

No. 3 Fall *Benchers' Bulletin* item 2

Joint retainer by police officers under investigation

In response to Commissions of Inquiry into police-related deaths, the BC Legislature established the Independent Investigations Office (IIO) to investigate incidents of death or serious harm involving police officers and special provincial constables in the province. The IIO opened in September 2012. Part 7.1 of the BC *Police Act* requires the IIO to investigate “incidents” in which police may have caused death or serious harm, including, but not limited to, criminal activity by the police.

All provincial police agencies have entered into a Memorandum of Understanding (MOU) with the IIO to enable the IIO to coordinate its investigations into police incidents. Section 15 of the MOU provides:

15.1 To prevent contamination of evidence, officers involved in or present during an incident which may fall within the jurisdiction of the IIO shall not communicate their accounts or recollections of the incident directly or indirectly to anyone other than an IIO investigator, except for communication that is necessary for:

- (a) public safety and obtaining medical care for injured persons;
- (b) the securing or identification of evidence;
- (c) the furtherance of concurrent investigations;
- (d) obtaining advice from legal counsel or a police association representative;
- (e) obtaining health care for an officer; or
- (f) any other purpose that is agreed upon by the IIO investigator and the police service liaison officer.

BC Code rules 3.4-5 to 3.4-9, which cover joint retainers, require that, before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

The IIO has asked the Ethics Committee whether a lawyer may jointly advise or represent two or more police officers who are under investigation for, or witnesses to, a serious incident that arose in the course of their duties.

The committee is of the view that the MOU would place a lawyer retained to act for more than one police officer with respect to the same investigation by the IIO in a conflict. That lawyer would be bound by the joint retainer rules to share information received from one police officer client with another police officer client. However, the lawyer would be prevented from doing so by Section 15.1 of the MOU, which requires that officers not indirectly communicate with each other concerning their involvement in the incident. The committee has concluded that, as a general rule, a lawyer should not jointly advise or represent two or more police officers under investigation for, or witnesses to, a serious incident that arose in the course of their duties.

The Law Society of Upper Canada has reached a similar conclusion, although the basis of that conclusion is a regulation made under the Ontario *Police Services Act*, rather than an MOU. In [Information for Lawyers — Acting for Police Officers in Ontario Special Investigations Unit \(“SIU”\) Investigations](#), the Law Society of Upper Canada advises:

As the [Law Society] rule requires that a lawyer cannot treat information as confidential as between joint clients and the regulation requires that the police officers not indirectly communicate with each other concerning their involvement in the incident, it is difficult to see how segregated police officers can properly be jointly represented.

Lawyers should also review the Supreme Court of Canada decision in *Wood v. Schaeffer* 2013 SCC 71, where the Court concluded that the Ontario *Police Services Act* and regulations prohibit subject and witness officers from consulting with counsel until the officers have completed their police notes and filed them with the chief of police.

Lawyers who, in spite of this Ethics Committee opinion, feel they have a good reason for jointly representing two or more police officers in these circumstances, should contact the committee for an opinion on the propriety of doing so.