

ETHICAL DILEMMAS FOR COUNSEL:
DISCLOSURE OBLIGATIONS v. THE SANCTITY OF PRIVILEGE

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I INTRODUCTION

Ethical dilemmas are posed by situations that call upon counsel to balance duties of confidentiality to their clients with their obligations to the public to ensure the integrity of the administration of justice and the legal profession. This paper focuses on the duties, tensions and obligations that face counsel when his or her client discloses information of a possible fraud being committed by the client or by another party. Such situations create tensions between the lawyer's duty to safeguard the client's privilege and obligations of disclosure in law and to the administration of justice.

Solicitor-client privilege is fundamental to the Canadian judicial system.¹ Clients must be able to speak freely and frankly with counsel when seeking legal advice. Counsel are required to hold these communications in the strictest confidence. Although solicitor-client privilege is fundamental, it is not without limitations. It is in determining where the limitations of the privilege are, and when information can or should be disclosed, that the challenge of balancing clients' rights with counsel's legal and ethical obligations arises.

II SOLICITOR-CLIENT PRIVILEGE IN CANADA

In Canada, solicitor-client privilege and the duty of confidentiality are defined by the Rules of Professional Conduct in each province and by the common law. The definitions emphasize the importance of holding client communications in the strictest confidence, which is fundamental to

¹ *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 45 (Supreme Court of Canada) [hereinafter *Smith v. Jones*].

the administration of justice. However, there are circumstances in which these restrictions and obligations conflict with each other. In cases of information regarding ongoing frauds, lawyers could find themselves facing the choice between breaching a client's confidences and running afoul of the law, possibly risking a charge of obstruction of justice.

A. Rules of Professional Conduct

The Rules of Professional Conduct of each province are designed to regulate and guide a lawyers' interaction with clients and the justice system, while maintaining their integrity and that of the legal profession. As said once by Lord Birkett:

“The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptation to forsake them...”²

Under the *Rules of Professional Conduct*³ of the Law Society of Upper Canada, lawyers have a duty to carry out the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.⁴ In respecting his or her duties to the client and providing legal advice, a lawyer must not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct.⁵ This obligation can give rise to conflicts with the duty of confidentiality.

² Taken from Lord Birkett's Presidential Address to the Holdsworth Club in Birmingham. Cited in, David Hawreluk, "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993) 27 LSUC Gazette 119 at 121.

³ *Rules of Professional Conduct*, R.R.O. 1990, Reg. 194 as am. [hereinafter, *Rules*].

⁴ *Ibid.*, Rule 1.03(1)(a).

⁵ *Ibid.*, Rule 2.02(5) and Commentary.

A lawyer must hold in strict confidence all information concerning the business and affairs of a client which was acquired in the course of the professional relationship.⁶ The lawyer must not divulge the information without the express or implied authorization of the client, unless required to do so by law. The client should feel completely secure and entitled to proceed to disclose information to counsel knowing that it will be held in strict confidence.

The duty of confidentiality under the *Rules* is not without limitations. There are situations when a lawyer is justified or permitted to disclose information without the client's consent. Limited disclosure is permitted when required by law or by order of a tribunal.⁷ Disclosure is also permitted where the lawyer reasonably believes that there is an imminent risk to an identifiable person or group of serious bodily harm or death. The lawyer may disclose only the information necessary to prevent this result.⁸

Although the Ontario *Rules* limit the scope of the duty of confidentiality, other provinces have not included the same limitations in their Rules of Professional Conduct. In New Brunswick, the duty of confidentiality does not extend to communications relating to criminal or fraudulent transactions unless the lawyer is advising a client who has been charged with a criminal offence. Rather, the lawyer is under a positive duty to report information concerning the commission of serious crime.⁹ In Saskatchewan, lawyers may disclose client information when they reasonably believe that a crime is likely to be committed, but are required to disclose when the crime

⁶ *Ibid.*, Rule 2.03(1).

⁷ *Ibid.*, Rule 2.03(2).

⁸ *Ibid.*, Rule 2.03(3).

⁹ *Law Society Act*, S.N.B. 1996, c.89, *Code of Conduct*, s. 5.

involves violence.¹⁰ Finally, lawyers in Quebec must preserve the secrecy of all confidential information unless authorized by the client or required by law.¹¹

The *Rules* recognize that corporate counsel confronts a difficult problem with confidentiality when he/she becomes aware that a corporation may commit a dishonest, fraudulent, criminal or illegal act. In contemplating whether or not the lawyer should “blow the whistle” on the corporation, the Commentary under the *Rules* states that the lawyer should not report the corporation, but rather should bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in the organization to the contrary.¹²

The Commentary leaves open the issue of the possible obligations on the lawyer to disclose a fraud actually in progress. Even though the lawyer is not giving legal advice in furtherance of the fraud, by acquiring the knowledge that the corporation or a third party is committing an ongoing fraud and not reporting it to the appropriate authorities, the lawyer may be allowing the fraud to continue. In such situations, the question remains as to the extent of the lawyer’s duty to the administration of justice and whether it should prevail over the duty to the client.

A lawyer’s duty, as an advocate, is to represent the client within the limits of the law while treating courts and administrative agencies with candour, fairness, courtesy, and respect. In doing so, the lawyer shall not knowingly assist or permit the client to do anything the lawyer considers to be dishonest or dishonourable.¹³ By holding information of an ongoing fraud in

¹⁰ *Legal Professions Act, 1990, S.S.*, 1990-91, c.L-10.1, *Code of Professional Conduct*, s. 11.

¹¹ *Professional Code, R.S.Q.*, c. C-26, s. 60.4.

¹² *Rules of Professional Conduct, supra*, Rule 2.03(3) and Commentary.

¹³ *Ibid.*, Rule 4.01 and Commentary.

confidence, the lawyer may be permitting the duty of confidentiality to conflict with the lawyer's duties as an advocate.

The withholding of such information could also erode public confidence in the legal profession. A lawyer must conduct himself or herself in such a way as to maintain the integrity of the profession and avoid even the appearance of impropriety.¹⁴ The public may view withholding such information as protecting the guilty and abetting in crime.

A violation of the *Rules* is considered professional misconduct. It can result in professional discipline of the lawyer and could ultimately result in disbarment. Professional misconduct includes engaging in conduct that is prejudicial to the administration of justice. In acquiring knowledge from clients of possible frauds, lawyers are often left to determine for themselves the lesser of two evils: disclose the information to the appropriate authority and violate the *Rules* as to confidentiality, or hold their client's confidence and possibly engage in conduct that could prejudice the administration of justice, erode public confidence in the legal profession, and perhaps lead to professional discipline or, indeed, criminal prosecution.

B. *R. v. Murray*¹⁵ – A Lawyer's Nightmare

The worst nightmare a lawyer could face as a result of following his or her client's instructions is to be charged with obstruction of justice. This is what Ontario lawyer, Kenneth Murray, experienced after following the instructions of his client Paul Bernardo, who was accused and ultimately convicted of murdering two teenage girls in one of the most notorious criminal prosecutions in Canadian history.

After police had thoroughly searched Bernardo's residence, Bernardo instructed Murray to go to the residence and remove videotapes hidden behind potlights in the ceiling. Murray did so and thereafter followed his client's instructions not to view the videotapes (which were recordings of the murders).

Murray eventually viewed the tapes, but retained them in the belief that they were vital to the defence theory that the real perpetrator and criminal mastermind was Bernardo's co-accused, his wife. Murray did not disclose the existence of the tapes to the prosecution, who eventually entered into a plea arrangement with the wife in exchange for her testimony against Bernardo. If the Crown had known of the tapes, it would not have entered into the plea arrangement.

Two months after Murray had removed the tapes, Bernardo told Murray that he was going to deny having any contact with either of the two victims and instructed that the tapes were not to be used to contradict this position. Complying with Bernardo's instructions would violate the *Rules of Professional Conduct*, and may have resulted in Murray being forced to be a witness against his own client. Murray had Bernardo discharge him as counsel, and four months Murray after first removed the tapes, they were turned over to the Crown. As a result of the delayed disclosure of the tapes, Murray was charged with obstruction of justice.

Murray was narrowly acquitted of the charge. The Court held that there was a reasonable doubt as to whether he had the required *mens rea* for the offence. However, in its reasons the Court held that although there is no obligation to help the police in prosecuting the crime, it is unlawful to take positive steps to conceal evidence. Solicitor-client privilege protects communications

¹⁴ *Ibid.*, Rule 6.01(1) and Commentary.

¹⁵ (2000), 48 O.R. (3d) 544 (Ont. S.C.J.)

between the solicitor and client but not real evidence of a crime.¹⁶ The Court held that once Murray had discovered the significance of the tapes, he was left with only three options:

- (a) Immediately turn over the tapes to the prosecution, either directly or anonymously;
- (b) Deposit them with the trial judge; or
- (c) Disclose their existence to the prosecution and prepare to do battle to retain them.¹⁷

C. The Law Society's Response

As a result of the *Murray* decision, the Law Society of Upper Canada has proposed an amendment to the *Rules* to permit lawyers to temporarily take possession of property relevant to a crime or offence to prevent its alteration or destruction, but the evidence must be promptly disclosed to the Crown or law enforcement authorities.¹⁸ The lawyer may retain possession of the property, after seeking immediate authorization from a committee of the Law Society, if he or she reasonably believes that it is in the interests of justice not to disclose it before trial or to permit testing of the evidence. The proposed rule does not require that information communicated to the lawyer by the client about the property be disclosed, as it is protected by solicitor-client privilege.

The proposed Rule is fiercely contested by the Attorney General of Ontario and various chiefs of police. They argue that a lawyer should never be permitted to retain possession of property relevant to a crime, but should turn the evidence over to law enforcement authorities. This

¹⁶ *Ibid.*, paras. 113 – 115.

¹⁷ *Ibid.*, para. 124.

¹⁸ Law Society of Upper Canada, Special Committee on Lawyers' Duty with Respect to Property Relevant to a crime or offence, *Report to Convocation*, March 21, 2002, Appendix B.

debate highlights tensions between protecting the interests of the client and obligations to the administration of justice and public confidence. The ability to retain evidence of a crime until trial, even though sanctioned by the Law Society, may still obstruct justice and cause the public to lose faith in the justice system. The public may consider the temporary retention as a way to protect the guilty.

D. The “Public Interest” Exceptions to Privilege – *Smith v. Jones*

The Supreme Court of Canada has held that the evidentiary rule of solicitor-client privilege has evolved into a substantive right which belongs to the client.¹⁹ However, just as no right is absolute, solicitor-client privilege is subject to exceptions. In certain circumstances other societal interests must prevail.²⁰ These exceptions include: innocence of an accused; criminal communications; and the public safety exception. The Supreme Court went on to hold that further exceptions are not foreclosed and may be expanded in the future.²¹

(i) Innocence of an Accused

This exception arises in situations where a person is charged with a crime to which another individual confesses to his or her counsel. When the enforcement of solicitor-client privilege means that an accused will be limited in his or her right to make full answer and defence to criminal allegations, the privilege can be breached (with the proviso that the information cannot be used in a later proceeding against the client).²² Society’s interests in an accused’s entitlement

¹⁹ *Smith v. Jones, supra*, at para. 48.

²⁰ *Ibid.*, para. 51.

²¹ *Ibid.*, para. 53.

²² *Ibid.*, para. 54.

to make full answer and defence and in not convicting innocent members of the public outweigh the privilege.

(ii) Criminal Communications

In *Descoteaux v. Mierzwinski*,²³ the Supreme Court of Canada held that communications that are criminal in themselves or that are intended to obtain legal advice to facilitate criminal activities are not privileged. This exception has been encompassed in the *Rules* in that a lawyer cannot advise or encourage a client to commit crime or fraud. The privilege is to facilitate the administration of justice; the purpose would be defeated if it was extended to cover lawyers who aid and abet criminal or illegal activities.²⁴

In the case of fraud, is a lawyer aiding or abetting the fraud by not disclosing it and thereby allowing it to continue? Although the lawyer is not advising the client on committing the crime, the effect may be to allow the fraud to survive or to encourage future fraud. These issues frequently arise for corporate counsel who obtain information that the corporation or members of the corporation are likely engaged or to engage in criminal activity. These issues require lawyers to critically consider the scope of their obligations. It is often a fine line between protecting client privilege and upholding the law.²⁵

Generally, Rules of Professional Conduct in Canada provide that lawyers may disclose knowledge of future crimes, but do not demand it. The Ontario *Rules* discuss the corporate lawyer's dilemma, but state the information should not be disclosed. Does the public interest in

²³ [1982] 1 S.C.R. 860.

²⁴ Allan C. Hutchinson, *Essentials of Canadian Law: Legal Ethics and Professional Responsibility*, (Toronto: Irwin Law, 1999) at page 117.

²⁵ *Ibid.*, page 173.

protecting victims of fraud outweigh client confidentiality? If at times societal interests will prevail over privilege, then lawyers may sometimes be required to exercise their moral judgement in reaching a decision on whether or not to disclose the information. “[T]he Rules are an occasion for the exercise of moral judgement, not a substitute for it.”²⁶

(iii) The Public Safety Exception

The Supreme Court of Canada has held that when the safety of the public is engaged, privilege will have to be balanced against this compelling need and in rare circumstances the public interest may be so compelling that the privilege must be displaced.²⁷ Before the privilege is set aside, three factors must be met:

- (a) Is there a clear risk to an identifiable person or group of persons?
- (b) Is the risk one of serious bodily harm or death?
- (c) Is the danger imminent?

The Court has made it clear that under the common law, there must be a threat of imminent, serious bodily harm or death in order to breach a client’s confidence. Once the lawyer has determined that these three factors are present, the ultimate disclosure must be restricted as much as possible to that information required to prevent the harm.²⁸

In setting out these factors, the Court has once again emphasized the importance of solicitor-client privilege, and that it should only be breached in the rarest of cases. The tension for lawyers when balancing the public’s interests with those of their client, is in determining the

²⁶ *Ibid.*

²⁷ *Ibid.*, at para. 74.

²⁸ *Ibid.*, at para. 86.

standard of public interest required to outweigh the interest of confidentiality.²⁹ The onus is on the lawyer to be satisfied that the public's interest outweighs that of keeping the information confidential.³⁰ It has been suggested that in the wake of *Smith v. Jones*, defence lawyers must make clear to their clients that some communications, even if not in furtherance of a crime, may not be covered by either the duty of confidentiality or solicitor-client privilege.³¹ The question remains whether disclosure is permitted or even mandated when efforts to dissuade clients from acting to harm others have failed.

III ISSUES IN THE CORPORATE CONTEXT

There are additional considerations and issues that are unique in the corporate context when clients disclose possible commission of fraud. These issues include: to whom are the lawyer's duties owed and increased reporting and disclosure obligations on corporations, directors, and officers.

A. To Whom are the Lawyer's Duties Owed

The duty of confidentiality and solicitor-client privilege is not easily defined in the corporate context. Corporations are a separate entity, distinct from the directors, officers, and shareholders who own and operate them.³² Lawyers must remember that they are engaged by the corporation and it is the corporation's interests which must prevail. In practice, this distinction may be difficult to discern, since lawyers usually take instructions from the directors and officers.

²⁹ Bennett, "Confidentiality in a Solicitor and Client Relationship" (1989), 23 L.S.U.C. Gazette 257 at 273.

³⁰ *Ibid.*, at 272.

³¹ David Layton, "Ethics, Confidentiality and Privilege: Comment on *Smith v. Jones*" (1999) Defence Briefs, Issue #48. Online: <http://www.crimlaw.org/defbrief28.html>.

³² Hutchinson, *supra*, at page 169.

Courts have generally held that communication to lawyers from anyone who has some control over the company's decision making process is privileged.³³ In *Mutual Life Assurance Co. of Canada v. Canada (Deputy A.G.)*³⁴ the court extended the duty of confidentiality to all legal communications between management and employees of the company, as well as communications between the lawyer and employees of a wholly owned subsidiary.

Lawyers owe a duty to the corporation to advise about the legality of its actions, and to do their best to keep the company on the right side of the law.³⁵ This duty creates tensions for lawyers when it is disclosed to them that the corporation is possibly engaged in fraud, or a representative of the corporation is using it to commit fraud. The lawyers should report the illegal conduct to those who have the overall responsibility for running the corporation, including, if necessary, the board of directors.³⁶ However, this does not settle whether or not the lawyer has the duty or obligation to report the fraud to the shareholders, who are the ultimate owners of the corporation, or to others.

Corporate lawyers also face conflicts when considering whether the public interest requires disclosure of confidential information to the appropriate authorities. As discussed earlier, a lawyer must balance whether the public interest outweighs the interest in keeping information confidential. It may be harder to determine what standard of public interest will tip the scale, since in the corporate context there may not be the presence of imminent, serious bodily harm or death. The lawyer must also question whether in not disclosing a fraud, he or she is assisting the

³³ *Ibid.*, at page 170.

³⁴ (1988), 28 C.P.C. (2d) 101 (Ont. H.C.J.).

³⁵ Hutchinson, *supra*, at page 173.

³⁶ *Rules of Professional Conduct, supra*, Rule 2.02 and Commentary.

fraud by allowing it to continue. The exercise in moral judgement for counsel in the corporate context is not an easy one.

B. Increased Reporting and Disclosure Obligations

Corporations have increasing obligations to disclose information to government and regulatory agencies. Corporate counsel are seen as the gate keepers of the corporation, advising on legal and ethical obligations, as well as keeping the company on the right side of the law. As a result of this gate keeping function, corporate counsel may have increased obligations to ensure that clients are disclosing proper information, or possibly be required to disclose the information themselves.

(i) *The Proceeds of Crime (Money Laundering) Act*

The Federal *Proceeds of Crime (Money Laundering) Act*, enacted and in force in June, 2000, has strict requirements as to record keeping and client identification for financial institutions and other businesses and professionals, including lawyers. Financial institutions, businesses and professionals must report to the designated authorities any suspicious transactions by clients which might fall within the description of a money laundering scheme. The fact that a report is made against a client must be kept confidential and not disclosed to the client. This reporting obligation raises clear conflicts with a lawyer's duty to the client.

The Federation of Law Societies of Canada has challenged as unconstitutional the requirement that lawyers must become informants against their clients. Courts in British Columbia, Alberta,

Ontario,³⁷ Nova Scotia, and Saskatchewan have issued interlocutory injunctions exempting lawyers from the strictures of this legislation pending a final judicial determination of its constitutionality.

This legislation raises directly for nation-wide discussion and judicial determination the issues discussed in this paper. In many, if not most, instances the reporting obligation currently embodied in the legislation will directly conflict with the solicitor-client privilege. Layered on top of this mandatory breach of privilege is the legislative prohibition against advising the client that the client's privilege has been waived without its consent. The very difficult balancing of interests raised by the legislation and whether it can live together with the constitutional principles which underlie Canada's legal system are nobly expressed by Mr. Justice Cullity of the Ontario Superior Court of Justice in granting an interlocutory injunction in favour of Ontario lawyers:

“The position of the Federation [of Law Societies of Canada] is that the legislation constitutes such an exceptional and direct attack on the solicitor/client relationship that its effects outweigh the undoubted injury to the public interest that would result from the grant of the temporary exemption requested. In agreeing with this position, I am influenced by my judgment of the fundamental importance to a federal democratic society of the issues at stake – affecting as they may do the administration of justice and the rule of law – the emphasis that has been given in previous cases, in this jurisdiction and elsewhere, to the value of the incidents of the professional relationship that will be overridden by the legislation, the severity of the harm that will have been inflicted if the legislation is ultimately held to be unconstitutional and, in particular, its immediate effect in imposing obligations to which penal sanctions are attached. Whether or not the narrow interpretation of section 5 of the Regulations that counsel for the Attorney General urged me to accept is correct, its advocacy does not weigh heavily on the side of the public interest that militates against an exemption pending a hearing on the merits. Nor does acceptance of an assumption that the legislation is in the public interest require one to ignore the fact that the effect of the remedy requested will do nothing more than to restore elements of a relationship, that have been considered in the past to be fundamental, until the merits of the application have been decided.”³⁸

The exemption from the legislation does not relieve one's client from the requirement to report activities of their own clients. Lawyers should be careful to explain the legislation and instruct

³⁷ See *Federation of Law Societies of Canada v. Attorney General Of Canada*, unreported January 9, 2002, Docket 01-CV-222041 (Ont. S.C.J.).

their clients when to “blow the whistle”. The exemption may also not relieve the lawyer from the obligation to report his/her client’s clients. The issue of whether or not privilege will extend to the clients of clients has not been judicially considered in this situation.

(ii) Securities Legislation and Regulatory Bodies

Securities legislation and regulators are responding to public pressure to require corporations to disclose more information in prospectuses, information circulars and annual reports. As such disclosure obligations increase, lawyers must advise on disclosure in legal documents prepared on a corporation’s behalf. Conflicts arise where the corporation or representatives of the corporation fail to heed a lawyer’s advice or commit fraud. Should the lawyer be under an obligation to report the activities to regulatory bodies?

The issue of a lawyer’s obligation to disclose information creates serious conflicts. The lawyer may face administrative or criminal proceedings for failing to disclose or facilitating a fraud. In *Wilder v. Ontario (Securities Commission)*,³⁹ the Ontario Court of Appeal held that the lawyer, Wilder, was subject to discipline proceedings by the Ontario Securities Commission in connection with possible fraudulent information in the preliminary prospectus of his client, YBM Magnex International Inc. The Court concluded the need to respect solicitor-client privilege does not require a blanket preclusion, preventing the Commission from reprimanding lawyers, so long as the Commission pays adequate heed to the importance of the privilege.⁴⁰ The Court held that the Commission should avoid creating a situation where the lawyer is placed in the dilemma of either foregoing the right to make full answer and defence or disclosing privileged

³⁸ *Ibid.*, para. 51.

³⁹ (2001), 53 O.R. (3d) 519.

information. In such (rare) cases, the Commission may have to forego proceedings against the lawyer.⁴¹

(iii) Financial Audits

Financial auditors become privy to the inner workings of their clients and may become aware of a client's fraudulent activities. Lawyers for financial auditors must advise their clients on the appropriate course of action to take in these circumstances, or the clients may face serious criminal consequences. For example, over the past 6 months, Andersen LLP in the United States has been facing obstruction of justice charges for destroying of documents in their possession in relation to their client, Enron, which had allegedly perpetrated frauds.

Lawyers should advise their clients that they are under an obligation not to destroy any documents relating to situations like Enron. If the client persists in such intentions, the lawyer may be under a positive duty to take documents into his or her possession. This may, in turn, require that the lawyer to disclose the documents if they are real evidence of a crime. The client should be informed of all of these tensions and conflicts. The lawyers, themselves, may face liability if they do not instruct the client to maintain the documents but, rather, allow the evidence to be destroyed.

IV CONCLUSION

In Canada, solicitor-client privilege is fundamentally important to the administration of justice. It is a substantive right belonging to the client. Since no right is absolute, the privilege is not

⁴⁰ *Ibid.*, para. 32.

⁴¹ *Ibid.*, para. 34.

without limitations. Lawyers are required to balance the interests of their client with the interests of the public and the administration of justice. The Supreme Court of Canada has held that it is only in the rarest of cases that societal interests will outweigh the interest of client privilege, but with increasing public interest and pressure for disclosure, the line between protecting the client and upholding the law is not at all clear and straight. Rather, it is all too often fuzzy, wavy and hard to follow.

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