PROFESSIONAL CONDUCT RULES AND CONFIDENTIAL INFORMATION VERSUS SOLICITOR-CLIENT PRIVILEGE: LAWYERS' DISPUTES AND THE USE OF CLIENT INFORMATION

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Solicitor-client privilege and law society codes of conduct do not perfectly overlap in terms of the scope of protected client information. In some contexts, codes of conduct permit lawyers to use protected information where solicitor-client privilege does not. The codes of conduct should be amended to clarify that they do not authorize use or disclosure of privileged information that is not permitted by law.

In client/lawyer litigation, solicitor-client privileged information is sometimes admitted on the basis of waiver of privilege. This is inappropriate. Client/lawyer litigation should instead proceed on the basis that no issue of privilege arises as between client and lawyer in respect of information that is not confidential as between them. However, care should be taken in client/lawyer to protect privileged information from disclosure to third parties by sealing and other protective orders.

Le secret professionnel de l'avocat et les codes de déontologie des barreaux ne couvrent pas tout à fait les mêmes renseignements. Dans certains contextes, les codes de déontologie autorisent les avocats à utiliser des renseignements protégés alors que le secret professionnel ne le fait pas. Les codes de déontologie devraient être modifiés pour préciser qu'ils n'autorisent pas l'utilisation ou la divulgation non prévue par la loi de renseignements protégés.

Dans un litige client-avocat, les renseignements protégés par le secret professionnel sont parfois admis sur la base d'une renonciation au privilège. Cette situation n'est pas acceptable. Les litiges client-avocat devraient plutôt procéder sur la base du fait qu'aucune question de privilège ne se pose entre le client et l'avocat à l'égard de renseignements qui ne sont pas confidentiels entre eux. Il faut cependant s'assurer de protéger les renseignements couverts par le secret professionnel contre la divulgation à des tiers au moyen d'ordonnances de mise sous scellés et d'autres ordonnances conservatoires.

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1. Introduction

The closely-related roles of the courts and of the law societies with respect to the professional conduct of lawyers can sometimes cause confusion. This article addresses the role of the courts with respect to solicitor-client privilege and the role of the law societies with respect to protection of client information in the context of the so-called "lawyers' exceptions."[1]

The relationship between the respective roles of the courts and the law societies has been highlighted in two recent decisions of the Supreme Court of Canada.

In *R v Cunningham*,[2] the Supreme Court dealt with a lawyer seeking to withdraw from the defence of an accused in a criminal proceeding. It was argued that the issue of withdrawal was a matter for the law society and not the court. In *Canadian National Railway Co v McKercher LLP*,[3] the Supreme Court addressed the relevance of law society conflict rules to court-ordered disqualification.

Not surprisingly, the Supreme Court made clear in both of these cases that the courts and the law societies have different but complementary roles. As Rothstein J said for the Court in *Cunningham*:

> The court's authority is *preventative* — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.
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> […] Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. They are not mutually exclusive.[4]

In *McKercher*, McLachlin CJC said:

> Courts of inherent jurisdiction have supervisory power over litigation brought before them […] The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.

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1 The "lawyers' exceptions" allow lawyers to use client information to defend themselves in various proceedings and to establish or collect their fees.

2 2010 SCC 10, [2010] 1 SCR 331 [*Cunningham*].

3 2013 SCC 39, [2013] 2 SCR 649 [*McKercher*].

4 *Cunningham, supra* note 2 at paras 35, 38 [emphasis in original].

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> The inherent power of courts to resolve issues of conflicts in cases that may come before them is not to be confused with the powers that the legislatures confer on law societies to establish regulations for their members, who form a self-governing profession … The purpose of law society regulation is to establish general rules applicable to all members to ensure ethical conduct, protect the public and discipline lawyers who breach the rules — in short, the good governance of the profession.[5]

This article discusses a similar, but slightly different, question, namely, the roles and the approaches of the courts and the law societies with respect to the protection of client information in the context of disputes to which lawyers are parties.

The thesis of this article is that (1) the law society conduct rules cannot create exceptions to solicitor-client privilege; (2) the "lawyers' exceptions" that are part of the law society conduct rules do not apply to solicitor-client privilege; (3) the conduct rules should be clarified so that conduct rules do not inadvertently undermine solicitor-client privilege and mislead lawyers causing a breach of their privilege obligations; and (4) the use of the principle of waiver of privilege in litigation by clients with their lawyers is both theoretically and practically problematic and should not continue.

2. The Law Societies and Client Information

The Federation of Law Societies of Canada (FLSC) *Model Code of Professional Conduct*[6] (Model Code) requires in Rule 3.3 that lawyers protect client information.

Model Rule 3.3-1 provides that:

> 3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
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> (a) expressly or impliedly authorized by the client;
> (b) required by law or a court to do so;

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5 *McKercher*, *supra* note 3 at paras 13, 15.

6 The Model Code provides a harmonizing model code for use by Canadian law societies in establishing codes of professional conduct in their jurisdictions (the "conduct rules"). In most provinces and territories, the harmonized code is called the *Code of Professional Conduct*. In Ontario, the *Rules of Professional Conduct* has been revised to harmonize to the Model Code. In Québec, the *Code of Ethics of Advocates* is being similarly revised.

(c) required to deliver the information to the Law Society; or
(d) otherwise permitted by this rule.

The breadth of Model Rule 3.3-1 is noteworthy. While solicitor-client privileged information is obviously covered by Model Rule 3.3-1, this model rule also protects information that is not privileged. As the Commentary notes, "The ethical rule is wider [than solicitor-client privilege] and applies without regard to the nature or source of the information or the fact that others may share the knowledge."

In addition to the limitations to the model rule set out in Model Rule 3.3-1(a) to (d), there are specific exceptions to the model rule.

Model Rules 3.3-4 and 3.3-5 provide exceptions sometimes called the "lawyers' exceptions" as follows:

> 3.3-4 If it is alleged that a lawyer or the lawyer's associates or employees:
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> (a) have committed a criminal offence involving a client's affairs;
> (b) are civilly liable with respect to a matter involving a client's affairs;
> (c) have committed acts of professional negligence; or
> (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,
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> the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.
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> 3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

These conduct rules allow lawyers to use client information to defend themselves in various proceedings and to establish or collect their fees. The existence of conduct rules permitting lawyers to use client information does not necessarily imply that there are no other restrictions on the use of client information. Yet Adam Dodek has suggested that the courts "implicitly accept these exceptions [as also being exceptions to solicitor-client privilege] without much pause."[7]

In considering the differences between the conduct rules and the law of solicitor-client privilege, it is useful to distinguish between the protection

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[7] Adam Dodek, "Solicitor-Client Privilege in Canada – Challenges for the 21st Century," Discussion Paper for the Canadian Bar Association, February 2011 at 12. See also Adam Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis Canada, 2014) at paras 8.95 to 8.128 [Dodek, *Solicitor-Client Privilege*].

of client information in disputes (1) between the client and the lawyer; and (2) between the lawyer and third parties including the state.

In respect of disputes between clients and their lawyers, there is no real difference between the law protecting solicitor-client privileged information and the Model Code as it protects client information. However, the "waiver of privilege approach" taken by the courts in respect of solicitor-client privilege as applied to disputes between clients and lawyers is problematic both analytically and in effect.

In respect of disputes between lawyers and third parties, there are differences between the protection of solicitor-client privileged information at law and the protection of client information by the Model Code. These differences are not practically problematic because lawyers must protect solicitor-client privilege even if the Model Code would otherwise permit disclosure of client information. The Model Code should be revised, however, to make clear the primacy of the law of solicitor-client privilege. It should be made clear that the protection of privilege is a lawyer's professional obligation.[8]

3. The Scope of Solicitor-Client Privilege and Waiver of Privilege

Solicitor-client privilege protects confidential communications between lawyer and client for the legitimate purpose of obtaining lawful professional advice or assistance.[9] In contrast, Model Rule 3.3-1 applies to information however obtained including from third parties while solicitor-client privilege does not. Model Rule 3.3-1 applies to information in respect of the client whether or not confidential. The exceptions to solicitor-client privilege are more narrowly drawn than are the exceptions to Model Rule 3.3-1.

In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*,[10] the Supreme Court of Canada stated plainly that:

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8 The BC *Code of Professional Conduct* includes a limited rule requiring lawyers to protect privilege. BC Rule 3.3-2.1 provides that "A lawyer who is required, under federal or provincial legislation, to produce a document or provide information that is or may be privileged must, unless the client waives the privilege, claim solicitor-client privilege in respect of the document." Lawyers face many situations in which privilege should be defended other than legislative compulsion.

9 *R v McClure*, 2001 SCC 14 at para 37, [2001] 1 SCR 445.

10 2010 SCC 23 at para 53, [2010] 1 SCR 815.

> … The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v Jones*, [1999] 1 SCR 455; *R. v Brown*, [2002] 2 SCR 185.[11]

In addition to understanding the privilege exceptions, it is important to understand how solicitor-client privilege can be waived and thereby lost. The easiest case of waiver occurs where the client elects to disclose privileged information in litigation, for example litigation against a corporate director in which the director defends his or her conduct on the basis of reliance on legal advice. The more difficult case occurs where the client does not disclose privileged information but rather takes a position in litigation as a result of which the court concludes that privilege is implicitly waived.

There are three points to be made about loss of privilege through waiver. The first is that this waiver is by voluntary disclosure by the client, rather than legally compelled disclosure.[12] The second is that, in litigation, the adverse party would not otherwise be aware of the privileged information.[13] The third is that voluntary waiver of privilege ordinarily terminates the privilege generally.[14] Where a client expressly or implicitly waives privilege in respect of relevant information in litigation, the adverse party becomes entitled to disclosure of that information and privilege ceases to protect that information for all purposes.

That the client is the decision maker with respect to voluntary waiver is consistent with the purposes of solicitor-client privilege. That voluntary

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[11] Parenthetically, it can be noted that the Model Code and the law of solicitor-client privilege both contain a public safety exception. The public safety exception is not, however, germane to issue of the "lawyers' exceptions."

[12] By contrast legally-compelled disclosure does not really affect waiver at all. While the courts speak of limited waiver as a result of compelled disclosure, what is really being said is that privilege continues, except as between the client and the recipient of the compelled disclosure.

[13] We have been assuming that the lawyer is not the adverse party at this stage of the analysis.

[14] It is too strong to say that voluntary disclosure inevitably results in general waiver. The "common interest" exception may be seen as a form of limited waiver. Limited waiver is discussed in Alan W Bryant, Sidney N Lederman and Michelle K Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3rd Ed (Canada: LexisNexis, 2009) at para 14.125 in the context of providing privileged information to the police for a limited purpose. While beyond the scope of this article, it seems that the courts are struggling to develop a coherent approach that continues to treat confidentiality as a *sine qua non* of solicitor-client privilege, while also wanting to permit some consensual third-party access to privileged information without loss of privilege. There does not appear to be a clear principle from which it can be deduced which voluntary disclosures result in limited waiver and which result in general waiver.

disclosure results in loss of privilege for all purposes is consistent with the core requirement of confidentiality.

In order to assess the "lawyers' exceptions," it is helpful to start by considering solicitor-client privilege in disputes not involving lawyers. Next, it is useful to consider disputes between lawyers and their clients. Finally, we will consider disputes involving a lawyer but not the client.

A) Disputes Between Clients and Third Parties

The context of disputes between clients and third parties is very different than between clients and their lawyers. Third parties do not have access to the client's privileged information. The client controls whether privilege is waived.

In disputes between clients and third parties:

a) clients are entitled to use privileged information in making claims against third parties or in defending claims by third parties. Where the client does so, privilege is waived; and

b) privilege may be lost where a client puts a matter in issue, or relies on some privileged information, where fairness requires that the adverse party have access to the privileged information.

B) Disputes Between Client and the Lawyer

Where a client makes a claim against his or her lawyer, whether for professional negligence, breach of fiduciary duty, in a fee dispute or otherwise, cases have held that there is voluntary waiver of solicitor-client privilege.[15] The logic is that, having put the relations between client and lawyer in issue, the client must be taken to have intended that the privileged information be referred to in the litigation. The implication is that fairness requires that the lawyer be entitled to explain what happened between the lawyer and the client by way of defence.

Treating privilege in client/lawyer proceedings on the same basis as in client/third-party proceedings is, however, unnecessary. Unlike in the client/third-party context, the lawyer already knows what happened between the lawyer and the client. There is no loss of confidentiality by

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15 See e.g. *National Bank Financial Ltd v Potter*; *Knowledge House Inc v Stewart McKelvey Stirling Scales*, 2007 NSSC 22 at para 6, 251 NSR (2d) 124; *Shuttleworth v Eberts et al*, 2011 ONSC 6106 at paras 73 and 74, [2011] OJ No 4550(QL) [*Shuttleworth*].

disclosure of that which is already known.[16] Holding that privilege is lost by disclosure in proceedings against the lawyer or by raising an issue in such proceedings is not necessary but it is prejudicial to the client.

The deeper question is why, given that solicitor-client privilege is a fundamental client right, must a client give up that right in order to hold their lawyer accountable? There seems to be no policy reason requiring that third parties gain access to privileged information because a client seeks to hold their lawyer accountable.[17]

But what about lawyers claiming against clients? Whether by an assessment of accounts or otherwise, lawyers are rightly entitled to seek payment of their accounts and clients are rightly entitled to dispute the amounts claimed. There is no issue of confidentiality *inter se*, since both the lawyer and the client know, or are entitled to know, all of the information relevant to the dispute. Given that privilege is the client's right, it is illogical to treat a claim for payment by a lawyer as waiver. It would be wrong in principle to require a client to waive privilege in order to dispute the amount claimed.

The rationale for solicitor-client privilege informs this discussion. As Fish J put it in *Blank v Canada (Minister of Justice)*:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[18]

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16 This point was made in *Shuttleworth*, *ibid* at para 67, which states:

> The cornerstone of privilege, including solicitor–client privilege, is that expectation of confidentiality, but it is vis-a-vis third parties, not inter se between the parties to the privileged relationship itself. It is only confidential and unable to be disclosed relative to the rest of the world, not the solicitor and client themselves. The contrary proposition is a *non sequitur*.

17 See e.g. *Wilson, King & Co v Torabian*, (1991), 53 BCLR (2d) 251 (SC) as discussed in Dodek, *Solicitor-Client Privilege*, *supra* note 7 at paras 8.121 to 8.123.

18 2006 SCC 39 at para 26, [2006] 2 SCR 319.

While solicitor-client privilege depends on a confidential relationship between solicitor and client, there is no basis for limiting the use of privileged information in disputes as between solicitor and client, so long as third party access is not thereby permitted.

The practical issue then becomes whether resolution of disputes between lawyer and client requires public access to privileged evidence. We know that such matters can practically be litigated without giving up privilege rights. In Law Society discipline matters, hearings are held to determine whether lawyers have engaged in professional misconduct. Necessarily given the issues involved, privileged information is often in evidence. Pursuant to section 49.8 of the Ontario *Law Society Act*,[19] privileged information is admissible in discipline hearings and privilege continues to protect that information despite its use as evidence. Section 61.2(2)(f) of the Ontario Act[20] permits hearings to be held "in the absence of the public and authorizing orders that specified information relating to a proceeding not be disclosed." This authority is used to protect against disclosure of privileged information that is evidence in a discipline hearing. The courts can similarly protect privileged information by use of sealing orders.[21]

To summarize, lawyers and their clients ought to be able to access the courts to resolve disputes between them in respect of their confidential relationships without the client thereby being forced to give up fundamental privilege rights. Applying the principle of limited waiver effectively addresses this problem in respect of claims by the client but not where the lawyer is the claimant. It is coherent and principled to see lawyer-client disputes as not raising the issue of privilege and therefore not giving rise to the issue of waiver at all.

This review of disputes between lawyers and clients indicates that there is a theoretical issue as to the basis upon which privileged information is accessible to resolve disputes between lawyers and clients, but the law of solicitor-client privilege and the exceptions to Model Rule 3.3-1 are to the same practical effect. In resolving disputes between lawyers and clients, the relevant information is accessible.

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19 RSO 1990, c L.8. Similar provisions in other Canadian jurisdictions include the *Legal Profession Act*, RSA 2000, c L-8, s 112; the *Legal Profession Act*, SBC 1998, c 9, s 88; and the *Legal Profession Act*, SNS 2004, c 28, s 77.

20 *Ibid*.

21 *Hollinger Inc (Re)*, 2011 ONCA 579 at paras 18 and 20, (2011), 107 OR (3d) 1; *Fotwe v Citadel General Assurance Co* (2005), 195 OAC 390 (Ont Sup Ct) at para 3.

C) Disputes Between Lawyers and Third Parties

Lawyers are at risk of criminal prosecution in respect of their client representation. The case of *R v Murray*[22] provides a particularly good example. As noted above, there is an exception to solicitor-client privilege to permit full answer and defence (the "innocence at stake" exception). Sub-rule 3.3-4(a) of the Model Code provides an exception where it is alleged that a lawyer or the lawyer's associates or employees have committed a criminal offence involving a client's affairs. It does not appear that the Model Code is more permissive than the law of solicitor-client privilege.

But lawyers are not just entitled to use client information in criminal matters under the Model Code. Rule 3.3-4 of the Model Code also allows use of confidential information where it is alleged that a lawyer or the lawyer's associates or employees:

(b) are civilly liable with respect to a matter involving a client's affairs; or
(c) have committed acts of professional negligence.

The Model Code does not expressly deal with quasi-criminal or regulatory matters that are neither strictly civil nor criminal. But it would be an illogical interpretation of the Model Code to suggest that Rule 3.3-4 does not apply to quasi-criminal or regulatory proceedings while applying to criminal and civil proceedings.

In *obiter*, Sharpe JA dealt with matters of confidential information and solicitor-client privilege in *Wilder v Ontario (Securities Commission)*.[23] The *Wilder* case considered the authority of the Ontario Securities Commission (OSC) to reprimand a lawyer for alleged misconduct in connection with client representation before the OSC. It was unsuccessfully argued that the Law Society of Upper Canada had exclusive jurisdiction to deal with alleged misconduct by lawyers. Having decided the case on other grounds, Sharpe JA then considered the argument that the protection of solicitor-client privilege requires that the Law Society have exclusive jurisdiction to address alleged lawyer misconduct. Sharpe JA first addressed the provisions of the *Rules of Professional Conduct* as follows:

> Where a lawyer is threatened with a reprimand by the OSC, there are two important interests at stake. On the one hand, the lawyer is entitled to be dealt with fairly and to

22 (2000), 48 OR (3d) 437, 144 CCC (3d) 322 (Ont Sup Ct).
23 (2001), 53 OR (3d) 519, 197 DLR (4th) 193 at paras 33-35 (CA) [*Wilder*].

> be permitted to answer the allegations that have been made. On the other hand, where the lawyer's answer involves revealing the confidence of the client, the client's interest in confidentiality is invoked. In this regard, the lawyer's promise of confidentiality is not absolute. It is recognized by The Law Society's Rules of Professional Conduct, Rule 2.03(4), there are situations in which a lawyer may be entitled to reveal the confidence of a client to defend against allegations of criminal misconduct, claims of civil liability or allegations that the lawyer is "guilty of malpractice or misconduct". It seems to me that a lawyer facing a reprimand for making an untrue or misleading statement is facing an allegation of "misconduct". The Law Society's Rules of Professional Conduct define the terms upon which a lawyer's promise of confidentiality is made. They contain a general provision allowing for disclosure of confidential information where necessary to defend the lawyer's legal interests, and there is no reason that provision should not apply to an allegation of misconduct by the OSC.[24]

This analysis by Sharpe JA is straightforward. The *Rules of Professional Conduct* do not prevent a lawyer from disclosing confidential information in the defence of an allegation of misconduct by the OSC. Sharpe JA then considered solicitor-client privilege as follows:

> However, this exemption for the lawyer does not, in my view, allow the OSC to ignore the importance of solicitor-client privilege in the exercise of its enforcement powers. The OSC, like any other public body exercising statutory authority, must ensure on a case-by-case basis that the substantive legal right to solicitor-client privilege is respected. In my view, the OSC must exercise particular caution where it decides to proceed against both the lawyer and the lawyer's client. Such a situation creates an inherent danger that the lawyer will have to reveal the client's confidence in order to mount a full defence. The OSC should avoid creating a dynamic where the lawyer is placed in the dilemma of either forgoing the right to defend his or her own interests or harming the interests of the client by disclosing privileged information. In such a case, it may well be that the OSC will have to decide to forgo proceeding against the lawyer or, at a minimum, ensure that adequate steps are taken to ensure that the proceedings are conducted in a fashion that fully respects the procedural rights of the lawyer and the substantive legal rights of the client. Failure to do so could well result in a situation where it would not be in the public interest to continue the proceedings against both the lawyer and the client.
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> I hasten to add that as the application for judicial review amounted to a pre-emptive strike against the OSC's intended hearing, there is nothing in the record as it now stands to indicate either that Wilder will argue the need to reveal privileged information in his own defence or, if that be the case, how the OSC will protect the client's interest.[25]

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24 *Ibid* at para 33.

25 *Ibid* at paras 34-35.

In my view, Sharpe JA rightly distinguished between the professional conduct rule with respect to confidential information and the legal right to solicitor-client privilege.[26] Sharpe JA indicated that the OSC should exercise regulatory discretion in deciding to proceed against both the lawyer and the client. The reasoning for this, he explained, is because "[s]uch a situation creates an inherent danger that the lawyer will have to reveal the client's confidence in order to mount a full defence." There are two possible interpretations of this passage. One is that the lawyer might disclose privileged information, perhaps reliant on the exception in the conduct rule. The other is that the phrase "in order to mount a full defence" is a terse reference to the "innocence at stake" exception. The latter is arguably the better interpretation. Sharpe JA clearly distinguished between the conduct rules and the legal right to solicitor-client privilege. I do not think that he treated the law society conduct rules as governing the legal right of the client to privilege. It seems that Sharpe JA's reasons are intended to highlight that care must be taken in application of the "innocence at stake" exception for lawyers, in order to ensure that the client is not prejudiced.

There are clearly regulatory proceedings against lawyers in which the "innocence at stake" exception to privilege would not apply while the conduct rules would permit access to confidential information. The *Wilder* case might actually be an example given that an "only" reprimand was sought. As Sharpe JA said in *Wilder*:

> Moreover, formal statements of reproof or disapproval of conduct in the form of reprimands are commonly used as administrative sanctions. In my view, reprimands qualify as preventative sanctions. They represent a formal statement that the conduct is unacceptable and will not be tolerated in the future. They are not imposed to punish or exact retribution and are therefore removed from the realm of pure penal sanction.[27]

While the "innocence at stake" exception makes obvious sense in the realm of pure penal sanction (and perhaps in other contexts), there is much less reason to see the basis for an exception to solicitor-client privilege where the remedy sought is a preventative sanction. As the Supreme Court of Canada said in *R v McClure* "… solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance." [28]

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[26] Dodek analyses *Wilder* differently in his text *Solicitor-Client Privilege*, *supra* note 7 at para 8.96.

[27] *Wilder*, *supra* note 23 at para 27.

[28] *R v McClure*, 2001 SCC 14 at para 35, [2001] 1 SCR 445.

While the courts have not expressly teased out the limits of the "innocence at stake" exception, the right to make full answer and defence itself is informed by sections 7 and 11 of the *Charter of Rights and Freedoms*.[29] Section 7 of the *Charter* establishes that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[30] Section 11 of the *Charter* provides a person charged with an offence with the right to be "presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[31]As McLachlin CJC and Iacobucci J said for the majority in *R v Mills*:

> It is well established that the ability of the accused to make full answer and defence is a principle of fundamental justice protected by s 7: *Dersch v Canada (Attorney General)*, [1990] 2 SCR 1505. Full answer and defence is also linked to other principles of fundamental justice "such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination": *R v Rose*, [1998] 3 SCR 262, per Cory, Iacobucci and Bastarache JJ, at para. 98. Many of these principles of fundamental justice are informed by the legal rights outlined in ss 8 to 14 of the Charter: *Re BC Motor Vehicle Act*, *supra*; *R v CIP Inc*, [1992] 1 SCR 843. Indeed, in *R v Seaboyer*, [1991] 2 SCR 577, at p. 603, the majority of this Court recognized that both s 7 and the guarantee of a right to a fair trial enshrined in s 11(d) are "inextricably intertwined" and protect a right to full answer and defence.[32]

The right to make full answer and defence is available to persons charged with an offence and to those who are sought to be deprived of their right to life, liberty and security of the person. Presumably, the "innocence at stake" exception applies in these circumstances.

In *R v Rodgers*, Charron J for the majority of the Supreme Court of Canada outlined the two-pronged test for whether proceedings trigger section 11 rights under the *Charter* as follows:

> The Court made it clear however that, under the first branch of the test, "all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s 11" (p. 560). Under the second branch of the test, a proceeding that is not criminal or quasi-criminal in nature but attracts a "true penal consequence" (such as imprisonment or a fine of a

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29 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

30 *Ibid*, s 7

31 *Ibid*, s 11(d)

32 *R v Mills*, [1999] 3 SCR 668 at para 69, 180 DLR (4th) 1.

> certain magnitude) will be equated to a criminal or quasi-criminal proceeding for s 11 purposes.[33]

There are regulatory proceedings that are not criminal or quasi-criminal in nature and there are regulatory proceedings that do not attract true penal consequences. Such regulatory proceedings do not ordinarily seek to deprive the respondent of life, liberty or security of the person. Without attempting to draw a clear dividing line, it seems clear that many regulatory proceedings do not attract the "innocence at stake" exception even assuming that the right to make full answer and defence always attracts the "innocence at stake" exception.

So we are left to consider some regulatory proceedings and all civil proceedings. In this context, the Model Code and the law of solicitor-client privilege are dissonant. Rule 3.3-4 authorizes use of confidential information but the law of solicitor-client privilege does not permit the lawyer to use privileged information absent client consent.

This dissonance does not necessarily mean that there is an inconsistency. The Model Code provides model rules to govern lawyers and determine proper professional conduct. The conduct rules regulate lawyers with respect to client information but the conduct rules do not regulate solicitor-client privilege. The law societies have no authority to regulate the legal rights to which clients are entitled.

As discussed above, the conduct rules deal with client information broadly. Only some of such client information is protected by solicitor-client privilege. And so, as a practical matter, the conduct rules allow lawyers to defend themselves in regulatory and civil proceedings using non-privileged client information but do not, and cannot, authorize the defensive use of privileged information. It would be better if the conduct rules made this clear by commentary indicating that Rule 3.3-4 does not authorize the use of privileged information by lawyers.

Further, lawyers should be required by the conduct rules to honour their clients' solicitor-client privilege. While other conduct rules can be invoked on this point, it seems appropriate to modify Rule 3.3-4 to expressly provide that lawyers may not use privileged information in the contexts mentioned in Rule 3.3-4, where not permitted by the law of privilege to do so.

Since Rule 3.3-1 protects information that is not privileged, we are left with the conclusion that Rule 3.3-4 allows lawyers to use non-privileged

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33 *R v Rodgers*, 2006 SCC 15 at para 61, [2006] 1 SCR 554.

confidential information in defence of civil and regulatory proceedings. One could argue for a tighter conduct rule, but the rationale for doing so seems weak. It is not clear why lawyers should not be able to make defensive use of information that would be available to a third party by subpoena or in discovery. So long as privilege is not breached, there is no obvious reason why the lawyer should be made especially vulnerable. Sharpe JA put this in terms of a "limited promise" of confidentiality in *Wilder*.[34] While it is for the law societies to regulate what "promise" is made, there is no compelling reason for greater protection of non-privileged information than currently exists.

4. Conclusion

There is no theoretical difficulty with the fact that the conduct rules have broader exceptions with respect to confidential information than does the law with respect to privileged information. In order to disclose solicitor-client privileged information in a proceeding, a lawyer must comply with both regimes. As the law of privilege is stricter, it governs in respect of privileged information. The conduct rules can and should be made clearer on this point, however, so that no one is confused into thinking that the conduct rules create privilege exceptions. The conduct rules cannot do that. It would also be valuable to create a conduct rule that expressly requires lawyers to abide by solicitor-client privilege.[35] While such a rule would admittedly be redundant, it would better ensure the protection of solicitor-client privilege. Such a rule would be entirely consistent with the approach taken in *Cunningham* and in *McKercher*, with the conduct rule providing further protection of this substantive right that is integral to the lawyer-client relationship.

Finally, it would be preferable if the courts did not address the use of privileged information in lawyer-client disputes as a matter of waiver, but rather on the basis that there is no privilege *inter se*. It would also be appropriate for courts to facilitate the resolution of disputes between clients and lawyers such that privileged information does not cease to be confidential.

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34 *Wilder, supra* note 23 at para 33.

35 As noted above, the BC *Code of Conduct* includes Rule 3.3-2.1 which requires lawyers to claim solicitor-client privilege in the face of legislatively compelled provision of privileged information absent client waiver. This rule is not part of the *Model Code* or the conduct rules outside of British Columbia. In any event, this rule is narrow and does not address this issues raised in this article.