

## **March 25, 2020 – Guidance for legal professionals testing or presumptively positive for COVID-19 virus**

A legal professional who has tested positive for the COVID-19 virus, or who is being treated as presumptively positive, may be required to provide information to a provincial health officer or their designate, pursuant to the relevant provincial or territorial public health act and regulations. The information sought might include the names and contact information of individuals with whom the professional has had recent contact. This may include the names of and contact information for clients. Under some circumstances, health authorities may also seek more detailed information such as the nature of the lawyer's recent encounters with individuals or their duration. Such information is confidential and, in some circumstances, may be privileged.

The Rules of Professional Conduct provide an exception to the duty of confidentiality in order to protect public safety or prevent future harm.

- 3.3-3** 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 death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

### **Commentary**

- [1] 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 rule, 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.
- [2] 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.
- [3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:
- (a) the likelihood that the potential injury will occur and its imminence;
  - (b) the apparent absence of any other feasible way to prevent the potential injury; and
  - (c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.
- [4] How and when disclosure should be made under this rule 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.

**[5]** If confidential information is disclosed under rule 3.3-3, 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.

As noted in commentary 2 above, the Supreme Court of Canada has recognized an equivalent exception to privilege if a serious and imminent threat to public safety exists to an identifiable person or group of persons (*Smith v. Jones*, [1999] 1 SCR 455).

#### **Extent of Information Communicated:**

In providing recent contact information to health authorities, a legal professional who has tested positive for the virus, or who is being treated as presumptively positive, may disclose the names and contact information of clients with whom the professional has been in recent contact. However, the legal professional must not disclose more information about those individuals than is required. In particular, a legal professional should take care not to identify as clients any individuals included in the disclosure or make any unnecessary reference to the purpose or circumstances of the contact.

Where the health authority asks about additional circumstances, such as the recency, proximity, location and duration of the contact, the lawyer should provide information only to the extent necessary to answer the related inquiry.

#### **Steps for Lawyers to Take:**

A legal professional who believes that disclosure may be warranted should, if able, contact the law society for ethical advice or refer to existing guidance from their law society regarding disclosure in these circumstances.

Client consent in advance to the disclosure of information is not required; however notice of the disclosure to any affected clients should be provided within a reasonable time.

#### **Record-Keeping Requirements:**

If confidential client information is disclosed, the legal professional should record this disclosure in accordance with commentary [5] of rule 3.3-3, the lawyer should prepare a written note as soon as possible and retain the note:

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- (a) the date and time of the communication in which the disclosure is made;
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  - (c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

The law society is available to answer questions about practice and professional obligations.