\)](#), [Nova Scotia’s Children and Family Services Act at s 25\(1\)](#), and [Newfoundland’s Children, Youth and Families Act at s 10](#).) In some provinces emotional harm is defined to include exposure to family violence. (For example: BC and Alberta.) It is generally an offence for anyone not to report their suspicion, whereas in Ontario only professionals are penalized for not reporting.

Child protection legislation requires a lawyer to report if the information is confidential. For example, if a lawyer learns about a situation from a third party (who is not the lawyer’s agent) the information will be confidential but not privileged, so a lawyer is required to report what she knows. In other words, if a lawyer learns something directly from the child, or her client’s spouse, she is required to report her concern. Similarly, government lawyers and in-house counsel may learn of a situation involving a child in the course of their employment. The

information would be confidential but not privileged if has nothing to do with the provision of legal advice, and so a lawyer must report it.

Child protection legislation is typically clear that it does not abrogate solicitor-client privilege. Newfoundland is an outlier - they require a lawyer to report regardless of whether the information is confidential or privileged. In most provinces however, the legislation does not allow a lawyer to disclose privileged information unless it meets an exception.

The future harm exception (a.k.a. the public safety exception) works to briefly override both solicitor-client privilege and confidentiality where there is a serious threat to public safety. (*Smith v Jones*, [1999] 1 SCR 455 (SCC) sets out the exception to solicitor-client privilege, which is codified in the [Model Code at R.3.3-3](#).) To qualify, the information must indicate that there is a clear, serious and imminent threat to a child. The test sets a high bar, it suggests a lawyer should be satisfied that the act will occur and serious psychological or physical harm or death will follow. If the test is met, a lawyer may disclose only enough information to prevent the harm. Ideally, if there is time, a lawyer should obtain a court order to let a judge decide whether the information she has qualifies under the exception; but it is not a requirement.

The test in *Smith v Jones* is discretionary. If the information is privileged and a lawyer identifies qualified information, it is up to her whether or not to disclose. [As Adam Dodek has said, the Supreme Court used “the language of discretion while invoking the logic of duty”](#). He argued that the test ought to be mandatory, framing it as a lawyer’s duty to take steps to prevent harm based on a moral imperative that flows from the privileged position lawyers hold within society.

In contrast, the future harm exception to the ethical duty of confidentiality is mandatory in [Saskatchewan](#), [Manitoba](#) and [New Brunswick](#). Importantly, Saskatchewan and Manitoba both relieve a lawyer from this requirement if she believes disclosure will “bring harm upon the lawyer or the lawyer’s family or colleagues.” (I.e.: through retaliation or threat of retaliation.) In the rest of the Canadian codes of professional conduct, including the Federation’s Model Code, the future harm exception is discretionary.

It might be argued that if information qualifies under the exception, then it becomes mandatory to report pursuant to the governing child protection legislation. However, the exception does not work to extinguish the privilege. The exception only narrowly allows a lawyer to disclose minimal information to prevent imminent harm and then that information is effectively protected again. (Amsel) That is not the same thing as excepting the information from privilege altogether. Unfortunately, discretion creates an ethical dilemma for a lawyer when she has qualified information and a competing duty to her client.

Why Might a Lawyer Not Report?

If a client confesses to harming a child, for example in the context of that lawyer defending the client from a criminal charge, and that harm has passed, then the information is protected from compelled disclosure. Child protection legislation that excludes information protected by solicitor-client privilege from the disclosure obligation, allows an accused the benefit of full disclosure to his lawyer for the purpose of his defense. Child protection legislation makes past harm relevant, but the public safety exception is concerned only with future harm.

When the harm is ongoing or has not happened yet, it is more complicated. It seems obvious to suggest the exception should be mandatory where there is a threat to a child, especially where legislation works to make reporting mandatory in every other circumstance; however, in the limited circumstance of family violence, I suggest the discretion provided is warranted.

Debates about whether the exception should be discretionary often turn on the threat coming from a lawyer's own client. As such, the lawyer cannot turn to her client for instructions as to whether or not to disclose because her client is the one who poses the threat. In the absence of instructions, given the strength of the protection and the compelling reason for the extremely rare exception, it suggest that disclosure ought to be mandatory when the test is met.

Some legal ethics theories also support mandatory disclosure. A lawyer's role is to pursue her client's interests within the law. [Positivist legal ethics theorists posit](#) that the law allows a democratic and pluralist society to function and grow, despite disagreements about what is moral. The law works to settle any disagreements we have as citizens about what is morally right and wrong. The law has value by providing stability and allowing the peaceful coexistence of its citizens, even when some of them may disagree. Since we as a society have decided that trying to prevent a serious threat to public safety outweighs a lawyer's duty to keep a client's confidences, and the law reflects that decision, it suggests the exception ought to be mandatory when the test is met. In other words, when information is qualified under the exception, a lawyer should not make the decision about what the right thing to do is - the law has basically done that for her. Moreover, when the client is doing something or is about to do something that we have decided is morally wrong, he has less of a claim to the lawyer's silence. (Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2nd ed. (Toronto: LexisNexis, 2016) at 236)

However, where a lawyer is dealing with a case that involves family violence, the client may not be the one posing a threat. The exception was conceptualized in response to a clear and imminent threat posed by a would-be serial killer. It is apparent that the exception did not consider a situation where the privilege-holder reveals the threat but is not the perpetrator of the harm. Family violence is uniquely problematic this way. The client may be a victim of it along with the child. If the exception were mandatory and a lawyer reported information without her client's consent, she may revictimize her client and increase the risk to the child by inflaming the abuser.

Discretion allows a lawyer to maintain her loyalty to her client by discussing the situation and getting instructions. Survivors of family violence know best how to keep themselves safe. It may be the safest option for all is not to report, especially if the client believes she can prevent the harm. That said, I recognize that things do not always work out so neatly. A client may be unwilling or unable to do what seems objectively safest. The discretion provided does give a lawyer the ability to disclose, if necessary. This places the lawyer in the uncomfortable position of determining a course of action absent client instructions and direction from the law, but family violence changes the rules in many ways and this is one of them.

In sum, a lawyer's role is to provide access to the law and pursue her client's interests within the bounds of legality. Clients of all varieties and dubious morality are entitled to competent representation. They are all entitled to be honest with their lawyers. It is only in the rarest and most extreme circumstances that a lawyer may betray that trust because a vulnerable member of our society needs protection. In my view, given the risks posed by family violence, the current law is correct – meaning both child protection legislation and the discretion provided under the future harm exception. What is missing is clear guidance and training for lawyers to ensure they can navigate the discretion competently and safely. There is not always time to get a court order, and even then the decision to disclose may not be straightforward. In making the decision to disclose protected information, I suggest that a lawyer should balance the source of the threat, the complexity created by family violence, the potential to avert the harm another way, and the weight imposed by society's decision to prioritize public safety over client loyalty.

This post originally appeared on [Slaw](#).

This post may be cited as: Deanne Sowter, "A Lawyer's Duty to (Sometimes) Report a Child in Need of Protection" (February 28, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_DS_ChildinNeed.pdf

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