

**VITAL TO ADVERSARIAL SYSTEM OR ADVERSARY OF JUSTICE?**  
A COMPARATIVE DISCUSSION OF ATTORNEY-CLIENT CONFIDENTIALITY RULES  
AND THE PUBLIC SAFETY EXCEPTION TO NONDISCLOSURE  
IN THE UNITED STATES AND CANADA

**ANDREW MARBLE**

**I. INTRODUCTION**

The lawyer plays an integral role in the search for and promotion of justice in the legal systems of both the United States and Canada. Lawyers are uniquely situated through their knowledge of the legal system and intimacy with the principals involved in particular legal matters to influence a judicial system's earnest search for justice. Tension sometimes exists between the lawyer's explicit duty of confidentiality toward his client and the lawyer's duty to aid the administration of justice. Nowhere is the tension more strongly felt by the lawyer than in situations that may invoke the public safety exception to attorney-client confidentiality. This paper explores the law of attorney-client confidentiality in the United States and Canada, particularly as it relates to situations in which disclosure of client confidences may be either permissible or mandatory, and attempts to shed some light on the unique nature of this problem. As courts, legislators and lawyers have found, there are a few easy solutions to this vexing problem.

**II. SOME BACKGROUND**

“The history of the privilege [in Canada] can be traced to the reign of [Queen] Elizabeth I [of England].”<sup>1</sup> According to the Canadian Supreme Court in *Solosky v. The Queen*,

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<sup>1</sup> Queen Elizabeth was Queen of England from 1587-1603.

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law . . . it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers . . . that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret. . .<sup>2</sup>

John Henry Wigmore, one of the great early American commentators on the law of evidence, took a moral position to justify the attorney-client privilege. “It must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent’s behest to be laid open through his own testimony . . . This double-minded attitude would create an unhealthy moral state in the practitioner.”<sup>3</sup> Other noted commentators have suggested a more restrictive view of attorney-client privilege. Jeremy Bentham, well-known legal philosopher and utilitarian, was of the view that although lack of privilege may undermine client confidence in attorneys, this same privilege often serves to obstruct justice.<sup>4</sup> “Let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have anything to fear from it.”<sup>5</sup> Other writings of Bentham’s cement the notion that he was a staunch advocate of relaxing the rules of privilege, in order to assure “[t]hat a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way of concerting a false defence, as he may do so at present.”<sup>6</sup>

Professor David Louisell, on the other hand, did not advocate relaxing the attorney-client privilege. Louisell quoted the following statement from Sir Francis Bacon in agreeing largely with Wigmore’s rationale: “The great Truste, between Man and Man, is the Truste of Giving

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<sup>2</sup> Solosky v. The Queen, 105 D.L.R. (3d) 745, 756 (Can.) (1979).

<sup>3</sup> JOHN HENRY WIGMORE, 8 WIGMORE ON EVIDENCE §2291, at 553 (J. McNaughton rev. 1961).

<sup>4</sup> See JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE § 301 (J.S. Mill ed. 1827).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Counsell. . .”<sup>7</sup> Louisell’s primary argument centers on the notion that there exists a sacred trust between client and counselor, arising from the fact that the client commits so much of himself to the counselor in the course of the relationship.<sup>8</sup>

### **III. THE GOVERNMENT STRUCTURES AND CONSTITUTIONAL HISTORIES OF CANADA AND THE UNITED STATES**

Determining the appropriate law of attorney-client privilege has long been a hotly debated issue in Canada and the United States. The issues presented are so challenging and fundamental, and the competing interests so highly valued, that the battle has been one of constitutional significance.

The legal systems of Canada and the United States mirror one another substantially in both structure and substance, having both been derived in no small part from the English common law regime. One important difference in these legal systems is their varied constitutional histories.

Unlike the American constitutional law, constitutional law in Canada is not derived from one source document. Canada’s Constitution Act of 1867 was the original codification of Canada’s federalist system.<sup>9</sup> Nearly one hundred years later, The Canadian Bill of Rights was passed by Parliament in 1960.<sup>10</sup> Section 1 of the Canadian Bill of Rights provides protection for Canadian citizens of many of their individual rights. Chief among those individual rights are life, liberty, property rights, due process, equality and equal protection, freedom of religion,

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<sup>7</sup> David Louisell, *Conformity and Confusion: Privileges in Federal Court Today*, 31 TULANE L. REV. 101, 112-113 (1956).

<sup>8</sup> *Id.* at 113.

<sup>9</sup> See CAN. CONST. (Constitution Act, 1867).

<sup>10</sup> See Canadian Bill of Rights (1960).

freedom of speech, freedom of assembly and association, and freedom of the press.<sup>11</sup> Section 2 provides further rights protections. Rights protected by section 2 include the right against arbitrary detention, rights against cruel and unusual punishment, the right to be informed of the reasons for detention, the right to retain and instruct counsel, *habeas corpus* rights in the event of unlawful detention, and other rights of the accused.<sup>12</sup> It is important to note, however, that the Canadian Bill of Rights was an act of Parliament, Canada's legislative body, and is not technically considered part of the Canadian Constitution. Canada constitutionalized many of these same rights in The Canadian Charter of Rights and Freedoms, promulgated in 1982.

The United States provides its citizens with similar rights protections through the United States Constitution, particularly the Bill of Rights.<sup>13</sup> Constitutional law in the United States has come from this single Constitution and the case law interpreting it over the past four centuries.

Despite technical differences in constitutional history, similarities between the two legal systems abound. Like the United States, Canada has a federalist system, where government power is divided among the federal government and the Canadian states, called provinces. Both Canadian and American high courts exercise judicial review, whereby the courts interpret constitutional provisions and rule on the constitutionality of government actions and legislation. The important implication for a comparative discussion of confidentiality rules is that the United States Constitution and Canada's constitutional documents are built on the same bedrock principles.

The evolution of the two countries' legal systems has resulted in rules of professional responsibility that are substantially the same in many respects.<sup>14</sup> However, seemingly slight

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<sup>11</sup> See *id.*, § 1.

<sup>12</sup> See *id.*, § 2.

<sup>13</sup> See U.S. CONST. amend. i-x.

<sup>14</sup> See MODEL RULES OF PROF'L CONDUCT (2003) and CODE OF PROF'L CONDUCT (Can.) (2002).

differences do exist in the two nations' rules of attorney-client confidentiality. These differences are important to explore because they come in the area of attorney-client confidentiality and privilege, an area of the law where fine distinctions can make a great difference and where line-drawing by legislators, judges, and ethics groups is of the utmost importance in clearly defining the lawyer's role with regard to protecting client confidences.

#### **IV. SOURCES OF BASIC RULES OF ATTORNEY-CLIENT CONFIDENTIALITY (CONSTITUTIONS, ATTORNEY ETHICS CODES, AND RULES OF EVIDENCE)**

The attorney-client confidentiality laws in both the United States and Canada come from a number of different sources of law. Both nations' constitutions provide provisions upon which attorney-client privilege is broadly based. Both countries also have ethical rules of professional conduct promulgated by their respective bar associations.<sup>15</sup>

Attorney-client privilege rules also have their place as rules of evidence. American privilege rules are grounded in principles of agency law<sup>16</sup> and are incidental to the Sixth Amendment of the United States Constitution.<sup>17</sup> The statutory provision that addresses modern attorney-client privilege as a rule of evidence is Rule 501 of Federal Rules of Evidence."<sup>18</sup> Rule 501 states: "Privilege . . . shall be governed by the principles of common law as interpreted by

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<sup>15</sup> *See id.* It is important to note that these ethical codes promulgated by the national bar associations are not binding law and that it is up to each individual jurisdiction to adopt the ethical rules as it sees fit to regulate attorney conduct. The model rules serve as a guide and are often adopted in whole or in substantial part by individual jurisdictions to govern their attorneys' conduct. Looking at these rules allows for an easy examination and comparison of dominant ethical concepts in the two country's legal systems.

<sup>16</sup> The lawyer is often thought of as the client's agent, and agency relationships typically require the agent to act only in the client's best interests.

<sup>17</sup> The Sixth Amendment of the United States Constitution mandates that the accused shall have the assistance of counsel for his defense. *See* U.S. CONST. amend. vi.

<sup>18</sup> *See* FED. R. EVID. 501.

the courts of the United States in light of reason and experience.”<sup>19</sup> Similarly, Canadian evidence rules regarding attorney-client privilege are found within its common law.

## **V. PUBLIC SAFETY EXCEPTION RULES IN CANADA AND THE UNITED STATES**

### **A. CODE OF PROFESSIONAL CONDUCT OF THE CANADIAN BAR ASSOCIATION**

Chapter IV of the Code of Professional Conduct of the Canadian Bar Association pertains to confidential information. The rule reads: “The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted by this code.”<sup>20</sup> Comment 11 of this rule articulates a key exception to this “bare-bones” rule of nondisclosure: “Disclosure to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be *mandatory* when the anticipated crime is one involving violence (emphasis added).”<sup>21</sup> Comment 13 to Article IV provides a cautionary note for attorneys invoking the right to disclose as set forth in Comment 11: “When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should always be careful not to divulge more information than is required.”<sup>22</sup>

### **B. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT**

Rule 1.6(a) of the American Bar Association Model Rules of Professional Conduct, recently amended in 2003, pertains to confidentiality of information. Rule 1.6(a) reads: “A

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<sup>19</sup> *Id.*

<sup>20</sup> CODE OF PROFESSIONAL CONDUCT, Chpt. IV (Can.) (2002)

<sup>21</sup> *Id.* at Chpt. IV cmt. 11.

<sup>22</sup> *Id.* at Chpt. IV cmt. 13.

lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation. . .”<sup>23</sup> Rule 1.6 also contains important exceptions. Rule 1.6(b)(1) provides that a lawyer “*may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”<sup>24</sup> Rule 1.6(b)(6), formerly Rule 1.6(b)(4), further provides that a lawyer *may* disclose confidential client information to the extent he believes necessary “to comply with other law or a court order (emphasis added).”<sup>25</sup>

## **VI. INSTRUMENTAL DEFENSE AND RIGHTS-BASED DEFENSE OF ATTORNEY-CLIENT PRIVILEGE**

The importance of attorney-client confidentiality certainly cannot be understated. There are a couple major defenses available to defenders of strict confidentiality rules. The instrumental or counsel-based argument against disclosure is described by Professor Harry Subin in his important article, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*.<sup>26</sup> Subin presents the instrumental argument in two prongs. “First, the right to counsel requires that incriminating communications from the client to the attorney be considered privileged, and therefore nondisclosable.”<sup>27</sup> “Second, whether privileged or not, permitting or requiring the lawyer to disclose such information renders it impossible for the attorney to provide effective representation, either because it destroys the client’s trust in the attorney, or because it puts the attorney in the intolerable position of being a witness against the client.”<sup>28</sup>

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<sup>23</sup> MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6(b) (2003).

<sup>24</sup> *Id.* at R. 1.6(b)(1) (emphasis added).

<sup>25</sup> *Id.* at R. 1.6(b)(6).

<sup>26</sup> Harry I. Subin, THE LAWYER AS SUPEREGO: DISCLOSURE OF CLIENT CONFIDENCES TO PREVENT HARM, 70 IOWA L. REV. 1091 (1985).

<sup>27</sup> *Id.* at 1128.

<sup>28</sup> *Id.* at 1128.

Some would argue that this instrumental rationale is so important as to be inviolable. This argument has not held water however, in the United States or Canada, because the “attorney-client privilege includes a host of qualifications—including, of course, the crime or fraud exception—that would be converted into a constitutionally mandated absolute rule.”<sup>29</sup> Nevertheless, this instrumental rationale does provide important insight into how the law of attorney-client privilege is conceived.

Another defense of attorney-client privilege is the rights-based defense. The rights-based defense focuses more on the human rights of the accused and loss of dignity that would result if the lawyer were free to violate the client’s confidences.<sup>30</sup> This defense, like the instrumental defense, is also weighed heavily by lawmakers and lawyers and is important to bear in mind when critically examining rules of attorney-client confidentiality.

### **VIII. COURTS EXERCISE CARE REGARDING SCOPE OF DISCLOSURE**

When the attorney decides to disclose information to the court or when this disclosure is mandatory, courts have generally exercised extreme care in limiting the scope of the attorney’s disclosure of confidential information. In *United States v. Zolin*, the Supreme Court ruled that it is proper for the trial court to undertake an in camera examination in determining whether the future crime-fraud exception applies; however, inspection is discretionary and can be ordered only upon showing of “a factual basis adequate to support a good faith belief by a reasonable person that such examination may reveal evidence of crime or fraud.”<sup>31</sup> This rule is a prime

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<sup>29</sup> *Id.* at 1129.

<sup>30</sup> For a good discussion of the rights-based defense to attorney-client confidentiality, *see* D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (Princeton, New Jersey: Princeton University Press, 1988) at 189.

<sup>31</sup> *United States v. Zolin*, 491 U.S. 554 (1989).

example of how carefully modern courts have regarded confidential information and how diligently they have worked to prevent the unnecessary disclosure of client confidences.

*Hawkins v. King County* represents an application of *Tarasoff*<sup>32</sup> principles to an attorney-client relationship, with a few important distinctions.<sup>33</sup> In *Hawkins*, a man was released on bail and subsequently assaulted his mother and committed suicide by jumping off a bridge. The court ruled that the attorney had no duty to warn the client's family because they were already aware of the risk that came from him being released.<sup>34</sup> Like *Tarasoff*, this case can be extremely troubling to the layperson and the professional alike. The client in *Hawkins* caused his lawyer, through their attorney-client communications, to believe that he could cause substantial bodily harm if released. Nevertheless, the lawyer acted as an agent in the strictest of senses and complied with his clients wishes to be represented in the bail hearing without informing the authorities of the potential dangerousness of the situation.

*Purcell v. District Attorney* deals with the evidentiary admissibility of documents that were disclosed properly by an attorney.<sup>35</sup> In *Purcell*, the court ruled that in order for the privileged conversations to be admissible, a judge would have to believe that the client had specifically discussed a future crime or fraud with the attorney and that discussion was embodied in those privileged documents. *Purcell* is yet another American case that is reflective of the care that judges exercise in protecting the attorney-client privilege and protecting confidential communications or work-product from being needlessly disclosed.

## **VIII. OTHER PROFESSIONAL RELATIONSHIPS, CONFIDENTIALITY, AND RELATIONSHIP TO ATTORNEY-CLIENT PRIVILEGE LAW**

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<sup>32</sup> See *Tarasoff v. Regents of University of California*, 171 Cal. 3d. 425 (1976).

<sup>33</sup> See *Hawkins v. King County*, 606 P. 2d 361 (Wash. App. 1979).

<sup>34</sup> See *id.*

<sup>35</sup> See *Purcell v. District Attorney for the Suffolk District*, 676 N.E. 2d 436 (Mass. 1997).

Professionals in many other fields have confidential relationships with their clients that substantially resemble the attorney-client relationship. These professionals include medical doctors, psychiatrists, clergy, and accountants. Many of the most talked about and most cited cases in attorney-client privilege law have come from the jurisprudence relating to other confidential professional relationships.

*Tarasoff v. Regents of University of California* is an oft-cited American case in matters dealing with attorney-client privilege.<sup>36</sup> Modern attorney-client jurisprudence has been influenced by this case,<sup>37</sup> even though the case does not deal with attorney-client privilege specifically, but rather with physician-client privilege. In *Tarasoff*, a client expressed his intention to kill a female friend to his psychiatrist.<sup>38</sup> The psychiatrist followed a strict interpretation of the rules of physician-client privilege and did not alert authorities about his client's murderous intentions. The client followed through with his violent objective, and the psychiatrist soon came under judicial scrutiny for not disclosing this information. This case aptly demonstrates the dangers of professionals in privileged relationships maintaining an absolute view of the privilege. A death may have been prevented with disclosure from the psychiatrist. The California Supreme Court held that a psychotherapist, having determined under professional standards that a patient posed a serious danger of violence, had a duty to use reasonable care to protect the identified victim.<sup>39</sup> The holding in *Tarasoff* was based upon the common-law rule of negligence that a person owes a duty to protect individuals from third persons when there exists a special relationship with the dangerous person. The *Tarasoff* court's

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<sup>36</sup> See *Tarasoff*, 171 Cal. 3d. 425.

<sup>37</sup> *Tarasoff* is often cited in American and Canadian cases with both approval and disapproval. See generally, *Wenden v. Trikha*, 28 A.R. 81, 102 (Can.) (1991). See also *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001).

<sup>38</sup> See *Tarasoff*, *supra* note 35.

<sup>39</sup> See *Id.*

imposition of a duty upon the psychiatrist created a different standard of disclosure for psychiatrists as compared to the American Bar Association's standard for lawyers, a standard which more closely matches the Canadian rules of confidentiality.<sup>40</sup>

*Smith v. Jones* is a recent Canadian case which engendered discussion about that nation's rules of attorney-client privilege.<sup>41</sup> Like *Tarasoff*, *Smith* involved a psychiatrist-client relationship. In fact, *Tarasoff* was cited by the Canadian judges in their ruling.<sup>42</sup> The psychiatrist and the lawyer disagreed regarding disclosure of certain confidences gained during the psychiatrist's professional relationship with the lawyer's client. Renke's case comment, *Secrets and Lives—The Public Safety Exception to Solicitor-Client Privilege: Smith v. Jones*, was critical of the limited scope of the Canadian Supreme Court's decision.<sup>43</sup>

The facts of *Smith v. Jones* are similar to the *Tarasoff* scenario. Jones was charged with aggravated sexual assault, and was referred to Dr. Smith, a psychiatrist, by his attorney. Jones provided the psychiatrist with detailed information about his fantasies of sex and violence involving prostitutes. Dr. Smith contacted Jones' attorney and gave the opinion that it was "more likely than not" that Jones would act out his fantasies of kidnapping, torturing, and killing women.<sup>44</sup> Dr. Smith assumed that the attorney would contact the proper authorities when confronted with this information and was surprised to find out that the information he disclosed to the defense attorney would not be communicated to the authorities. Dr. Smith then commenced an action seeking a declaration entitling him to disclose the information. This decision was more important not for the holding, but for the criticism it received from

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<sup>40</sup> See CODE OF PROFESSIONAL CONDUCT, Chpt. IV, cmt. 11, *supra* note 20.

<sup>41</sup> *Smith v. Jones*, 132 C.C.C. (3d) 225 (Can.) (1999).

<sup>42</sup> *Id.* at 244.

<sup>43</sup> See Wayne Renke, SECRETS AND LIVES—THE PUBLIC SAFETY EXCEPTION TO SOLICITOR-CLIENT PRIVILEGE: SMITH V. JONES, 37 ALBERTA L. REV. 1045 (1999).

<sup>44</sup> See *Smith*, *supra* note 40 at 238-39.

commentators for the incomplete resolution of matters of attorney-client privilege provided by the Canadian Supreme Court.<sup>45</sup>

#### **IX. COURTS IN BOTH COUNTRIES NEED TO UNDERTAKE A MORE RIGOROUS ANALYSIS OF THE COMPETING INTERESTS INVOLVED**

As Renke aptly points out in his comment on *Smith*, the Canadian Supreme Court's decision raised a number of important issues without thoroughly addressing them; among them; the framework for considering limitations on solicitor-client privilege; the interests at stake; the interests supporting the limitation of privilege and confidentiality; whether disclosure is mandatory or discretionary; justifiable means for limiting privilege and confidentiality; and the application of the public safety exception to the facts of the case.<sup>46</sup>

Renke is critical of the Canadian Supreme Court's cursory treatment of these important issues throughout his case comment. He cites the approach in *R v. Oakes* as the appropriate framework for analyzing the limitation of clients' interests in confidentiality.<sup>47</sup> "In this context, the first step is the identification of the interests at stake and the threat posed to them by the public safety exception; the second step is identification of the competing interests served by the public safety exception; and the third step is the determination of whether the public-safety exception rule properly balances the interests at stake and the competing interests."<sup>48</sup>

According to Renke and Layton, *Smith v. Jones* was a lost opportunity.<sup>49</sup> The Canadian Supreme Court had the opportunity to iron out a number of issues of confidentiality and privilege, but the decision came off as incomplete and confused. This case is a good example of

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<sup>45</sup> See *id.* See also Renke, *supra* note 39 at 1045. See also David Layton, ETHICS, CONFIDENTIALITY, AND PRIVILEGE: COMMENT ON SMITH V. JONES, 48 Defence Brief (April 9, 1999) available at <http://www.crimlaw.org/defbrief48.html> (last visited March 29, 2004).

<sup>46</sup> Renke, *supra* note 39 at 1039.

<sup>47</sup> *R. v. Oakes*, 1 S.C.R. 103 (Can.) (1986).

<sup>48</sup> Renke, *supra* note 39 at 1051. See also *Oakes*, *supra* note 46.

<sup>49</sup> See Renke, *supra* note 39. See also Layton, *supra* note 41.

many of the problems courts have run into writing clear and effective attorney-client confidentiality and privilege decisions. There is often a problem with confusing or conflating the terms confidentiality and privilege.<sup>50</sup> Moreover, Canadian and American courts both often fail to address completely the nature of disclosure rules and fail to clearly articulate when the public-safety exception applies. The decision in *Smith* is a prime example.

#### **X. IS THE THREAT OF COMPRISING THE ATTORNEY-CLIENT RELATIONSHIP WITH MANDATORY DISCLOSURE RULES A LEGITIMATE CONCERN?**

A common argument in favor of a strict construction of attorney-client privilege is the threat that disclosure presents to the sanctity of the attorney-client relationship. It is quite difficult to determine, however, whether a shift in the rules of disclosure would have a real effect on the quality of information gained or the client's trust of the attorney. Some may be blinded by their view of confidentiality as absolutely fundamental and fail to take into consideration that the threat of systemically compromising attorney-client communications may not be as real as they think. A few crucial questions need to be addressed. How many clients really rely on the strictness of the current confidentiality rules? How noticeable would a shift to slightly stricter regime of mandatory disclosure, in certain limited and unusual circumstances, be to the average client who does not disclose his dangerous intentions to his attorney? These questions linger and for the most part the answers from the courts and from the profession have come down on the side of strict confidentiality and/or the granting of attorney discretion in situations where future harm is possible.

#### **XI. CONSIDERATIONS OF BODILY INTEGRITY AND PUBLIC SAFETY**

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<sup>50</sup> See Layton, *supra* note 41. Layton is critical of the majority in *Smith v. Jones* for "the abject failure to comprehend fully the distinction between confidentiality and privilege."

A mandatory disclosure rule may seem more attractive when the public safety concerns are taken into account. As Subin notes, “Mandatory disclosure of client misconduct, in the face of competing demands for confidentiality, is premised on the overriding need to prevent harm.”<sup>51</sup> Section 7 of the Charter of Rights and Freedoms confirms that all Canadian citizens have the rights to life, liberty, and security of the person.<sup>52</sup> The Canadian public safety exception to attorney-client privilege promotes the important objectives of preserving life and bodily integrity by authorizing steps that attorneys must take to limit the risk that their client may harm another member of society. Public safety is favored by the language of the Canadian Code of Professional Conduct, which provides that disclosure of information “will be mandatory when the anticipated crime is one involving violence.”<sup>53</sup> The permissive nature of attorney disclosure rules in the American Model Rules of Professional Conduct arguably favors attorney-client relationship over public safety in disclosure circumstances.<sup>54</sup>

## **XII. SAFETY OF THE PERPETRATOR VS. SAFETY OF VICTIM**

The ultimate question posited by Subin in his article is “whether the moral balance shifts when the client’s wrongful acts threaten to harm others, for then a conflicting moral proposition—that we should prefer the victim of wrongdoing over the perpetrator—emerges.”<sup>55</sup> The answer given by the advocates of strict confidentiality is that the values served by confidentiality require sacrificing the victim in almost all cases.”<sup>56</sup> This may seem an overly harsh characterization of the dilemma, but it is important to consider Subin’s point that the

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<sup>51</sup> Subin, *supra* note 26 at 1175.

<sup>52</sup> See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

<sup>53</sup> See CODE OF PROFESSIONAL CONDUCT Art. IV cmt.11 (Can.) (2002).

<sup>54</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2003).

<sup>55</sup> Subin, *supra* note 26 at 1159.

<sup>56</sup> *Id.*

choice of confidentiality over safety could possibly create an interesting moral dilemma of favoring the perpetrator's counsel rights over the victim's right to life, safety, or bodily integrity.

## **XII. WHAT ABOUT THE PERSONAL SAFETY OF ATTORNEYS?**

Another consideration in the debate concerning a public safety exception to confidentiality is the personal safety of the attorneys involved. There is always a chance that the personal safety of the attorney could come into issue if the attorney makes certain disclosures of information learned from his client. Threats against the well-being of attorneys and the safety of their families certainly provide a disincentive for lawyers to disclose certain information learned in the course of the relationship. In a jurisdiction where disclosure is made to be largely permissive, like the United States, the attorney will certainly consider his own personal safety when deciding whether or not to disclose the information, and understandably so. When considering a mandatory public safety exception to confidentiality, the question whether lawyers have any duty to put their own safety at risk in order to protect the safety of the public rears its ugly head. In a profession where the ethical mandates of attorneys are promulgated by other members of the profession, it is understandable that attorneys are reticent to put themselves and their colleagues at risk by making disclosure more mandatory and less permissive. Arguably, the members of the Canadian Bar Association have put their colleagues in harm's way because the mandatory disclosure rules may not allow attorneys to adequately protect their personal safety.<sup>57</sup>

## **XIII. ATTORNEY LIABILITY IN A PERMISSIVE DISCLOSURE REGIME**

Another problem presented in the event of disclosure by an attorney is the problem of attorney liability for her decision. This potentially cuts both ways. An attorney could be sued by

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<sup>57</sup>See CODE OF PROFESSIONAL CONDUCT Art. IV cmt.11 (Can.) (2002).

his client for breaching his duty of confidentiality or an attorney could be sued by the victim of his client's actions for not disclosing the client's intent to perform the illegal act.<sup>58</sup> Lawyers may be tempted to make their disclosure decisions for liability reasons, not in the best interests of justice<sup>59</sup>. This type of quandary is more readily fostered in a jurisdiction where the disclosure rules are unclear or where the case law that interprets a lawyer's ethical standards deviates from the plain language of the ethical regulations set out by the relevant standards of professional conduct. Canadian and American courts are both guilty of this deviation. When lawyers can be sued by clients and victims, the consequences of considering liability before disclosure are very real and could be antithetical to the search for justice that the disclosure rules seek to foster.

#### **XIV. CANADIAN LAW VS. AMERICAN LAW**

Canadian and American legal systems are similar in important ways, and the systems bear in mind the same set of competing considerations when making rules regarding attorney disclosure in the name of public safety. Both countries have found helpful authority in the rules regarding confidential relationships between other professionals and their clients.<sup>60</sup> And both countries still have some gnawing ambiguities in their rules of disclosure, which present attorneys with difficult choices. The rules often operate with the use of permissive language, presenting attorneys and their other professional agents (doctors, psychiatrists, etc.) with difficult decisions to make regarding whether or not to disclose information they gained in the course of the relationship. Concepts such as imminence, harm, public safety, crime, among others, have been poorly defined as they relate to various court rulings, ethical rules, and statutes regarding attorney disclosure of otherwise confidential communications. The right of the attorneys to

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<sup>58</sup> See Subin, *supra* note 26 at 1174.

<sup>59</sup> *Id.*

<sup>60</sup> See Tarasoff, *supra* note 35 at 425 and Smith, *supra* note 40.

exercise their own personal judgments presents a whole host of problems, chief among those being considerations of personal safety and their own personal beliefs about the proper function that confidentiality serves in the legal system at large and in their own personal practices.

Many laypeople also have problems with the broad sweep of confidentiality. Cases of “guilty” clients being deemed innocent by the courts and stories of damning information that goes undisclosed to the courts can leave a bad taste in the mouth of the average citizen who hopes that justice will be served.<sup>61</sup> In spite of this occasional public doubt, both the American and Canadian legal systems have properly recognized that a rigorous protection of confidentiality between attorneys and clients is vital to the functioning of their respective legal systems.

The chief difference in the confidentiality rules of the United States and Canada remains the language of the regulations of attorney ethics. The American public safety exception, as posited by the American Bar Association, creates a system of permissive disclosure.<sup>62</sup> The Canadian public safety exception, as formulated by the Canadian Bar Association, makes disclosure mandatory when the future crime likely to be committed by the client is a crime of violence.<sup>63</sup> The American system is known for being staunchly adversarial and a permissive disclosure rule promotes the idea that private attorneys working in the best interests of their clients provide the best results in the search for justice. The Canadian system of mandatory disclosure creates more of a feeling that the lawyer is in some way an “officer of the court” and has a role protecting public safety at-large.

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<sup>61</sup> The famous O.J. Simpson murder trial provides a popular example of the American public questioning the propriety of attorney representation and, indeed, the propriety of the justice system itself. For a discussion of this case, see David Robinson, Jr., *THE SHIFT OF BALANCE OF ADVANTAGE IN CRIMINAL LITIGATION: THE CASE OF MR. SIMPSON*, 30 AKRON L. REV. 1 (1996). Also capable of producing substantial public outcry are cases where lawyers may know the whereabouts of a missing body and follow the duty of confidentiality in not disclosing this fact. See *People v. Belge*, 41 N.Y. 2d 60 (N.Y. 1976)

<sup>62</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

<sup>63</sup> See CODE OF PROF'L CONDUCT Art. IV cmt. 11 (Can.) (2002).

## **XV. ADVANTAGES OF A MANDATORY DISCLOSURE RULE?**

I would argue that the Canadian public safety exception is better than the American rule for dealing with difficult attorney dilemmas relating to disclosure. The Canadian rule protects third-parties from potential harm in obvious instances where the client is highly likely to perform the illegal act, while maintaining the all-important rules of confidentiality in other instances. It may simply be too tempting for an attorney to weigh the consideration of public safety properly when she is faced with heavy questions of personal safety, personal liability, and firmly ingrained personal opinion regarding the disclosure. Under the Canadian rules, the lawyer is not faced with as many hard choices, and is still allowed to exercise discretion and protect confidentiality in instances where the potential consequences are not so likely or so dire. Of course, Canadian attorneys are still required to determine whether the client's future violent conduct is "likely". Attorney discretion can never be entirely eliminated in legal systems where the importance of confidentiality is paramount.

Professor Subin's proposed disclosure law would read as follows:

An attorney who believes there is a substantial likelihood that a client intends to engage, or is engaged, in conduct constituting a felony should take whatever measures are feasible to dissuade the client from undertaking or continuing the action and to rectify the consequences of misconduct which already has occurred. If the client persists, the attorney has an affirmative duty to disclose the information to a court or law enforcement authority. If the information to be disclosed was not learned in a communication protected by the evidentiary privilege, the attorney should simply make full disclosure. If the information is privileged, the attorney should alert the court or law enforcement authority to the fact that he possesses information regarding the client that must be disclosed. Unless there is a successful challenge to the assertion of the privilege, the information, when disclosed, would be immunized; it could not be used directly or indirectly against the client. Alerting the prosecutor prior to disclosure would enable him to take steps to guard any existing evidence from being tainted by the immunized information.<sup>64</sup>

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<sup>64</sup> Subin, *supra* note 26 at 1179.

This rule seems imminently reasonable but may be an unnecessary exercise in statutory construction. I think the American Bar Association need only look to its neighbors to the north for a better solution to the public safety exception quandary.