DOING OUR DUTY: THE CASE FOR A DUTY OF DISCLOSURE TO PREVENT DEATH OR SERIOUS HARM

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Prelude

A.[1] You are a social worker or a psychologist or perhaps a doctor treating a patient with a history of domestic violence who is in the midst of a bitter matrimonial dispute. During the course of treatment, your patient threatens to murder his estranged wife. Based on the information that you have received from your client, you have reasonable grounds to believe that your client will carry out this threat. What should you do? Must you warn the potential victim or call the police?

B.[2] You are a lawyer acting for the husband with a history of domestic violence in a bitter matrimonial dispute. Your client threatens to murder his estranged wife if he is unsuccessful in the case. You have reasonable grounds to believe that your client will carry out this threat. What should you do? What must you do? Must you warn the potential victim or call the police?

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[1] This example is adapted from the facts of the *Tarasoff* case, see *Tarasoff v. Regents of the University of California,* 551 P.2d 334 (Ca. 1976).

[2] This example is taken from Sir Thomas Lund's 1956 lectures to the Law Society of Upper Canada (see infra note 4 at 47) and repeated in his 1960 Law Society (England) lectures (*A Guide to the Professional Conduct and Etiquette of Solicitors* (London: The Law Society, 1960) at 103)) which greatly influenced the development of the rules of professional conduct in Canada viz. through their recital by M.M. Orkin in *Legal Ethics* (Toronto: Cartright & Sons, 1957) and the subsequent adoption of the Code of Professional Conduct by the Canadian Bar Association in 1974 which was greatly influenced by Orkin's work.

Introduction

In the above example, whereas doctors, psychologists and social workers have an ethical duty to disclose information to prevent harm to a third party, Canadian lawyers have no such duty. In this short article, I take the opportunity to review the state of the Canadian lawyer's ethical duty to disclose information necessary to prevent the death of, or serious injury to, another person. First, I contend that after the Supreme Court of Canada's decision in *Smith v. Jones*[3], lawyers *never* have a duty to disclose information learned during the retainer regarding the client's intention to kill or seriously injure another person. For ease of reference, I refer to this scenario throughout this paper as "information about a threat to public safety." I then analyze and critique the arguments proffered against imposing a duty to disclose information about a threat to public safety. Finally, I explain why we should impose an ethical duty on lawyers to reveal information about a threat to public safety. Let me make clear that what I propose to discuss is an *ethical* duty as opposed to a *legal (or tort)* duty. By this I mean that I will put forward a case as to why the legal profession should impose an ethical duty on its members; I do not address the issue of whether the legislature or the courts should impose such a requirement.[4]

Development of a Duty to Disclose in Canada

Canadian lawyers have not thought much about their duty, if any, to disclose information learned in the course of a retainer about a threat to the life or safety of another person. What little discussion there has been has focused on the exception to the duty of confidentiality where future crimes may be committed by a client. In 1956, England's Sir Thomas Lund gave a series of lectures on legal ethics at the Law Society of Upper Canada. In 1957, Mark Orkin relied heavily on the content of those lectures in writing what would stand for a quarter of a century as the only book

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[3] [1999] 1 S.C.R. 455.

[4] I am indebted to Chris Bredt for challenging me on the distinction between an *ethical* and a *legal* duty. It can be asserted that imposing an ethical duty on lawyers would create a concomitant legal duty whereby lawyers could be sued in tort. I do not believe that this is necessarily the case. The breach of an ethical duty may give rise to charges by the Law Society of professional misconduct or conduct unbecoming a barrister or solicitor. However, not every breach of professional conduct rules is actionable in tort. The courts have drawn a distinction between negligence and professional misconduct. It would be open to the courts or the legislature to create a legal duty based on an ethical duty contained in the professional conduct rules, but that would be a separate exercise. Similarly, the courts or the legislature could create a legal duty in the absence of an ethical duty. Although legal and ethical duties are certainly interrelated, one does not necessarily follow from the other.

on Canadian legal ethics.[5] Both Lund and Orkin posited a duty for lawyers to disclose information that they learned from their client about an intention to commit a serious crime.[6] However, in 1974, when the Canadian Bar Association ("CBA") published its first Code of Professional Conduct, relying heavily on Orkin's work, it did not follow Orkin in imposing an ethical duty to disclose information about a future serious crime. Rather, it left the disclosure of such an intention to the personal discretion of each lawyer: "Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed."[7]

However, in 1987, when the CBA revised its Code, it changed this rule to require disclosure of anticipated crimes involving violence and permitted disclosure when a lawyer "has reasonable grounds for believing that a crime is likely to be committed."[8] Some provincial law societies followed the old CBA model of permissive disclosure, while others adopted the new mode of mandated disclosure in some cases and permissive disclosure in other instances. Because of these different approaches, we can identify five positions surrounding the issue of duty versus discretion:

1. Permissive disclosure for future crimes/No mandatory disclosure[9];
2. Permissive disclosure for future crimes/Mandatory disclosure when the anticipated crime involves violence;[10]
3. No permissive disclosure/Mandatory disclosure for serious crimes;[11]
4. Permissive disclosure where death or serious bodily harm may result or when the

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[5] See Orkin, *supra* note 2 at 86.

[6] See T.G. Lund, *Lectures on Professonal Conduct and Etiquette* (Toronto: Richard de Boo Ltd., 1956) at 46 and Orkin, *supra* note 2 at 86.

[7] CBA, Code of Professional Conduct (1974), chapter 4, commentary 11.

[8] CBA, Code of Professional Conduct (1987), chapter 4, commentary 11.

[9] Law Society of Upper Canada, Rules of Professional Conduct, rule 4, commentary 11 (in force until October 31, 2000).

[10] Law Society of Alberta, Code of Professional Conduct, chapter 7, rule 8(c) and commentary 8.1; Law Society of Manitoba, Code of Professional Conduct, chapter 4, commentary 11; Law Society of Saskatchewan, Code of Professional Conduct, chapter 4, commentary 11.

[11] Barristers' Society of Nova Scotia, Legal Ethics and Professional Conduct Handbook: A Handbook for Lawyers in Nova Scotia, chapter 5, commentary 5.12.

future crime is a serious indictable offence/No mandatory disclosure;[12]
5. Permissive disclosure where death or serious bodily harm may result/No mandatory disclosure.[13] Thus, until recently, no uniform "Canadian" position on the lawyer's duty to disclose existed.

All of this changed in mid-1999 with the Supreme Court's decision in *Smith v. Jones*[14] which set out the parameters of a public-safety exception to solicitor-client confidentiality. Briefly,[15] the Supreme Court held that solicitor-client privilege may be set aside when there is a clear and imminent risk of serious bodily harm or death to an identifiable person or group of persons. This strange case arose in Vancouver where a "Mr. Jones" was arrested for aggravated assault in an attack on a prostitute. The lawyer for Mr. Jones sent his client for an evaluation by "Dr. Smith" in order to prepare for a defence. Mr. Jones bared his soul, one might say, to Dr. Smith, revealing his intentions to abduct and kill other prostitutes. Dr. Smith went to court seeking a declaration allowing disclosure of this information, despite having been retained by the accused's lawyer (This meant that Dr. Smith was acting as an agent of the accused's lawyer and was therefore covered by solicitor-client privilege).

The decision wavers back and forth between the language of duty and the language of discretion: that is, the old difference between "must" and "may". The distinction is critical for it determines whether a lawyer faced with a situation that meets the public-safety exception is required to disclose information to the appropriate authorities or whether that lawyer simply has the discretion to do so but may choose to stay silent.

A careful review of the decision leads me to conclude that the Court does not create a duty to disclose but merely recognizes the discretion to do so. First, while recognizing that the linguistic evidence supports both views,[16] the language used by

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[12] Former chapter 5, rule 12 of the Law Society of British Columbia's Professional Conduct Handbook.

[13] Current chapter 5, rule 12 of the Law Society of British Columbia's Professional Conduct Handbook. The B.C. Rule appears modeled on American Bar Association Model Rule 1.6(b) "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . .".

[14] *Supra* note 3.

[15] For a detailed review of the case see: A. Dodek, "The Public Safety Exception to Solicitor-Client Privilege: *Smith v. Jones*" (2000) 34 U.B.C.L.Rev. 293.

[16] On duty, see paras. 1, 74, 85. On discretion, see paras. 28, 29, 34, 96 and 104.

both the majority[17] and the minority[18] in their conclusions point to a discretion rather than a duty. Second, elsewhere in the case, both the majority and the minority distance themselves from the jurisprudence of duty regarding a doctor's duty to disclose confidential information.[19] Finally, the procedural posture and background of the case leads to the conclusion that the Court is not establishing a duty. In the original application, the trial judge holds that Dr. Smith not only had the discretion to disclose the privileged information but indeed had a duty to do so. The Court of Appeal expressly disavows such a duty. In dismissing the appeal, the Supreme Court therefore rejects a duty and finds only a discretion.

Where do Canadian lawyers stand after *Smith*? One result is a return to the position in 1957 when Orkin wrote *Legal Ethics*. Once again, there is a uniform rule of legal ethics applicable throughout the country. Elsewhere, I have referred to this phenomenon as "the nationalization of legal ethics."[20] By this I mean that the Supreme Court's decision in *Smith v. Jones* must be taken to supersede the law societies' rules respecting disclosure. Pronouncements on the differences between solicitor-client privilege and the ethical duty of confidentiality have become anachronistic. It used to be said that the duty of confidentiality was wider than solicitor-client privilege because the latter was an evidentiary rule that could only be raised in legal proceedings. However, over the last two decades, the Supreme Court of Canada has expanded the concept of solicitor-client privilege from an evidentiary rule into a substantive right that applies and can be enforced in a variety of contexts.[21] Consequently, solicitor-client privilege now largely overlaps with the lawyer's duty of confidentiality set out in the law societies' ethical rules.[22]

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[17] From Justice Cory: "Dr. Smith chose to bring a legal action for a declaration *that he was entitled to disclose* the information he had in his possession in the interests of public safety." *supra* note 3 at para. 96. And further: "This case raised the issue of when solicitor-client privilege *can be set aside*." *ibid.* at para. 104 [*emphasis added*].

[18] From Justice Major: "Accordingly, I would allow the appeal without costs, confirm the entirety of Mr. Jones' communications to Dr. Smith to be privileged but *permit* Dr. Smith to give his opinion and diagnosis of the danger posed by Mr. Jones." *ibid.* at para. 34.

[19] See para. 59 of the majority reasons and paras. 32 and 33 of the minority reasons.

[20] *Supra* note 15.

[21] See *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; and *Smith, supra* note 3.

[22] It may be that the duty of confidentiality is still broader than solicitor-client privilege in that the privilege only attaches to "communications" from client to lawyer or lawyer's agent whereas the duty attaches to all information learned in the course of the retainer. However I suspect that the privilege would be judicially interpreted to encompass such information whether or not learned through direct

The above conclusion is buttressed by the decision of the Law Society of Upper Canada to change its rule regarding disclosure. Prior to the change, the Law Society of Upper Canada was one of the jurisdictions that followed the 1974 CBA model in imposing no duty to disclose but permitting disclosure of future crimes. However, in the wake of *Smith v. Jones*, the Law Society of Upper Canada restricted its "future crime exception" to mirror the more limited discretion to disclose information about a threat to public safety set out in this case.[23]

Arguments Against Imposing a Duty to Disclose

It is difficult to find an argument expressly countering the duty to disclose information of a threat to public safety. Whenever the possibility arises of breaching solicitor-client privilege or the duty of confidentiality, resort is made time and again to the same argument, regardless of the context. Thus, in the first line of his reasons in *Smith v. Jones*, Cory J. recounts that,

> (t)he solicitor-client privilege permits a client to talk freely to his or her lawyer secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed. It has long been recognized that this principle is of fundamental importance to the administration of justice and to the extent it is feasible, it should be maintained.[24]

Furthermore, the privilege has been justified by the absolute necessity for those faced with a legal problem to have recourse to the assistance of a legal professional. Thus, the privilege is grounded on "the full and frank disclosure" argument: without the privilege, clients would not be candid with their lawyers and might hold back relevant information.

Neither ethical codes nor case-law expand beyond this bare assertion. The CBA's Code of Professional Conduct comments:

> The lawyer cannot render effective professional service unless there is full and

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"communications" from the client.

[23] See Law Society of Upper Canada, Revised Rules of Professional Conduct, Rule 2.03(3):

> Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

[24] *Supra* note 3 at para. 35.

> unreserved communication between him and his client. At the same time the client must feel completely secure and he is entitled to proceed on the basis that without any express request or stipulation on his part matters disclosed to or discussed with his lawyer will be held secret and confidential.[25]

In *Upjohn v. United States,*[26] the U.S. Supreme Court articulated the "full and frank disclosure" justification in the following terms:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[27]

This is not much of an expansion on the explanation offered by Lord Chancellor Brougham in 1833 in *Greenough v. Gaskell,*[28]

> If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

What this demonstrates is that in the course of nearly two centuries, the highest courts and the leaders of the profession in three countries are each able to muster two remarkably similar sentences to justify the strongest privilege in existence in Anglo-American law. It is also notable that the "full and frank disclosure" explanation focuses on the reasons for the existence of the privilege and, in so doing, presents an absolutist position that either it exists or it does not. The reality is that the privilege has been subject to numerous exceptions for many years and the true issue is not its existence but its extent. This absolutist position is not surprising given the proclivity of judges and lawyers in invoking religious language to describe solicitor-client privilege in terms such as "sacred" and "sacrosanct."[29] The use of such language demonstrates the attitude of the legal profession towards the privilege. The profession defends solicitor-client privilege with a religious zeal bordering on moral fundamentalism. As demonstrated in the discussion on the "full and frank

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[25] At chapter 4, commentary 1.

[26] 449 U.S. 383 (U.S.S.C. 1981).

[27] *Ibid.* at 389.

[28] (1833), 1 Myl. & K. 103.

[29] See e.g. Kirk Makin, "Defence lawyers complain they're under attack" *The Globe and Mail* (13 November 2000) ("Veteran lawyer Austin Cooper said the sanctity of solicitor-client confidence has been threatened by another development: potential evidence that finds its way into the hands of defence lawyers.")

disclosure" justification, discourse of the basis for the privilege is characterized by a refusal to probe deeply into the reasons for its continued existence. Solicitor-client privilege is accepted on a leap of faith.

Recently, the Ontario Court of Appeal endeavoured to articulate further rationales for solicitor-client privilege beyond "full and frank disclosure". In *General Accident Assurance Co. v. Chrusz*[30], Doherty J.A. rightly characterized full and frank disclosure as serving a utilitarian purpose. However, he probed beyond the usual two sentence justification in asserting that solicitor-client privilege "is an expression of our commitment to both personal autonomy and access to justice."[31] Doherty J.A. further asserted that the privilege promotes the adversarial process by ensuring the undivided loyalty of the lawyer as the champion of the client's cause.

The arguments in defence of the absolute nature of solicitor-client privilege and against a duty to disclose information of a threat to public safety are deeply flawed. I offer three arguments in support of this conclusion: (1) a lack of empirical evidence to support the "full and frank disclosure" argument; (2) an internal contradiction in the argument; and (3) an external contradiction in the argument.

First, the "full and frank disclosure" justification remains utterly untested by any empirical data. It is based on common sense -- which may in fact prove correct. However, when the courts create new rules of law, they demand a far more exacting level of evidence than they are able to marshal in support of the existence of this rule. Where is the social science evidence, so popular with the courts these days, to support the claim that the absence of the full protection of the privilege would have a chilling effect on clients' candour to their lawyers?

Indeed, our experience in other areas of the law show that people have many motives to lie: fear, embarrassment, uncertainty, shame, confusion, etc. The existence of solicitor-client privilege does not explain how these psychological barriers are to be overcome. The same sort of common sense psychology that lies behind the "full and frank disclosure" argument lay behind the creation of the *Miranda* rule. It was believed that criminal defendants were being coerced into confessing to their crimes because they were not being made aware of their constitutional right to remain silent. It turns out that this supposition was at least partially incorrect: *Miranda* is over three decades old -- every teenager who watches

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[30] 45 O.R. (3d) 321 (C.A.).

[31] *Ibid.* at 334.

television knows the warnings by rote -- and yet, criminal defendants continue to confess to their crimes. Why should we think that human behaviour would be any different for "full and frank disclosure" with one's legal counsel?

Second, the "full and frank disclosure" argument is internally contradictory. Many rights or privileges have internal limitations without defeating their purpose, but what makes this argument internally inconsistent is its absolutism: its failure to acknowledge, explain and justify the existing exceptions to the privilege. According to the logic of "full and frank disclosure", the exceptions that have been carved out to the privilege over the years should have jeopardized the lawyer-client relationship. Specifically, the largest group of exceptions to the privilege falls under the heading of "lawyer's self-defence". A lawyer may disclose confidential or privileged information to collect a fee or when the lawyer, or a member of the lawyer's firm, faces a disciplinary, civil or criminal charge in connection with the client. These exceptions may make sense on the grounds that we should not permit clients to take advantage of the privilege by using it as a sword rather than a shield, as the saying goes. However, when we return to the "full and frank disclosure" rationale we must conclude that again this justification is wanting. It cannot encourage the utmost candour for the client to know that if a dispute arises with the lawyer, the client's words will be used against him or her.[32]

Third, the "full and frank disclosure" argument is externally contradictory. By this I mean that it is accepted by the courts and the legislature as gospel when it comes to solicitor-client privilege, but is disregarded by these bodies in other contexts. In other situations, the necessity for "full and frank disclosure" may be more imperative, but the privilege attaching is far less absolute. Specifically, physicians face a myriad of reporting obligations that under this argument would stand in the way of patients confiding in their doctors and would inhibit effective treatment. For example, in Ontario, doctors are required by statute to report a patient who is suffering from a condition which makes it dangerous to drive; an air traffic controller, pilot, or other aviation licence holder who suffers from a condition that is likely to constitute a hazard to aviation safety; and instances of suspected child abuse.[33] Yet, the legislature and the courts have not concluded that the exceptions

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[32] I seriously doubt that many lawyers make their clients aware of this exception when they initially interview their clients. But this is another problem. . .

[33] These statutory reporting obligations are in addition to the ethical duty of doctors to disclose information where maintaining confidentiality would result in a significant risk of substantial harm to others. See Code of Ethics of the Canadian Medical Association, Approved by the CMA Board of Directors, October 15, 1996, s. 22.

to doctor-patient confidentiality stand in the way of efficacious treatment. Why are lawyers different from medical professionals in this respect? Arguably, lawyers are different. As stated by Cory J. in *Smith v. Jones*, solicitor-client privilege is "the highest privilege recognized by the courts."[34] However, the services that they provide are, for the most part, less important to the individual than those provided by doctors, nurses, psychologists, psychiatrists and social workers. This is the rub of the issue. The question is not whether solicitor-privilege is justified, but whether its status as the pre-eminent privilege is warranted. I do not believe that it is.

The Case for Imposing a Duty

Lawyers occupy a privileged position in our society. As members of a self-regulated profession, we are entrusted with controlling our own affairs. In this respect, lawyers are no different from other self-regulating professions such as medicine or dentistry. However, what separates law from these other professions is the extent to which oversight of the self-regulation remains "in the family". Actions of the self-regulating professions are reviewed by the courts which may be considered an "outsider" respecting all professions except the law. That is to say, law is the sole self-regulated profession where the supposedly independent oversight is conducted by former members of the profession.[35] Moreover, legislative oversight is similarly flawed: most of the legislative drafters in provincial departments of justice are themselves lawyers, as are their ministers. In an age where public opinion surveys demonstrate that the public is increasingly cynical of the actions and role of lawyers in our society, the question remains to what degree do lawyers deserve the trust that has been accorded to them? Lawyers do not deserve, nor do they require, exceptions from the duty to disclose imposed on their colleagues in other professions. As former U.S. District Judge and leading commentator on legal ethics, Marvin Frankel has written, "the duty to make even painful disclosures is one we have been increasingly ready to impose on non-lawyers."[36] Lawyers should also share this societal burden.

I begin with the moral argument. As members of society, lawyers have a duty to that society and to their fellow members of the community. This has long been

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[34] *Supra* note 3 at para. 44.

[35] As a recent letter to the *Globe and Mail* quipped, "Lawyers and Judges are the same breed of cat." Tony Fricke, "What's so Confusing?" *The Globe and Mail* (6 November 2000) at A18 (Letter to the Editor).

[36] M. Frankel, *Partisan Justice* (New York: Hill and Wang, 1978) at 83.

recognized by Canadian codes of legal ethics dating back to the Canons of Legal Ethics which recognized that lawyers owe a duty to the State "to maintain its integrity and its law." As former University of New Brunswick Law Professor Beverley Smith has written, the CBA Code "leaves little doubt but that the highest duty of loyalty is owed to what is called 'the protection of the public interest'". Smith recognizes that this is a somewhat amorphous phrase but holds that it certainly includes the state and its systems as well as its people.[37] Professor Smith acknowledges the conflict between this duty of loyalty and the duty to one's client but concludes that in Canada, the lawyer's duty of loyalty to the state and its systems "is amongst the highest, if not *the* highest, duty."[38] I argue that in the most limited of circumstances -- when a lawyer has reasonable grounds to believe that death or serious injury to another person will occur -- the lawyer has an ethical duty to act and take steps to prevent that most serious harm from occurring. In so doing, the lawyer is exercising a moral imperative as a member of a society which has entrusted him or her with a privileged place within it.

In somewhat of a paradox, I believe that *Smith v. Jones,* supports my case for imposing a duty on lawyers rather than granting them the discretion to disclose. In analyzing the case, I concluded that the Court did not impose a duty but rather gave lawyers the discretion to disclose information that meets the public safety exception. This conclusion is supported by the recent change to Ontario's Rules of Professional Conduct which eliminated any duty, replacing it with a limited discretion which tracks the language of the *Smith* case.

In *Smith,* the Court uses the language of discretion while invoking the logic of duty. The Court balances competing interests -- the sanctity of the privilege on one hand and public safety on the other -- and concludes that disclosure outweighs the privilege in very limited circumstances. For instance, the Court states that solicitor-client privilege "must yield to the right of accused persons to fully defend themselves".[39] If there are circumstances where the privilege "must yield", then this indicates that the lawyer "must reveal" the information. Once the Court has concluded that there are situations where disclosure outweighs maintaining the privilege, it follows that when this test has been met, that the scales are tipped in favour of disclosure and the lawyer must disclose the information necessary to

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[37] B.G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book, 1998) at chapter 1, at 16, para. 30.

[38] *Ibid.* at chapter 1, at 17, para. 33.

[39] *Supra* note 3 at para. 52.

prevent the harm.

The logic of *Smith* dictates that if a lawyer has information that would save a third party from death or serious injury, the lawyer must step forward and disclose this information. However, the ruling does not require the lawyer to do so. Thus, if we consider for a moment those infamous tapes that Ken Murray retrieved from Paul Bernardo's home, we can see how the result in *Smith* does not go far enough. Imagine for a moment that instead of the tapes depicting Bernardo and Homolka's *past completed* crimes, they displayed *continuing* crimes. We do not have to drastically alter the facts to envision this scenario. Consider for a moment that Bernardo went to see a lawyer while Homolka remained at home with one of their abducted victims. Bernardo takes the tapes to his lawyer and shows him the tape of their crimes and of their current victim who is still being held in his home. What should the lawyer do? I submit that this is the clearest example that meets the test of a clear, serious, and imminent danger to an identifiable person as set out by the Court in *Smith*. Applying the *Smith* ruling, the lawyer would have the choice whether or not to disclose this information to the authorities but would be under no ethical duty to do so. This simply cannot be. I contend that the logic of public duty embraced by the Court in *Smith* supports the imposition of such an ethical duty.

It is recognized that solicitor-client privilege is "the highest duty". This is true judicially, but the question is whether it deserves to be. In this respect, the criminal process casts a giant shadow over the thinking about solicitor-client privilege. The unique challenges of criminal law should be a starting, rather than an ending, point for the discussion. As Major J. discusses in his partial dissent in *Smith*[40], in the criminal context, solicitor-client privilege is a constitutionally protected value through an accused's right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence. Major J. proceeds to warn that "[s]anctioning a breach of privilege too hastily erodes the workings of the system of law in exchange for an illusory gain in public safety."[41] This leads Major J. to conclude that the disclosure should be limited so as to impair the accused's *Charter* rights as little as possible. I agree with Major J. but would take this a step further. The purpose of the disclosure which breaches solicitor-client privilege is the prevention of harm to another person. Our focus is on the protection and the promotion of public safety, not on the punishment of the purported offender. To this end, information disclosed by counsel in the interest of public safety should be used

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[40] *Supra* note 3 at para. 7.

[41] *Ibid.* at para. 23.

for that purpose only and not to aid in the conviction or punishment of the offender. Thus, I support the recognition of a limited use immunity for statements disclosed by counsel or their agents on grounds of public safety. This compromise will not please the absolutists on either side: those who wholly embrace public safety as an organizing norm will demand to see the offender or potential offender prosecuted or sentenced to a stiffer term as a result of the revelations of his intentions;[42] those who see solicitor-client privilege as "sacred" will object to requiring an accused's lawyer to "rat" on him. To both of these positions, I say that our *Constitution* is characterized not by absolutism but by compromise and balancing. A duty to disclose coupled with a grant of immunity promotes public safety while safeguarding the individual's rights.

Recognizing an ethical duty on lawyers to disclose information that could prevent the death or serious injury of another person fosters equality and the rule of law. The basic conception of the rule of law is that no one is above the law; all are equal before it. This is not true when it comes to the duty to disclose information of a threat to public safety; other professionals are required by statute and their codes of ethics to disclose such information whereas lawyers are not. Lawyers should be placed on the same footing as their colleagues in other professions.

Thus, I recommend that law societies amend their codes of conduct to provide for a rule as follows: "A lawyer shall disclose information received as a result of the solicitor-client relationship if the lawyer has reasonable grounds to believe that the disclosure is necessary to prevent the death of or serious injury to any person." This would be coupled with a legislative or judicial rule that information received from a solicitor as a result of the disclosure of such information may not be used in the prosecution or sentencing of the client.

Several points should be noted. First, the lawyer is instructed to disclose information received as a result of the solicitor-client relationship which would include information that the solicitor received from the client directly, from other sources, and from the solicitor's own awareness or deduction of the situation. Second, the solicitor must have reasonable grounds to believe that disclosure is necessary to prevent the harm. Third, the harm must be of the most serious magnitude, that is death or serious injury which, as the Supreme Court has

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[42] This is exactly what happened in the *Smith* case where the accused had originally agreed to plead guilty in exchange for a sentence of two years. After the Supreme Court's decision permitting disclosure of Smith's communications with his psychiatrist, the Crown withdrew that offer and sought to proceed against Smith as a dangerous offender.

recognized, includes both physical and psychological injury. Finally, I have purposely refrained from mentioning the word "crime" because it is possible that the potential harm may not be criminal, e.g. a client's suicide. The duty of disclosure should not turn on whether a crime is committed. It should be goal-oriented to prevent the projected harm rather than process-oriented focusing on the magnitude of a crime which may be committed.

Conclusion

In his recent book *Outrage: Canada's Justice System on Trial*, former Attorney General of British Columbia Alex Macdonald asked why we allow "such a wide gap to spread between a plain moral and social duty and what the law calls for?"[43] The answer is that we should not and we need not. It is time for lawyers to shed their privileged status and acknowledge their duty in common with other professionals to protect the public in very limited circumstances. In so doing, lawyers will be exercising their moral duty as Canadians.

[43]A. Macdonald, *Outrage: Canada's Justice System on Trial* (Vancouver: Raincoast Books, 1998) at vi.