

Guidance for lawyers testing positive for COVID-19 virus

A lawyer who has tested positive for the COVID-19 virus, or who is being treated as presumptively positive, may be required to provide information to the provincial health officer or her designate under the *Public Health Act* and its regulations. The information may include the names and contact information of clients or other individuals with whom the lawyer has had recent contact. Such information is confidential if acquired during the course of the professional relationship and, in some unusual circumstances, may be privileged.

Rule 3.3-3 of the Code of Professional Conduct provides a future harm/public safety exception to a lawyer's duty of confidentiality.

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.

The Supreme Court of Canada recognized an 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

A lawyer who has tested positive for the virus or is being treated as presumptively positive may disclose the names and contact information of clients with whom the lawyer has been in recent contact. However, the lawyer must not disclose more information about those individuals than is required to protect public safety or prevent future harm. In particular, the lawyer should take care not to identify any individuals as clients in the disclosure, nor make any unnecessary reference to the purpose or circumstances of the contact.

Where the health authority asks about additional circumstances, such as the proximity, location, duration or how recent the contact, the lawyer should provide information only to the extent necessary to answer the inquiry.

Steps for lawyers to take

A lawyer who believes that disclosure may be warranted or is unclear whether disclosure is warranted should contact the Law Society for ethical advice. If practicable and permitted, a lawyer may seek a judicial order (see commentary [4] of rule 3.3-3); however, this would be rare.

Client consent in advance to the disclosure of information is not required, although 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 lawyer should prepare a written record as soon as possible, in accordance with commentary [5] of rule 3.3-3, and retain the record. The record should include the information below:

[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 the lawyer intended to prevent, the identity of the person who prompted the lawyer to communicate 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.

Practice advisors continue to be available to answer questions about practice and professional obligations. Contact information may be found on the [About Practice Advice](#) page on the website.