The Law Society of British Columbia

Memo

To: Members of the Profession and others interested in BC Code changes

From: Ethics Committee

Date: September 8, 2016

Subject: Consultation on proposed *Code of Professional Conduct* Rule 5.1-2A: Incriminating Physical Evidence

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This memorandum presents for review and comment a draft rule and commentary regarding "Incriminating Physical Evidence," which has been created for potential addition to the *Code of Professional Conduct for British Columbia* (the "BC Code"). The Ethics Committee is seeking feedback from members of the profession and other interested persons prior to finalizing its recommendation to the Benchers that the rule be adopted. Individuals interested in providing comments for the Committee to consider may do so by email to the attention of Lance Cooke at lcooke@lsbc.org. Please be sure to identify in the subject line of such emails that the message is a response to the consultation on the proposed incriminating physical evidence rule.

Background

Rule 5.1-2A, concerning a lawyer's obligations with respect to incriminating physical evidence was adopted into the Federation of Law Societies' Model Code of Professional Conduct in 2014. In 2016, commentary [5] to the Model Code rule was amended with the insertion of the second sentence. The up to date Model Code rule 5.1-2A and commentary are reproduced below, following the proposed BC Code version.

Gavin Hume, QC, the Chair of the Federation Standing Committee on the Model Code, made the following comments about the final 2014 version of the rule in his memo to the Law Societies of November 6, 2014:

> 37. The need to review provisions in the Model Code relating to incriminating physical evidence in the possession of a lawyer was first identified by the Federation's Model Code Implementation Committee at the time of adoption of the Model Code. The law societies of Alberta and British Columbia subsequently raised this issue with the Standing Committee. In 2013, the Standing Committee determined that this topic was a priority and began actively working on it.
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> 38. In drafting the rules governing this complex issue, the Standing Committee had the benefit of a large portfolio of research prepared by the Law Society of Alberta ("LSA"). The Standing Committee also considered rules and reports from Alberta, Ontario, British

Columbia and the American Bar Association. In addition, the Standing Committee reviewed the Ontario Superior Court of Justice decision in *R v. Murray*, [2000] O.J. No. 2182, and a large number of academic articles. The amendments also reflect feedback from discussions with experts in ethics and the handling of incriminating evidence provided by law societies during the consultation process. The Standing Committee was assisted by Ross McLeod, Q.C., Practice Advisor at the LSA throughout its work on this rule.

39. New rule 5.1-2A prohibits the concealment, destruction or alteration of incriminating physical evidence. The commentary following the rule provides detailed guidance on the scope and application of the rule. The rule was drafted broadly to ensure that any conduct relating to the obstruction or attempted obstruction of the course of justice would also be caught.

40. The Standing Committee determined that a lawyer's possession of exculpatory evidence does not raise the same ethical issues and ought not to be included in the scope of the rule, deciding that it would be best to have a brief, principled rule addressing a lawyer's obligations when dealing with incriminating physical evidence.

41. Much of the commentary to rule 3.5-7 has been moved to the commentary to rule 5.1-2A. The commentary to rule 5.1-2A elaborates on the types of evidence covered by the rule, addresses the tension between the lawyer's duties to the client and the administration of justice in these circumstances, provides options drawn from case law (specifically those prescribed in *R. v. Murray*) for the manner in which a lawyer might deal with such evidence, and discusses issues relating to protection of client confidentiality and privilege. Consultation feedback expressing concern about the creation of a mandatory turnover rule led the Standing Committee to eliminate a proposed requirement directing lawyers to seek the agreement of the prosecution or direction of a tribunal once charges have been laid before testing, examining or copying incriminating evidence.

42. Based on consultation feedback, the Standing Committee added language to paragraph [6] of the commentary to rule 5.1-2A concerning the non-destructive testing of evidence. This commentary advises lawyers to proceed with caution to ensure there is no concealment, destruction or alteration of the evidence. In addition, the Standing Committee added language reminding lawyers that the very act of opening or copying electronic materials could alter them.

Since the incriminating physical evidence rule's adoption into the Model Code, versions of the rule (allowing for some local modification) have been adopted by a number of law societies across Canada. Work on a proposed BC Code version of the rule has been conducted both by the Ethics Committee and by a working group appointed by the Ethics Committee. The version of the rule immediately below is a result of that dedicated effort and the most recent review and assessment by the 2016 Ethics Committee. Below, in order, are the BC Code version of the rule proposed for consultation purposes, the current Model Code version of the rule, and some discussion of differences between the proposed BC Code version and the Model Code version of the rule.

The draft rule and commentary proposed for British Columbia

Incriminating Physical Evidence

5.1-2.A A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice.

Commentary

[**1]** In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer's possession of illegal things could constitute an offence and may require that the client obtain new counsel or disadvantage the client in other ways. It is imperative that a lawyer consider carefully the implications of accepting incriminating physical evidence. A lawyer should obtain the advice of senior criminal counsel or a Law Society practice advisor before agreeing to take possession. Where a lawyer already has possession this advice should be promptly obtained with respect to how the evidence should be handled.

[3.1] The options available to a lawyer who has taken possession of incriminating physical evidence include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination;

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it; or

(d) returning the evidence to its source, provided doing so will not cause the evidence to be concealed, destroyed or altered.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary, electronic or other evidence is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

[7] A lawyer must never take possession of an item the mere possession of which is illegal, such as stolen property, unless specific dispensation is afforded by the law, such as under the "innocent possession" exception, which allows a person to take possession of such an item for the sole purpose of promptly turning it over to the police.

For Comparison: the Federation's Model Code rule 5.1-2A regarding incriminating physical evidence

5.1 THE LAWYER AS ADVOCATE

Incriminating Physical Evidence

5.1-2A A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory, and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client

privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that he or she has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

Differences between the proposed BC Code version and the Model Code version of the rule

Many recommendations originating from the Ethics Committee or communicated by the Ethics Committee are already included in the Model Code version of rule 5.1-2A and commentary. However, some additional differences between the Model Code version and the proposed BC Code version are as follows:

1. The words "or otherwise act" have been omitted from the proposed statement of the rule.

The Ethics Committee's view is that the phrase in question has the effect of broadening the prescriptive meaning of the rule in a way that does not serve the rule's specific purpose. The purpose is to clarify one's obligations and assist lawyers who may come into possession of incriminating evidence, not to stand as a general ethical prohibition of engaging in a specific criminal activity.

2. Redrafted commentary [3] emphasizes the importance of the lawyer's initial decision to either take or refuse possession of the evidence and the importance of obtaining advice concerning this issue.

In its submission of April 2014 to the Federation Standing Committee, the Ethics Committee advised:

> To begin with, we think the draft rule and commentary should place greater emphasis on the importance that lawyers should place on the initial decision to accept or decline to accept physical evidence of a crime. This is a critical decision and if a lawyer decides this issue correctly in the beginning the lawyer may avoid becoming involved in difficult issues of professional conduct which may damage one or more of the integrity of the administration of justice, the client's interests and the lawyer's reputation.
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> In addition, we think the rule and commentary should also emphasize the importance of lawyers' obtaining advice when an issue concerning a lawyer's obligations under the rule arise. Although this is true of many other situations involving professional responsibility issues, the potential criminal responsibility that lawyers face in such situations and the public attention they may attract, in our view, warrant some mention of the desirability of obtaining advice in such situations in the commentary.

3. Redrafted commentary [3.1] adds the express option of returning the evidence to its source.

In its submission of April 2014 to the Federation Standing Committee, the Ethics Committee advised:

> In our opinion the commentary should expressly address the option of returning evidence to its source. Under the current wording, that option is not excluded. However, we are of the view there is merit in being more direct about what a lawyer may and may not do with respect to this option.
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> It is our view that a lawyer should be able to return evidence to its source where there is an objectively reasonable basis for concluding that:
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> (1) the item is not contraband;
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> (2) source-return is possible, which it will usually not be if the client is the source and he or she has disappeared or is in custody;
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> (3) source-return will not cause the item to be destroyed, concealed, altered or lost, or used to cause physical harm to anyone.

4. Commentary [5] includes the 2016 Model Code amendment with a minor change in wording.

The proposed commentary [5] includes the middle sentence added by the Federation of Law Societies in 2016 but replaces "he or she" with "the client" to eliminate a potential ambiguity.

5. Redrafted commentary [6] amends the Model Code version to include other evidence that is not either a document or electronic.

The redrafted commentary contemplates that non-destructive testing, examination or copying may apply to evidence that is not documentary or electronic.

6. Redrafted commentary [7] deals with the issue of contraband.

In its submission of April 2014 to the Federation Standing Committee the Ethics Committee advised:

> Neither rule 5.1-2A nor the commentaries mention contraband. We think there would be value in adding a commentary to make the point that a lawyer can never take possession of evidence where possession is illegal unless specific dispensation is afforded by law. So, for example, a lawyer can't take possession of child pornography, cocaine, restricted

firearms, a stolen iPhone with all the included data, electronic documents obtained by breaking into a sexual assault complainant's email account, and so on.

The main dispensation is the so-called "innocent possession" exception, which allows a lawyer (or anyone else) to take possession of contraband for the sole purpose of promptly turning it over to the police. This is what occurred 10 years ago in Toronto when a law firm contacted police to say it had possession of items stolen from the Art Gallery of Ontario.

Not addressing the contraband problem risks lawyers getting overly caught up in whether the evidence is incriminating, and wrongly deciding to take and keep possession of contraband in the belief that it's okay to do so because the contraband is wholly or substantially exculpatory.