



The Law Society of
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du Haut-Canada

INFORMATION FOR LAWYERS – ACTING FOR POLICE OFFICERS IN ONTARIO SPECIAL INVESTIGATIONS UNIT (“SIU”) INVESTIGATIONS

Ontario Regulation 283/11, made under the *Police Services Act*, came into force on August 1, 2011, and amends Ontario Regulation 267/10, *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*. Ontario Regulation 267/10 prohibits subject officers, who are police officers whose conduct appears, in the opinion of the Special Investigations Unit (“SIU”) director, to have caused the death or serious injury under investigation, from being represented by the same legal counsel as witness officers. Witness officers are police officers who, in the opinion of the SIU director, are involved in the incident under investigation but are not subject officers. Section 6 of Ontario Regulation 267/10, as amended, provides that to the extent that it is practicable, the chief of police shall segregate all police officers involved in the incident from each other until after the SIU has completed its interviews, and that “a police officer involved in an incident shall not communicate directly or *indirectly* with any police officer involved in the same incident concerning their involvement in the incident until after the SIU has completed its interviews” (emphasis added).

To the extent that a lawyer may be jointly retained by two or more subject officers or witness officers, the lawyer should be aware of rule 2.04(6) of the *Rules of Professional Conduct*, which addresses joint retainers. The rule provides that where a lawyer accepts employment from more than one client in a matter, the lawyer shall advise the clients that: (i) the lawyer has been asked to act for both or all of them; (ii) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned; and (iii) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.¹

¹ There is a limited exception to this rule for joint retainers in the lending context that is not relevant here.

Lawyers who act for more than one officer with respect to an investigation by the SIU must comply with the requirements of both the joint retainer rule and Ontario Regulation 267/10, as amended. A lawyer retained to act for multiple officers must observe the law and not defeat the purpose of section 6 of Ontario Regulation 267/10 by serving as a conduit between segregated officers jointly represented by the lawyer. Further, the law requires that a lawyer retained to act for multiple officers must not disclose anything, confidential or otherwise, said by one segregated officer to any other segregated officer until the SIU has completed its interviews.

A lawyer who is unable to comply with section 6 of Ontario Regulation 267/10 and the lawyer's obligations under Rule 2.04(6) would effectively be unable to accept a joint retainer in such circumstances. As the rule requires that a lawyer cannot treat information as confidential as between joint clients and the regulation requires that the police officers not indirectly communicate with each other concerning their involvement in the incident, it is difficult to see how segregated police officers can properly be jointly represented. Lawyers should also review the Ontario Court of Appeal decision in *Schaeffer v. Wood*, which discusses issues relevant to the Rules and regulation. The Supreme Court of Canada granted an application for leave to appeal this decision on June 28, 2012.