

January 12, 2016

Ontario Securities Commission  
20 Queen Street West, 20th Floor  
Toronto, ON  
M5H 3S8

**Re: OSC Notice and Request for Comment - Proposed OSC Policy 15-601 -  
Whistleblower Program**

Dear Sir/Madam:

We write with respect to the Ontario Securities Commission's ("OSC") Notice and Request for Comment with Respect to Proposed OSC Policy 15-601 – Whistleblower Program ("the Proposed Policy"). In particular, we wish to respond to the first specific consultation question contained in the Notice: "Do you agree with in-house counsel being eligible for a whistleblower award? If not, why?"

For the reasons stated below, we do not believe that in-house counsel should be eligible for a whistleblower award.

As law professors who research and write on the topic of legal ethics and practitioners with particular interest in legal ethics, we are concerned that the Proposed Policy will generate confusion or conflict with respect to lawyers' obligations in relation to solicitor-client privilege as well as their duties of confidentiality, commitment and avoidance of conflicts of interest.

We note that the Proposed Policy contains a number of exclusions which appear to have the aim of recognizing and respecting lawyers' professional obligations. In particular, we note that the definition of "original information" in section 1 excludes, *inter alia*, information obtained either "(i) through a communication that was subject to solicitor-client privilege" or "(ii) in connection with the provision of legal advice to a client or employer, on whose behalf the whistleblower or the whistleblower's firm acts or provides services." Additionally, we note that, under sections 15(1)(c) and (d), external and in-house counsel are excluded from acting as whistleblowers if they have obtained information in connection with providing legal services to, or conducting the legal representation of, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial barreau or law society rules.

We commend the Commission for including these exclusions but, respectfully, are of the opinion that they do not provide adequate recognition of, and respect for, lawyers' professional obligations.

Our specific concerns are as follows:

- (1) One possible interpretation of the exclusions in relation to the definition of "original information" is that they exclude all information that an in-house lawyer would receive in his or her capacity as an in-house lawyer. Given this interpretation, the later position that lawyers may disclose provided it is in accordance with applicable provincial or territorial barreau or law society rules is inconsistent, and also risks confusing lawyers into inaccurately believing that they can disclose information;
- (2) To the extent that the exclusions in relation to the definition of "original information" do not exclude all information that an in-house lawyer would receive in his or her capacity as an in-house lawyer, disclosure under the Proposed Policy would appear to violate a lawyer's confidentiality obligations under the Law Society of Upper Canada's *Rules of Professional Conduct* to "hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information" (Rule 3.3-1), subject to specified narrow exceptions such as permitting disclosure 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 (Rule 3.3-3);
- (3) Although lawyer whistleblowing is justified under the narrow exceptions provided for in the *Rules of Professional Conduct*, insofar as the Proposed Policy provides financial awards for disclosure, the presence of a financial incentive risks creating a conflict with lawyers' duty of commitment to a client's cause, recently recognized by the Supreme Court of Canada to be a principle of fundamental justice (*Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401) and placing the lawyer in a conflict of interest with his or her client contrary to his or her fiduciary obligations and obligations under the Law Society of Upper Canada's *Rules of Professional Conduct*;
- (4) The further exclusions found in section 15(1) that prohibit disclosures impermissible under law society rules do not appear to adequately remediate the above issues. First, a lawyer's ethical obligations are defined not only by law society rules but by common law provisions set out by the courts. This is particularly true in the areas of solicitor-client privilege, fiduciary obligations and conflicts of interest. Second, we note that section 15(2) renders the exception for an in-house lawyer found in section 15(1)(d) inapplicable in three circumstances, namely where:

(i) the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the whistleblower submission from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(ii) the whistleblower has a reasonable basis to believe the subject of the whistleblower submission is engaging in conduct that will impede an investigation of the misconduct; or

(iii) at least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, CCO (or their functional equivalents) or the individual's supervisor.

These nullifications conflict with a lawyer's professional obligations for the reasons set out in (2) and (3) above. Additionally, they would appear to directly conflict with in-house counsel's "reporting up" obligations under Rule 3.2-8 of the Law Society of Upper Canada's *Rules of Professional Conduct* which permit "silent" as opposed to "noisy" withdrawal upon knowledge that an organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally.

In view of the above concerns, we respectfully disagree that in-house should be eligible for a whistleblower award. The concerns discussed above also apply, in our view, to external counsel. As such, it is our opinion that lawyers should be excluded from the Proposed Policy entirely.

If helpful to the Commission, we would be happy to elaborate on any of the concerns discussed above or to answer any questions arising from our comment.

Sincerely,

Brent Cotter, Professor, College of Law, University of Saskatchewan  
Adam Dodek, Associate Professor, Faculty of Law, University of Ottawa, LSM  
Malcolm Mercer, General Counsel, McCarthy Tétrault and Law Society Bencher  
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