Plenary 6: Ethics Session

Tackling Crime and Corruption in the Construction Industry and the Lawyer's Ethical Duties Regarding Client Wrongdoing
Cross-Border Panel

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Corruption in the News

(link: https://www.bing.com/videos/search?q=mayor+vaillancourt+arrest&view=detail&mid=9C1B75069AB8706110819C1B75069AB870611081&FORM=VRDGAR)
Lead-up to the Charbonneau Commission

Role of the media
2009 - CBC

Government investigations
- 2011 - Anti-Corruption Commissioner
- 2011 - Commission of Inquiry
Lead-up to the Charbonneau Commission

Role and process of Commission of Inquiry

• Powers over Witnesses + Documents
• Augmentation of Powers

Parallels in the American system

• Federal (3 branches)
• 50 States
• Municipal
## Commission’s Findings of Wrongdoing in the Construction Industry

### Procurement
- Bid rigging; collusion between bidders; interference with selection committees of public procurement; intimidation of competitors

### Contract Administration
- Padding of requisitions and unsupported changes, fake invoices

### Corruption
- Bribes of public officials, conflicts of interest, infiltration by organized crime, money laundering, tax avoidance/evasion

### Notwithstanding existing ethical and legal prohibitions and other safeguards
Relatable Experience Internationally and in the U.S.

Global perspectives on law, theory and practice in tackling corruption

U.S. experience with fraud in the construction industry

Stories Unfolded

GILLES SURPRENANT’S TESTIMONY

‘I took the money, I went to meet the contractor, he gave me an envelope and I took it. It was a big error in judgment.’

- Gilles Surprenant, former City of Montreal engineer

The witnesses also revealed that the construction industry had been infiltrated by the Mafia.

- Justice France Charbonneau

Charbonneau Report

NOTE: THIS INTERACTIVE GRAPHIC MAY NOT BE COMPATIBLE WITH ALL BROWSERS.
Why is the Construction Industry Especially Vulnerable?

- Low-level and individual actors can have outsized impact, avoiding corporate oversight
- $$$$ and minimal financial oversight
- Numerous players and thousands of touch points in every project
- Company owners and management who have come up through the rough-and-tumble
- Public element of procurement
- Human nature, from top to bottom
Recommendations and Reforms in Quebec

1. Review the framework for the awarding and management of public contract
2. Improve prevention and detection activities and strengthen sanctions
3. Protect political party financing from influence
4. Promote citizen participation

The U.S. Lawyer’s Ethical Duties Regarding Client Wrongdoing, and Comparable Ethical Considerations in Canada

When duties to disclose wrongdoing may arise

Application of extracts from the Model Rules, and Canadian equivalents
Evolution of Duties at Common Law and in the Model Rules

Pre-Watergate: Canons and DR’s

1983 - Model Rules of Professional Conduct

ABA Ethics 2000 Commission recommendations

Current Model Rules
Definitional Leeway Under the Rules

"fraud" is defined as "conduct that is fraudulent under the substantive or procedural law... and has a purpose to deceive."

“believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

“substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

Result: significant leeway for the lawyer who is considering whether circumstances require him or her to make a disclosure of a client's actions.
Prohibition on Participating in Clients’ Unlawful Conduct

**MODEL RULE 1.2(d)**

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**Comparable Rules in Canada:** articles 3.2-7 and 5.1-2 of the Model Code of Professional Conduct of the Federation of Law Societies of Canada (Model Code)
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comparable Rule in Canada: article 3.3-1 of the Model Code
CONFIDENTIALITY OF INFORMATION

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

Comparable Rule in Canada: article 3.3-3 of the Model Code
Honesty and Trustworthiness

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comparable Rule in Canada: article 5.1-2 of the Model Code
The Litigator’s Obligation of Candor Toward the Tribunal

(a) A lawyer **shall not knowingly:**

(3) offer evidence **that the lawyer knows to be false.** If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer **shall take reasonable remedial measures**, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

**Comparable Rules in Canada: articles 3.2-7, 5.1-2, 5.1-2A and 5.4-2 of the Model Code**
The Litigator’s Obligation of Candor Toward the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Comparable Rules in Canada: articles 3.2-7 and 5.1-2 of the Model Code
The Transactional Lawyer’s Duty of Truthfulness

In the course of representation a lawyer shall not knowingly

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comparable Rules in Canada: articles 3.2-7, 5.1-2, 5.1-2A and 5.4-2 of the Model Code
Representation of Organizational Clients

An evolving area requiring a multi-stage analysis, and identification of precisely who is the client.

Based upon "best interest" of the organization and likelihood of "substantial injury" to the organization.

Lawyer "shall refer" violations to higher authority in the organization, including the highest authority that can act on behalf of the organization.

Comparable Rules in Canada: articles 3.2-3 and 3.2-8 of the Model Code
Representation of Organizational Clients

Model Rule 1.13

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
Representation of Organizational Clients

• If despite the lawyer's efforts,
  • there remains failure to address something that "is clearly a violation of law" and
  • the lawyer reasonably believes that substantial injury to the organization is reasonably certain to result,

the lawyer may reveal information relating to the representation "whether or not Rule 1.6 permits such disclosure, but only if and to the extent that the lawyer reasonable believes necessary to prevent substantial injury to the organization."

Comparable Rules in Canada: articles 3.2-8 and 3.7-7 of the Model Code
Withdrawal and its Implications and Potential Consequences on the Client

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law.

Comparable Rule in Canada: article 3.7-7 of the Model Code
Withdrawal and its Implications and Potential Consequences on the Client

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud.

Comparable Rule in Canada: article 3.7-7 of the Model Code
Withdrawal and its Implications and Potential Consequences on the Client

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall **continue representation notwithstanding good cause for terminating the representation.**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving **reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.**

**Comparable Rules in Canada:** articles 3.7-1 to 3.7-10 of the Model Code
Merci – thank you!