



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

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Email: [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

Ms Josée Turcotte  
Secretary  
Ontario Securities Commission  
20 Queen Street West  
22nd Floor  
Toronto, ON M5H 3S8

Dear Ms. Turcotte,

**Re: Proposed OSC Policy 15-601 - Whistleblower Program**

The Law Society of Upper Canada appreciates the opportunity to comment on the proposed OSC Policy (“the Policy”) that would institute a Whistleblower Program, and in particular consultation question 1, which is “do you agree with in-house counsel being eligible for a whistleblower award? If not, why?”

The Law Society supports the purpose of the OSC’s Policy and its efforts to address serious securities misconduct in the marketplace. We also note that the Policy reflects an acknowledgement that solicitor and client privileged information and information obtained in course of the provision of legal advice requires specific treatment in the operation of the Policy. However, the Law Society does not support in-house counsel being eligible for a whistleblower award. Our view is that this would create uncertainty for lawyers in fulfilling obligations to maintain confidentiality of client information and protect privileged information, and may offend the lawyer’s duty of commitment to the client’s cause.

Our comments focus on three aspects that relate to the operation of the Policy and lawyer’s duties.

First, lawyer’s ethical rules include requirements to protect the confidentiality of client information, which is broadly defined. This concept is distinguished from solicitor and client privilege, and our *Rules of Professional Conduct* explain that the ethical rule is wider and applies without regard to the nature or source of the

information or the fact that others may share the knowledge. We find it hard to conceive when the confidentiality rules would permit disclosure of confidential client information in a whistleblowing context. The same is equally true with respect to information protected by solicitor-client privilege. It may be very difficult for a lawyer to disclose information under the Policy without offending the professional standard that obliges a lawyer to maintain the confidentiality of client information and without breaching solicitor-client privilege where applicable.

We note that the description of the Policy states

*... the Proposed Policy adds that external counsel and in-house counsel may be considered eligible for a whistleblower award where disclosure of the information would otherwise be permitted by a lawyer under applicable provincial or territorial barreau or law society rules.*

The Law Society believes that this concept would create a real risk of confusion and possible error, as the Policy would suggest that there could be circumstances where lawyers can ‘blow the whistle’ on their clients and receive a reward, when permitted by Law Society Rules. But as noted above, the Law Society Rules and solicitor-client privilege do not permit lawyers to ‘blow the whistle’ on their clients. In the context of an organizational client, the Rules provide that when the lawyer acting for the organization knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, which may include serious securities misconduct, then the appropriate step would be reporting up the chain of command within the organization, and ultimately withdrawing from representation if necessary. However, the Rules do not ordinarily permit or require disclosure of confidential information to third parties, including the Ontario Securities Commission, in such circumstances.<sup>1</sup>

The rule in Ontario is based on the Federation Model Code of Professional Conduct, and similar provisions are found in other Canadian jurisdictions. Information protected by solicitor-client privilege would not be properly disclosed in such circumstances unless one of the very limited exceptions to solicitor-client privilege applies which is difficult to imagine in this context. Second, including in-house counsel as individuals eligible for a whistleblower award as described may create a serious conflict between the lawyer’s self-interest and the lawyer’s duty of commitment to the client’s cause. The Supreme Court of Canada recently stated that lawyers’ duty of commitment to their clients’ causes is a principle of fundamental justice, and is essential to maintaining confidence in the integrity of the administration of justice.<sup>2</sup>

Third, the Law Society is of the view that if lawyers are to be included in the operation of the Policy, whistleblowing in breach of solicitor-client, litigation and other legal privileges should be expressly ineligible. We note that the definition of

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<sup>1</sup> *Rules of Professional Conduct*, Rule 3.2-8 and Rules 3.3-1 to 3.3-4.

<sup>2</sup> *Attorney General of Canada v. Federation of Law Societies of Canada*, 2015 SCC 7, paragraph 91.

“original information” which would be the subject of the whistleblowing report only speaks to the exclusion of information that is obtained through a communication that is solicitor-client privileged.

We would be happy to meet with you to discuss these issues further and thank you for your consideration.

Yours truly,

A handwritten signature in blue ink that reads "Janet E. Minor." The signature is written in a cursive style with a large initial 'J' and 'M'.

Janet E. Minor  
Treasurer