Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Appendix "A"

ADVISORY COMMITTEE ON THE FUTURE HARM EXCEPTION

FINAL REPORT

June 2, 2010

INTRODUCTION

1. The Advisory Committee on the Future Harm Exception was appointed in April, 2010 by the Executive Committee with the following Terms of Reference:

> i. Review the existing exceptions to the confidentiality rules in place in the codes of professional conduct of Canadian law societies;
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> ii. Review relevant academic literature;
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> iii. Consider the discussion and feedback on the different options for a future harm exception reviewed at the Federation's recent conference in Toronto; and
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> iv. Draft for consideration by Council such future harm exception to the rule on confidentiality as the Committee deems appropriate.
>
> Frederica Wilson and Melanie Mallet will provide the necessary staff support to the Advisory Committee on behalf of the Federation. Financial resources are available for the purpose of holding such in-person or telephone meetings as are reasonably required for the Advisory Committee to carry out its mandate.
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> If possible, it would be desirable for the Working Group to report in time for the next Federation Council meeting to be held on June 6-7, 2010 with the opportunity for the Federation Executive to consider the Working Group's recommendations in advance of such meeting.

2. The Committee was composed of:

- Chair: Mona Duckett of Dawson, Stevens, Duckett & Shaigec in Edmonton; Practicing criminal defence and related administrative law; Council Member to the FLSC for the Law Society of Alberta;
- Katherine Corrick, Director, Policy and Tribunals, Law Society of Upper Canada
- Adam Dodek, Professor of Law, University of Ottawa
- Sheila Greene, General Counsel for the Newfoundland and Labrador Association of Public and Private Employees, Council Member to the FLSC for the Law Society of Newfoundland and Labrador;
- Gavin Hume, practicing labour relations and employment law in the Vancouver office of Fasken Martineau DuMoulin LLP; Bencher and First Vice President of the Law Society of British Columbia; Chair of the LSBC Ethics Committee;

3. Staff of the Law Society of Upper Canada, Jim Varro, Policy Counsel and Sophie Galipeau, Counsel to the Office of the Director, Policy and Tribunals provided considerable and very valuable assistance to the Committee. Melanie Mallet and Frederica Wilson provided staff support from the office of the Federation.

4. The Committee's final proposed Rule 2.03(3) and commentary is attached as Appendix "A". This report identifies the issues dealt with by the Committee and the considerations that informed our decisions in drafting the rule and commentary. Jeff Hoskins of the LSBC generously edited the final rule with very short notice.

GENERAL CONSIDERATIONS

5. The Committee recognized the critical importance to the lawyer and client relationship of both privilege and confidentiality. Solicitor and client privilege has been recognized as a substantive legal right of fundamental importance necessary for the efficient operation of the legal system. Confidentiality as a discrete ethical duty is an elemental part of that relationship. Permitting or mandating disclosure of confidential information without client permission in circumstances that are too broad risks impairing the trust clients must have in lawyers and their preparedness to be candid and forthcoming in the provision of information to secure advice. That also risks the effectiveness of lawyers who may not have the necessary information to provide accurate advice and effective representation. Both the administration of justice and the effectiveness of the independent bar may suffer in the result.

6. These concerns must be balanced against the ability of lawyers to protect the public good by limited and exceptional disclosure to prevent very serious harm that the lawyer reasonably believes will occur and that the lawyer believes can be prevented by disclosure of confidential information. That ability to protect the public must be recognized, particularly when lawyers are permitted to disclose confidential information without consent for purposes of defending themselves against allegations of wrongdoing or to collect their fees.

7. The Committee agreed that disclosure under this rule should be an exceptional occurrence, and that any disclosure made must be limited to the minimum amount of information necessary to achieve the goal of prevention of significant harm.

8. The Committee further agreed that ethical rules should provide as much clear and practical guidance to lawyers as possible so they are not left guessing what the ethical rule requires or when it applies.

DISCLOSURE FOR FINANCIAL HARM

9. No Canadian rule of professional conduct expressly addresses disclosure of confidential information to prevent financial harm. The American Bar Association Model Rule (Rule 1.6(b)(2) and (3)) was amended in 2003 to capture this type of disclosure, largely as a result of huge corporate failures in that country, and resulting modifications to regulatory regimes and securities exchange requirements. The Committee agreed that Canadian legal regulators should not modify our ethical rules merely because of an American initiative borne out of the failure to regulate other industries.

10. However we recognize that in some rare circumstances, pure financial injury could have devastating consequences for individuals. Current ethical rules allow lawyers to disclose confidential information where necessary to protect the lawyer's financial interests in fee collection. In the rare case where a lawyer could prevent very significant financial harm by limited disclosure, but was ethically prohibited from doing so, the public interest would not be served. Further the public's perception of lawyers and the role we occupy in the legal system might suffer if we are seen to rank our own interests above the public interest. We have an opportunity to be proactive in addressing this issue now rather than being reactive if and when a similar crisis to that in the US occurs in this country.

11. The ABA Model Rule approach endorses disclosure not only to prevent, but also to mitigate or rectify financial harm. The Committee considered that the balancing of the above policy factors did not warrant this broad an incursion into confidentiality and loyalty. There is also increased and uncertain scope to a provision authorizing disclosure for purposes of mitigation and rectification, not only prevention, of financial harm.

12. The ABA Model Rule ties disclosure to circumstances where the lawyer's services were being used in the course of the conduct creating the risk. That provision must be read in light of their other ethical rules regarding withdrawal duties. Canadian ethical rules, and indeed the Model Code, prohibit the lawyer from assisting a client in fraudulent, dishonest or illegal conduct. The lawyer must withdraw from acting if the client persists in such conduct using the lawyer's services. The Committee felt that in these circumstances, there was no justification for linking permissible disclosure to only lawyer-assisted conduct.

13. The Committee proposes what we view to be a very limited financial harm exception to confidentiality, permitting disclosure where there is an imminent risk of substantial financial injury to an individual caused by an unlawful act. We recognize that the word "substantial" is capable of interpretation; however, it is used in many other legal contexts. When the threshold for disclosure is qualified by the need for an imminent risk, reasonable belief that it will occur and a reasonable belief that it can be prevented, limited disclosure to prevent financial harm impairs the relationship of loyalty and trust as little as reasonably possible.

14. American jurisdictions that have adopted some version of the ABA Model Rule economic harm amendment use phraseology varying from "crime" to "fraud" to "illegal act" to describe the conduct to be prevented. Where defined, "fraud" usually incorporates a "purpose to deceive". The Committee examined the meaning of civil fraud in a torts context and concluded that the term "unlawful act" would capture this. The goal of the disclosure is to prevent substantial wrongful financial harm even that which is not strictly criminal or strictly fraudulent.

15. The Committee recognized that potential financial harm could result to individuals, corporate entities or governments. Again, balancing the concern that too liberal a disclosure rule will impair client and lawyer trust, individually and systemically, the Committee concluded that substantial financial harm to an individual warranted the incursion into confidentiality, whereas such harm to corporate or similar entities did not.

DISCLOSURE FOR WRONGFUL CONVICTION

16. To the Committee's knowledge, only Alaska and Massachusetts have amended their ethical confidentiality rules to allow disclosure to "prevent the wrongful execution or incarceration of another". (Rule 1.6(b)(1)(C) in Alaska and 1.6(b)(1) in Mass.). There have been a number of high profile cases in the United States of people having been wrongfully imprisoned for decades, despite lawyers possessing and holding secret, in accordance with their ethical obligations, information from clients that those people were innocent.

17. The Committee recognized the serious impact of such injustices on both the wrongfully convicted, and the justice system as a whole. Public perception of the role

and responsibilities of lawyers is likely harmed where it is discovered that a lawyer possessed information that might have assisted the innocent person in obtaining redress.

18. The Committee also considered the very broad range of circumstances that such an exception could cover. Criminal convictions are stigmatizing and can have serious consequences even absent imprisonment. Wrongful imprisonment could be for a brief time or for life.

19. Balanced against these interests, the Committee recognized that disclosure could result in extremely serious consequences to the client whose information was disclosed and to their relationship with their lawyer. There is no certainty that the disclosed information will assist the wrongfully convicted; a number of American authorities have held that disclosure without consent is a breach of privilege barring admission into evidence. Others have held that due process and fundamental fairness required admission of such evidence. Irrespective of whether the disclosed information is admissible and useful to exonerate the wrongfully convicted, there is substantial risk that the information, or other information derived from it, could be used to the serious prejudice of the person whose confidences were disclosed without consent.

20. The Supreme Court of Canada has confirmed the existence of an "Innocence at Stake" exception to solicitor/ client privilege*: R. v. McClure* 2001 SCC 14; *R. v. Brown* 2002 SCC 32. Where a person attempts to access privileged information to establish his or her innocence, a very stringent test must be met. In *Brown*, the Supreme Court confirmed that the privilege holder receives use and derivative use immunity, but not transactional immunity. These cases may prove important when the procedure for possible disclosure and the consequences of disclosure are considered.

21. Although the Committee was inclined to recommend a very limited exception, or an exception the application of which would be limited given commentary guidance, in the end, the Committee decided this was an issue that required further reflection and consultation. As a result, the Committee has not included such an exception in the current rule, but recommends that further work be done by this Committee or some other appropriately constituted group, with jurisdiction to consult criminal lawyers, the group most affected by such an exception.

THE THRESHOLD OF HARM FOR DISCLOSURE

22. The Committee recommends that the threshold for disclosure of an imminent risk of serious bodily harm or death not be linked to criminal wrongdoing by the client. The threshold for disclosure should be focused on the consequences, namely the harm risked. Thus, the proposed rule does not require that the triggering conduct be a "crime".

23. The Committee had concerns about the breadth of the term "psychological harm", and its inherent vagueness and uncertainty. The Committee recognized that the Supreme Court of Canada has ruled that in some contexts serious psychological harm could constitute serious bodily harm where it substantially interferes with an individual's health and well-being. As a result, the Committee recommends that the necessary threshold of harm for the general exception be defined as "death or serious bodily harm" and that reference be made in the commentary to the Supreme Court's interpretation of

that phrase, to provide guidance to a lawyer as to what might, in some circumstances, meet the test.

THE PROCEDURE FOR DISCLOSURE

24. Only two Canadian jurisdictions (LSUC and the Barreau) have rules that touch upon the procedure that might be followed should the lawyer decide that disclosure is warranted. In one, it is suggested that a judicial order be obtained where practicable, the phraseology used by the Supreme Court in *Smith v. Jones* [1999] 1 S.C.R. 455, and in the other, counsel is urged to contact the regulator for guidance. Disclosure of confidential information by experts has been litigated in applications for declaratory relief and injunctions.

25. Despite the Committee's desire to provide practical guidance to lawyers, the availability and practicality of judicial authorization to disclose is unclear. If the matter arises outside an existing cause of action, despite the inherent jurisdiction of the courts, it is unclear that the courts will opine on matters of pure ethics. Not all such questions will raise matters of privilege. Most law societies have ethical advisors available to lawyers, however not all operate in the same fashion. Circumstances in which the lawyer is considering disclosure will also range from the very urgent to those less so.

26. In the result, the Committee recommends that the lawyer consult the governing body for whatever guidance or assistance might be available. Further, in some instances, court authorization might be permitted and practical.

SHOULD THE RULE BE MANDATORY OR PERMISSIVE?

27. The Committee discussed the competing considerations in favour of the provision being mandatory or permissive. Some are listed here:

Possible advantages of a mandatory provision:

- Increased certainty for the lawyer making the ethical decision
- Consistency of treatment of similar issues
- Public perception that the profession takes such risks of harm seriously
- Avoidance of any risk that a lawyer would simply dismiss a serious threat and not disclose because it was not required
- Reluctance to breach confidentiality and thus an increased tendency to seek advice
- The ability to dissuade the client with the warning that serious threats must be disclosed
  Possible decreased liability for breach of confidence

Possible advantages of a permissive provision:

- Maximum flexibility to the lawyer having to deal with fact situations which may be very diverse and raise many factors for consideration
- The ability of the lawyer to decide whether or not to disclose without fear of professional discipline for having made the "wrong decision"
- Encouragement for the lawyer to carefully assess all the circumstances recognizing that they are exercising their independent judgment

- Encouragement for the lawyer to get advice as they are responsible for that careful factual assessment and exercise of discretion
  Possible decreased liability for failing to disclosure

28. As can be seen, many of the factors "cut both ways". It can be argued that either mandatory or permissive provisions would encourage a lawyer to get advice and assess the circumstances carefully. Equally, either option allows some flexibility for the lawyer to carefully assess all relevant factors. Although the Committee was not unanimous, we recommend a permissive provision. One member of the Committee would have drafted the provision as permissive for economic harm and mandatory for physical harm and one other would have preferred a mandatory approach for the entire rule.

29. Given the necessary ambiguities in some of the words in the test and the unpredictable circumstances in which this issue could arise, the Committee is persuaded by the greater flexibility for the lawyer weighing the various factors including the nature, degree and imminence of the harm with the prejudice to the client and the relationship, in the permissive provision. Lawyers must be trusted to act in accordance with the high ethical standards we set in protecting clients' rights and interests, but with the flexibility to do the morally correct thing in the face of serious preventable harm. The diversity of circumstances and factors which will drive this case by case, yet rare decision, should give due regard to the lawyer's exercise of discretion and good judgment.

CONCLUSION

30. In conclusion, the Committee recommends that the attached Rule 2.03(3) and its commentary be adopted as part of the Model Code of Conduct. The Committee also recommends that further work and consultation be completed on the issue of extending this provision to include an exception to address wrongful imprisonment or conviction.

APPENDIX "A"

Proposed Rule:

2.03(3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of:

(a) death or serious bodily harm, and disclosure is necessary to prevent the death or harm; or

(b) substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury.

Proposed Commentary

Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this subrule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

"Unlawful acts" giving rise to substantial financial injury may include criminal, quasi-criminal or fraudulent acts that are contrary to criminal, regulatory or civil law.

In assessing whether disclosure of confidential information is justified to prevent substantial harm, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

How and when disclosure should be made under this subrule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact

the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

If confidential information is disclosed under Rule 2.03(3), the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when the lawyer becomes aware that the organization may commit a dishonest, fraudulent, criminal or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the rules make it clear that the lawyer must not knowingly assist or encourage any dishonesty, fraud, crime or illegal conduct (Rule 2.02 (7)) and specify how a lawyer should respond to conduct by an organization that has been, is or may be dishonest, fraudulent, criminal, or illegal (Rule 2.02 (8)), it does not follow that the lawyer should disclose an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer must hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Even if the exceptions do not apply, there are several steps that a lawyer should take when confronted with proposed misconduct by an organization. The lawyer's duties are owed to the organization and not to the officers, employees, or agents of the organization (Rule 2.02 (3)), and the lawyer should comply with Rule 2.02 (8), which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by an organization.