

FOR DECISION

**PROPOSED DISCLOSURE POLICY FRAMEWORK**

**MOTION**

19. **Convocation's approval is sought for a disclosure policy framework to describe what information the Society should or should not be permitted to disclose about complaints and investigations, including disclosure to public authorities (law enforcement and other regulators, including other Canadian law societies) and the public.**

**Review of Disclosure Practices**

20. The Society discloses information to law enforcement and other regulatory bodies as part of its public interest mandate.
21. In 2014, Convocation approved a document describing the Society's current process for reporting to law enforcement (police and other regulatory bodies, including other Canadian law societies). The document is attached as **Tab 9.2.2.1**.<sup>1</sup> A Working Group of the Professional Regulation Committee, the Disclosure Working Group, was established to review the Society's practices in reporting information and provide the Committee with advice on these issues.<sup>2</sup>
22. The Working Group considered a number of issues relating to disclosure of information, including
- a. Protection of confidential and solicitor-client privileged information received through complaints and investigations
  - b. Protection of compelled incriminating statements
  - c. Disclosure to public authorities
  - d. Disclosure to other Canadian law societies
  - e. Disclosure of information about investigations to the public.
23. The Working Group developed this policy framework for the Committee's consideration to describe the circumstances in which the Law Society should disclose information about complaints and investigations as well as the legal requirements regarding disclosure. The

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<sup>1</sup> The document is available on the Law Society's website at <http://www.lsuc.on.ca/reporting-law-enforcement/>

<sup>2</sup> The Working Group is chaired by Malcolm Mercer. Between 2014 and 2016, John Callaghan, Jacqueline Horvat, Brian Lawrie, Heather Ross, and Paul Schabas served on the Working Group.

Committee agrees with the Working Group's approach and provides this report to Convocation for its consideration.

24. Current practices regarding disclosure of regulatory information are described in this report. Statutory amendment and/or operational changes may be required to fully implement the policy framework.

## Principles

25. The Law Society of Upper Canada plays a crucial role protecting the public interest. As Justice McLachlin (as she then was) <sup>3</sup> said for the Supreme Court of Canada “[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions”<sup>4</sup>. More recently, Justice Lebel said for the Supreme Court, “the importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not be forgotten that in the client-professional relationship, the client is often in a vulnerable position.”<sup>5</sup>
26. While it is always important that governments and regulators be transparent in the exercise of their duties and responsibilities, transparency is essential for the Law Society. Public trust in lawyers and paralegals depends, in part, on public confidence in effective Law Society regulation. Because these are self-regulating professions, their regulation is significantly enhanced by transparency. The Law Society regulates the legal professions in the public interest. It strives to be effective and transparent in the discharge of its regulatory responsibilities.
27. On the other hand, confidentiality is fundamental to the provision of legal services. The Supreme Court of Canada has repeatedly emphasized that the “integrity of the administration of justice depends upon the unique role of the [lawyer] who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented”. Canadian law is clear that “solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance”<sup>6</sup>. The *Rules of Professional Conduct* and *Paralegal Rules of Conduct* require that all information concerning the business and affairs of the client acquired in the course of the professional relationship be held in strict confidence.<sup>7</sup>
28. The need for regulatory transparency and the requirement that client confidences be protected creates an inherent tension in Law Society regulation. The Law Society is authorized to review confidential information that even the courts may not examine. This

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<sup>3</sup> Prior to her appointment as Chief Justice.

<sup>4</sup> *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at p. 249.

<sup>5</sup> *Pharmascience Inc. v. Binet*, [2006] 2 SCR 513 at para. 36.

<sup>6</sup> *R. v. McClure*, [2001] 1 SCR 445 at paras. 2 and 35

<sup>7</sup> *Rules of Professional Conduct*, Rule 3.3-1, *Paralegal Rules of Conduct*, 3.03(1).

power is required for effective regulation. But because of the inherent tension between transparency and confidentiality, perfect transparency is not possible or desirable in the public interest.

29. In order to achieve effective regulation, the Law Society can require lawyers and paralegals to cooperate with investigations by responding to allegations, providing answers to questions and producing documents. There is no right to remain silent in the face of a Society investigation. A lawyer or paralegal who is compelled to provide a statement has a legitimate interest in ensuring that their statement is not used for other purposes. Indeed, knowing that a statement could be used for other purposes will lead to refusals to provide statements in some circumstances. The challenge is to appropriately balance effective and fair regulation and the requisite transparency.
30. The Act provides that the Law Society has a duty to protect the public interest and a duty to act in a timely, open and efficient manner.<sup>8</sup> Decisions about disclosure must be made with regard to these duties. Greater clarity about the Society's ability to disclose information about complaints and investigations will further its ability to be transparent and accountable.

### **Statutory Framework**

31. The statutory framework governing disclosure in the *Law Society Act* (Act) is set out in sections 49.8 and 49.12 and is attached at **Tab 9.2.2.2**.
32. The Act provides that the Law Society may demand and collect confidential and privileged information and compel self-incriminating information from licensees as part of the regulatory process. The Society is also subject to strict confidentiality requirements about the uses that may be made of this information.
33. These requirements exist to ensure the integrity of the regulatory process. The receipt and processing of a complaint requires that confidential client information be disclosed to the Law Society. Clients and licensees have an interest in ensuring that this information is not disclosed unless authorized by the legislation.
34. The Law Society in its regulatory operations is frequently required to make decisions about disclosure of regulatory information. Information is disclosed to complainants, witnesses and licensees, the media and the public. The Law Society also receives requests for information from law enforcement, or needs to disclose information to law enforcement on the Society's own initiative.

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<sup>8</sup> *Law Society Act*, RSO 1990, c L.8 as amended, s. 4.2

## **Reporting to Public Authorities (Law Enforcement and Other Regulators)**

35. The Law Society is aware that information it collects may also be evidence of criminal activity or other regulatory breaches. Such information could include evidence of a crime, breach of a statute, threats to public safety or risk of harm to a person where making the disclosure is likely to reduce the risk.
36. The Law Society will report to public authorities where there are reasonable grounds to believe that a licensee or any other person has been involved in criminal or illegal activity. Reports are made to police, other regulators and bodies such as the Children's Aid Society.
37. The Law Society staff work cooperatively with law enforcement and other regulators on an ongoing basis to support their respective statutory mandates and jurisdiction, within the parameters of confidentiality requirements. This includes training and education as well as collecting and reporting information.
38. Disclosure by the Law Society of information collected in the course of investigations can only take place under the exceptions set out in section 49.12(2) or by order of the court under s. 49.13. "Information" may also include incriminating physical evidence, which may involve additional disclosure obligations.
39. Information may be disclosed under section 49.12(2)(a) if required "in connection with the administration of the Act". Under this provision, investigators may contact other regulators or police services in order to obtain information from them, and this happens when necessary for the purpose of the Society investigation or otherwise necessary for the administration under the Act.
40. The Law Society may also report information otherwise protected under section 49.12(2)(f) to police or others when there is a risk of imminent harm. The harm to be prevented by disclosure under section 49.12(2)(f) of the Act may include physical, psychological or economic harm to a person.
41. Under these circumstances, the Law Society has notified police, licensees and others who were the targets of threats, including threats of self-harm.
42. Under s. 49.13, the Law Society may apply to the Superior Court of Justice to release information to public authorities. Under By-Law 11, section 57, the Executive Director of the Professional Regulation Division must seek the approval of the Proceedings Authorization Committee (PAC) before any such application can be made. In making its decision, PAC is to give primary consideration to the extent to which disclosure of information is necessary in order to protect the public and further the administration of justice (section 57(3)).

43. Section 49.13 sets out exceptions to what the Court may order. For example, under s. 49.13(2)(b), an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege cannot be disclosed.
44. In addition to reports by the Society, the Society encourages complainants and witnesses to report directly to public authorities and supports their efforts in doing so.
45. The Society's experience is that often, complainants are interested in speaking with the police, and in many instances they have already reported to police at the time of initial contact with the Society. Direct contact between complainants and police is advantageous because clients can choose to waive privilege, and this allows police to collect the evidence directly. Further, clients are not subject to confidentiality requirements under the Act.

### **Proposed Disclosure Policy Framework**

46. It is proposed that the policy framework at **Tab 9.2.2.3** be adopted by the Society. The attached document clarifies the circumstances in which information may be disclosed. It also clarifies the Law Society's legal obligations to protect certain information from disclosure. The following circumstances and limitations are identified in the framework:
  - a. Disclosure to public authorities;
  - b. Disclosure to prevent future harm;
  - c. Disclosure to other Canadian law societies;
  - d. Disclosure to the public about the fact of an investigation;
  - e. Confidentiality of complaints and investigations;
  - f. Protection of solicitor-client privilege; and
  - g. Compelled incriminating statements.
47. The Committee believes that this approach is consistent with the Law Society's public interest mandate and in furtherance of the Law Society's regulatory objectives that include transparency, with the necessary protections in place to protect privileged and confidential information. As noted at the beginning of this Report, statutory amendment and operational changes may be required to fully implement this framework.

## **REPORTING CRIMINAL OR ILLEGAL ACTIVITY TO LAW ENFORCEMENT AND OTHER REGULATORS**

As part of our mandate to protect the public interest, the Law Society reports to law enforcement about criminal or illegal activity. This document describes the Law Society's process for reporting to law enforcement.

In this document, "law enforcement" refers to police and other regulatory bodies, including another Canadian law society.

1. The Law Society will report to law enforcement where there are reasonable grounds to believe that a licensee or any other person has been involved in criminal or illegal activity.
2. In addition to reports by the Law Society, the Law Society encourages complainants and witnesses to report directly to law enforcement and supports their efforts in doing so.
3. A report is not required if law enforcement is already aware of the alleged illegal activity.
4. The report cannot include information that is subject to the confidentiality provisions of section 49.12 of the *Law Society Act*. As a general rule the report will include a summary of the relevant allegations based on information received with the initial complaint. Consent of the complainant and/or client will ordinarily be obtained before the report is made.
5. The Law Society will disclose additional information under section 49.12(2)(f) of the *Act* if there are reasonable grounds to believe that there is a significant risk of harm and that making the disclosure or report will reduce the risk.
6. The harm to be prevented by disclosure under section 49.12(2)(f) of the *Act* may include physical, psychological or economic harm to a person.
7. On release of decisions of the Law Society Tribunal, any matter that raises issues of criminal or illegal activity will be reported to law enforcement.

**LAW SOCIETY ACT EXCERPTS  
DISCLOSURE WORKING GROUP REPORT  
SEPTEMBER 2016**

**Investigations  
Conduct**

49.3 (1) The Society may conduct an investigation into a licensee's conduct if the Society receives information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming a licensee. 2006, c. 21, Sched. C, s. 43.

**Powers**

(2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,

- (a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;
- (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
- (c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, s. 43.

**Capacity**

(3) The Society may conduct an investigation into a licensee's capacity if the Society receives information suggesting that the licensee may be, or may have been, incapacitated. 2006, c. 21, Sched. C, s. 43.

**Powers**

(4) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section is satisfied that there are reasonable grounds for believing that a licensee being investigated under subsection (3) may be, or may have been, incapacitated, the person conducting the investigation may,

- (a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;
- (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
- (c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, s. 43.

49.4-49.7 REPEALED: 2006, c. 21, Sched. C, s. 43.

## **Privilege**

### **Disclosure despite privilege**

49.8 (1) A person who is required under section 42, 49.2, 49.3 or 49.15 to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (1).

### **Disclosure by other person, body**

(1.1) The Society or the Complaints Resolution Commissioner, as the case may be, may receive from any person or body information or documents in relation to a review under section 42, an audit under section 49.2, or an investigation under section 49.3 or 49.15, even if the information or documents are privileged or confidential. 2013, c. 17, s. 14 (1).

### **Admissibility despite privilege**

(2) Despite clause 15 (2) (a) and section 32 of the *Statutory Powers Procedure Act*, information provided and documents produced under section 42, 49.2, 49.3 or 49.15 and information or documents described in subsection (1.1) are admissible in a proceeding under this Act even if the information or documents are privileged or confidential. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (2); 2013, c. 17, s. 14 (2).

(2.1) REPEALED: 2013, c. 17, s. 14 (3).

### **Privilege preserved for other purposes**

(3) Subsections (1), (1.1) and (2) do not negate or constitute a waiver of any privilege and, even though information or documents that are privileged must be disclosed under subsection (1) or may be received under subsection (1.1), and are admissible in a proceeding under subsection (2), the privilege continues for all other purposes. 2013, c. 17, s. 14 (4).

### **Removal for copying**

49.9 (1) A person entitled to examine documents under section 42, 49.2, 49.3 or 49.15 may, on giving a receipt,

- (a) remove the documents for the purpose of copying them; and
- (b) in the case of information recorded or stored by computer or by means of any other device, remove the computer or other device for the purpose of copying the information. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (2).

### **Return**

(2) The person shall copy the documents or information with reasonable dispatch and shall return the documents, computer or other device promptly to the person from whom they were removed. 1998, c. 21, s. 21.

### **Order for search and seizure**

49.10 (1) On application by the Society, the Superior Court of Justice may make an order under subsection (2) if the court is satisfied that there are reasonable grounds for believing,

- (a) that one of the following circumstances exists:
  - (i) a review of a licensee's professional business under section 42 is authorized,

- (ii) an investigation into a licensee's conduct under subsection 49.3 (1) is authorized, or
  - (iii) a licensee whose capacity is being investigated under subsection 49.3 (3) may be, or may have been, incapacitated;
- (b) that there are documents or other things that relate to the matters under review or investigation in a building, dwelling or other premises specified in the application or in a vehicle or other place specified in the application, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person; and
- (c) that an order under subsection (2) is necessary,
- (i) because of urgency,
  - (ii) because use of the authority in subsection 42 (2) or 49.3 (2) or (4) is not possible, is not likely to be effective or has been ineffective, or
  - (iii) because subsection 42 (2) or 49.3 (2) or (4) does not authorize entry into the building, dwelling or other premises specified in the application or the vehicle or other place specified in the application. 2006, c. 21, Sched. C, s. 46 (1).

### **Contents of order**

(2) The order referred to in subsection (1) may authorize the person conducting the investigation or review, or any police officer or other person acting on the direction of the person conducting the investigation or review,

- (a) to enter, by force if necessary, any building, dwelling or other premises specified in the order or any vehicle or other place specified in the order, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person;
- (b) to search the building, dwelling, premises, vehicle or place;
- (c) to open, by force if necessary, any safety deposit box or other receptacle; and
- (d) to seize and remove any documents or other things that relate to the matters under investigation or review. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 46 (2).

### **Terms and conditions**

(3) An order under subsection (2) may include such terms and conditions as the court considers appropriate. 1998, c. 21, s. 21.

### **Assistance of police**

(4) An order under subsection (2) may require a police officer to accompany the person conducting the investigation or review in the execution of the order. 1998, c. 21, s. 21.

### **Application without notice**

(5) An application for an order under subsection (2) may be made without notice. 1998, c. 21, s. 21.

### **Removal of seized things**

- (6) A person who removes any thing pursuant to an order under this section shall,
- (a) at the time of removal, give a receipt to the person from whom the thing is seized; and

- (b) as soon as practicable, bring the thing before or report the removal to a judge of the Superior Court of Justice. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

### **Order for retention**

(7) If the judge referred to in clause (6) (b) is satisfied that retention of the thing is necessary for the purpose of the investigation or review or for the purpose of a proceeding under this Part, he or she may order that the thing be retained until,

- (a) such date as he or she may specify; or  
(b) if a proceeding under this Part has been commenced, until the proceeding, including any appeals, has been completed. 1998, c. 21, s. 21.

### **Extension of time**

(8) A judge of the Superior Court of Justice may, before the time for retaining a thing expires, extend the time until,

- (a) such later date as he or she may specify; or  
(b) if a proceeding under this Part has been commenced, until the proceeding, including any appeals, has been completed. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

### **Return**

(9) If retention of a thing is not authorized under subsection (7) or the time for retaining the thing expires, it shall be returned to the person from whom it was seized. 1998, c. 21, s. 21.

### **Seizure despite privilege**

(10) An order under this section may authorize the seizure of a thing even if the thing is privileged or confidential. 1998, c. 21, s. 21.

### **Admissibility despite privilege**

(11) Despite clause 15 (2) (a) and section 32 of the *Statutory Powers Procedure Act*, a thing seized under this section is admissible in a proceeding under this Act even if the thing is privileged or confidential. 1998, c. 21, s. 21.

### **Privilege preserved for other purposes**

(12) Subsections (10) and (11) do not negate or constitute a waiver of any privilege and, even though a thing that is privileged may be seized under subsection (10) and is admissible in a proceeding under subsection (11), the privilege continues for all other purposes. 1998, c. 21, s. 21.

### **Identification**

49.11 On request, a person conducting an audit, investigation, review, search or seizure under this Part shall produce identification and proof of his or her authority. 1998, c. 21, s. 21.

### **Confidentiality**

49.12 (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part. 1998, c. 21, s. 21.

### **Exceptions**

- (2) Subsection (1) does not prohibit,

- (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
- (b) disclosure required in connection with a proceeding under this Act;
- (c) disclosure of information that is a matter of public record;
- (d) disclosure by a person to his or her counsel;
- (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure; or
- (f) disclosure, if there are reasonable grounds for believing that,
  - (i) if the disclosure is not made, there is a significant risk of harm to the person who was the subject of the audit, investigation, review, search, seizure or proceeding or to another person, and
  - (ii) making the disclosure is likely to reduce the risk. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 47.

## **Testimony**

(3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1). 1998, c. 21, s. 21.

## **Disclosure to public authorities**

49.13 (1) The Society may apply to the Superior Court of Justice for an order authorizing the disclosure to a public authority of any information that a bencher, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing under section 49.12. 1998, c. 21, s. 21; 2002, c. 18, Sched. A, s. 12 (2).

## **Restrictions**

(2) The court shall not make an order under this section if the information sought to be disclosed came to the knowledge of the Society as a result of,

- (a) the making of an oral or written statement by a person in the course of the audit, investigation, review, search, seizure or proceeding that may tend to criminate the person or establish the person's liability to civil proceedings;
- (b) the making of an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege; or
- (c) the examination of a document that the court determines to be subject to solicitor-client privilege. 1998, c. 21, s. 21.

## **Documents and other things**

(3) An order under this section that authorizes the disclosure of information may also authorize the delivery of documents or other things that are in the Society's possession and that relate to the information. 1998, c. 21, s. 21.

## **No appeal**

(4) An order of the court on an application under this section is not subject to appeal. 1998, c. 21, s. 21.

## POLICY FRAMEWORK<sup>1</sup>

### ***Disclosure to public authorities***

1. The Society should disclose confidential information to public authorities (police and other regulatory bodies including non-Canadian law societies) where required in the public interest in a manner that protects solicitor-client privilege. This is consistent with the Society's public interest mandate and is one of the Federation of Law Societies of Canada National Discipline Standards.<sup>2</sup>
2. Neither privileged information nor compelled incriminating statements should be disclosed to public authorities unless public safety is at risk (see discussion at paragraphs 15-18 below).

### ***Disclosure to prevent future harm***

3. The Society should disclose confidential information if there are reasonable grounds to believe that there is significant risk of harm to the licensee or to another person if the disclosure is not made, and making the disclosure is likely to reduce the risk. This is permitted under section 49.12(2)(f) of the Act.
4. Neither compelled incriminating statements nor privileged information may be disclosed to prevent future harm unless public safety is at risk (see discussion at paragraphs 15-18 below).

### ***Disclosure to other Canadian law societies***

5. The Society should be permitted to disclose confidential information about a lawyer who is a member of another Canadian law society with that other law society in a manner that protects solicitor-client privilege. This is one of the National Discipline Standards but is not explicitly permitted under the Act.
6. Disclosure could include compelled incriminating statements if protected by the other law society from disclosure to public authorities. Disclosure would not include privileged information except possibly where the other law society has the same statutory powers, obligations and protections in respect of privileged information.

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<sup>1</sup> This Policy Framework is to be read and interpreted together with the applicable statutory framework in the *Law Society Act*. Certain items in the Policy Framework will require legislative amendments for implementation.

<sup>2</sup> The National Discipline Standards were approved by Federation Council on April 3, 2014. Standard 17 provides "there is an ability to report to police about criminal activity in a manner that protects solicitor-client privilege". Online at <http://flsc.ca/wp-content/uploads/2014/12/complaints1.pdf>

### ***Disclosure to the public about the fact of an investigation***

7. The Society may disclose information about the fact that a licensee is under investigation. This is distinct from information obtained by the Society as a result of an investigation, which may not be disclosed.

### ***Confidentiality of complaints and investigations***

8. The Act specifically protects information obtained as a result of an audit, investigation, review, search, seizure or proceeding under the Act.
9. Information received prior to the commencement of an investigation should be treated as confidential, in the same manner as information obtained as a result of an audit, investigation, review, search, seizure or proceeding under the Act.

### ***Protection of solicitor-client privilege***

10. Law Society staff disclose information about regulatory action to complainants, witnesses and licensees, public authorities, the media and the public. In disclosing information, the Society must protect solicitor-client privilege and may only disclose privileged information in accordance with statutory and common law requirements.
11. Solicitor-client privilege is not lost or waived by making a complaint. In 2013, amendments were made to the Act to clarify that the Society and the Complaints Resolution Commissioner may receive privileged information from members of the public in the context of specified processes and may introduce it in specific proceedings without any loss of privilege.
12. Under section 49.12(2) of the Act, disclosure of privileged information is permitted in the following circumstances:
  - (a) Where required in connection with a proceeding under the Act;
  - (b) By a person to his or her counsel; or
  - (c) If the disclosure were with the written informed consent of the privilege holders and the written consent of all persons who might reasonably be affected by the disclosure.
13. The Supreme Court of Canada has repeatedly made clear that solicitor-client privilege “must remain as close to absolute as possible if it is to retain relevance” and “any legislative provisions that interfere with the privilege more than “absolutely necessary” will be found to be unreasonable”. *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401 at para. 44. The Supreme Court of Canada has recognized only two exceptions to solicitor-client privilege, namely, the public safety exception and the innocence at stake exception, the second of which is highly unlikely to apply in the law

society context. *Maranda v. Richer*, [2003] 3 SCR 193 at para. 52 and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815 at para. 53.

14. Even where permitted, disclosure of the privileged communications should be as limited as possible.

### ***Compelled incriminating statements***

15. Compelled incriminating statements may not be disclosed except in accordance with common law requirements (if public safety is at stake).
16. Licensees are required to cooperate with the Society, which has broad powers to collect information from licensees in the course of an investigation, including the authority to compel self-incriminating information.
17. For the purpose of this framework, compelled incriminating statements are information that comes to the knowledge of the Society as a result of an oral or written statement made by a person in the course of an audit, investigation, review, search, seizure or proceeding that may tend to incriminate the person or establish the person's liability to civil proceedings. The Society has the statutory authority to compel incriminating statements from licensees, but other public authorities do not. The use of incriminating statements is restricted outside of the Act. For these reasons, compelled incriminating statements require additional protection from disclosure.<sup>3</sup>
18. Compelled incriminating statements are distinct from other incriminating information received as a result of an audit, investigation, review, search, seizure or proceeding, for example, the Society's work product or the licensee's client file. Incriminating information is also strictly confidential under section 49.12 but does not require the same level of protection as compelled incriminating statements.

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<sup>3</sup> Incriminating information, including compelled incriminating information, may be disclosed in a discipline proceeding (49.12(2)(b)), by a person to his or her counsel (49.12(2)(d)), with the written consent of all persons whose interests might reasonably be affected by the disclosure (49.12(2)(e)) or to prevent future harm (49.12(2)(f)). Disclosure in these circumstances should continue to be permitted.