

ASSIST PEER SUPPORT

A Note on the Ethics of Peer support, by Ross McLeod, Practice Advisor 2018

A lawyer acting as a peer supporter for another lawyer does not create a lawyer-client relationship. That does not mean, however, that the peer supporter ceases entirely to be “lawyer” who is bound to act ethically.

What are the duties of a peer supporter who discovers illegal or unethical conduct on the part of the lawyer being supported? Must the peer supporter report every instance of apparent misconduct to the Law Society?

The following excerpts from the Code of Conduct highlight certain duties owed by lawyers to their clients. Also included is the Code rule dealing with the duty to report another lawyer’s misconduct. Although it is worded in a mandatory way – “a lawyer must report” – the circumstances delineated in sub rules (c) through (f) contain what a lawyer would recognize as permissive language. Commentary [4] specifically references programs like peer support. The Code of Conduct does not have statutory force; it is a guideline for best practice. The Law Society cannot legislate a specific exception to the duty to report but the Commentary tries to define the threshold acting on that.

There is no element of apparent discretion in the obligation to report the lawyer who misappropriates trust money or who walks away from the practice. Still, any lawyer (including peer supporters) can say something like, “If you don’t self-report your trust shortage by the end of the day, I will have to do it tomorrow.”

Criminal activity needs to be “related to a lawyer’s practice”. Here there is evident scope for exercising judgment as to what may be “related” or not. Lawyers should also remember that the Rules of the Law Society obligate lawyers who are charged with criminal offenses to report that to the Law Society and later to report on the disposition of those charges.

Sub rules (d-f) also allow some scope for discretion in reporting another lawyer. What is after all “a substantial question” or “likely to be materially prejudiced”?

Law Society Practice Advisors are available to provide further guidance on interpreting these rules.

Competence

3.1-2 A lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.

Commentary

[14] The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

Quality of Service

3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Commentary

Examples of expected practices

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (m) avoiding the use of intoxicants or drugs that interfere with or prejudice the lawyer's services to the client;

Future Harm / Public Safety Exception

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 an identifiable person or group is in imminent danger 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. 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] 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 substantial harm, a lawyer should consider a number of factors, including:

- (a) the seriousness of the potential injury to others if the prospective harm occurs;
- (b) the likelihood that it will occur and its imminence;
- (c) the apparent absence of any other feasible way to prevent the potential injury;
and
- (d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[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 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.

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust money;**
- (b) the abandonment of a law practice;**
- (c) participation in criminal activity related to a lawyer's practice;**
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;**
- (e) conduct that raises a substantial question about a lawyer's capacity to provide professional services; and**
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.**

Commentary

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (for example, through another lawyer). In all cases, the report must be made without malice or ulterior motive.

[2] Nothing in this rule is meant to interfere with the lawyer-client relationship.

[3] Instances of conduct described in this rule can arise from a variety of causes, including addictions or physical, mental or emotional conditions or disorders. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports the ASSIST Program in Alberta and similar agencies in their commitment to the provision of counselling on a confidential basis. Therefore, a lawyer who is making a bona fide effort to have another lawyer seek help for such problems is not required to report to the Society non-criminal conduct of that lawyer that would otherwise have to be reported under the rule. However, the lawyer must advise the Society if there are reasonable grounds to believe that the other lawyer is encouraging or will engage in conduct that is criminal or is likely to harm any person or of any other conduct under the rule if the lawyer refuses or fails to seek help.