September 4, 2012

In Memoriam: The Law Society of Alberta Code of Professional Conduct, 1995-2011 (1995 Code)

By Alice Woolley

Comment on:

The new Law Society of Alberta Code of Conduct.

In the fall of 2011 the Law Society of Alberta implemented a new Code of Professional Conduct. The new Code is based on the Model Code of the Canadian Federation of Law Societies. Its implementation resulted in the repeal of the prior Law Society of Alberta Code of Conduct ("1995 Code"), the implementation of which in 1995 may be the most innovative step ever taken by a Canadian law society. The 1995 Code rejected the Canadian Bar Association Model Code, which all Canadian law societies had to that point followed, more or less, with its narrow scope and tendency towards the aspirational. Instead the 1995 Code set out clear and comprehensive guidelines establishing the essential obligations of lawyers working across practice contexts, and covering the spectrum of the tasks that lawyers do.

Over the several years I taught the 1995 Code to my students, my respect for it increased. And it was increased further when, in 2009-2010, I wrote my ethics textbook, *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis Canada, 2011). My textbook relied on a variety of Canadian codes – those of the CBA, the Federation, British Columbia, Alberta and New Brunswick. While I did not agree with the approach the 1995 Code took to every issue, there was no significant issue of legal ethics on which it was silent, and on almost all of them it offered thoughtful, clear and detailed guidance. Indeed, the 1995 Code consistently provided the most helpful guidance of any of the codes I relied upon to write the book.

I have tried to love the new Code. I have even tried to like it, or to see it as a reasonable replacement for its predecessor. I recognize, in reading it, the Law Society of Alberta ethics sub-committee's hard work to try and retain the 1995 Code's virtues (work to which I contributed). Certainly it is better than the Federation of Law Societies' Model Code on which it is based. But despite all of that, I remain saddened and disheartened by the loss of what was, truly, a regulatory triumph.

This blog is my eulogy for the 1995 Code and, as well, some general reflections on what its passing may suggest about the risks of national regulatory initiatives. To quote the great demotivator poster: "Meetings: None of us is as dumb as all of us".

It also, though, ends with a suggestion of possibility and hope – the role that, perhaps, the 1995 Code could continue to play in assisting Alberta's lawyers achieve professional excellence.

Where it came from

According to Professor John M. Law of the University of Alberta, who was a member of the Law Society of Alberta sub-committee that drafted the 1995 Code, its inspiration was "the inadequacy of the existing CBA code, which was largely aspirational, uneven in coverage, dated, and law based (lots of references to old cases)". He also noted the influence of the American Bar Association's reworking of its model rules. The Committee of the Law Society that drove the change was constituted primarily of senior lawyers including Edward Molstad, Sid Bercov, Barry Vogel and Peter Martin. Another lawyer, Linda Flynn, took a lead role in drafting the 1995 Code. Professor Law said that "[i]f the Code read well it is all due to her work." There was also consultation with lawyers more generally and with the judiciary.

In his e-mail to me Professor Law further noted that

> We wanted the Code to be useful, to be not only a public statement of lawyer's ethics but also a means of educating a growing bar about ethical practice. We spent a great deal of time over the structure of the Code, principles, rules and commentary. We decided to set out the rules functionally, in the context of the major roles of lawyers or elements of lawyering. The commentary was a very important element to guiding lawyer conduct.
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> Among the innovations for the time were the use of clear often mandatory language, this code would be in appropriate cases the basis for lawyer discipline. Rather than use language such as "candor" we spelled out " a lawyer must not lie to....". We extended conflicts and confidentiality rules to not only firms but associations of lawyers, we tried to draw a "bright line" in terms of conflicts

Why it was great

The 1995 Code did what its drafters intended, and in that fact lies its greatness. It created a set of functional rules, with illuminating and comprehensive commentaries that clearly elaborated the nature of the lawyer's obligations. Thus, as Professor Law noted, the 1995 Code included rules prohibiting lawyers from lying to or misleading their clients (Ch. 9, R1), other lawyers (Ch. 4, R1) or opposing parties to negotiations (Ch. 11, R1). The commentary further noted that it is misleading to state something that is technically accurate but substantively untrue (e.g., Ch. 4, R2, Comm.). The new Code, by contrast, retains the rule against not lying to or misleading other lawyers (R6.02(2)) but eliminates the direct prohibition on lying to clients or to opposing parties. Those obligations may be included elsewhere insofar as Rule 6.02(5) requires that a lawyer correct misapprehensions she or her client have created in an opposing party, and Rule 2.02(2) requires that a lawyer be "honest and candid" when advising a client. But the former clear and consistent direction for honesty across the lawyer's practice is gone.

Part of the virtue of the 1995 Code was its structure, with its distinct chapters dealing with the key functions of the lawyer – advising (Ch. 9), advocacy (Ch. 10) and negotiation (Ch. 11) – and addressing the distinct ethical issues that can arising in different practice contexts, such as for lawyers working in corporations or for government (Ch. 12) or as criminal prosecutors (Ch. 10, Rule 28). The other reason for its excellence, though, was, as noted, the extent and clarity of its commentaries elaborating the rules. These commentaries occurred throughout the 1995 Code but are largely absent from the new Code, as a few examples will illustrate.

The 1995 Code's advocacy rules thus contained 28 separate rules, each of which had an extensive commentary. The substance of most of the rules is reproduced in the new Code, but the new Code has very little of the commentary that animated its predecessor. Both codes prohibit, for example, taking any step in a matter that is "clearly without merit" (Ch. 10, R1; R. 4.01(2)(b)). While the new Code provides no commentary on what that means, 1995 Code explained that merit does not mean that the lawyer must believe that she will prevail; it means only that the "position is supportable by a good faith argument on the merits". The commentary further noted that the lawyer has greater latitude in this respect "if (for example) all of the facts have yet to be fully substantiated or the lawyer expects to develop further evidence through discovery". Similarly, both codes prohibit the introduction of inadmissible evidence (Ch. 10, R. 19; R 4.01(2)(j)) but the new Code provides no commentary at all while the 1995 Code set out the rationale for the rule and some examples of what would violate it ("contriving to reveal a clearly inadmissible document, photograph or other inflammatory evidence, and deliberately posing an improper question"). The 1995 Code also indicated when "knowledge" will be imputed to the lawyer ("if, under the circumstances, it would not have been reasonable for the lawyer to come to any other conclusion") and that the rule does not prohibit a lawyer from introducing evidence "for which there exists a reasonable argument in favour of admissibility". And as a final (but not the only) example from the advocacy rules, the 1995 Code set out an extensive set of guidelines in relation to the duties of prosecutors (Ch. 10, R28). Almost none of those guidelines are reproduced in the new Code (R 4.01(4)).

With respect to fees and lawyer competence, the new Code again includes in substance most of the rules from the 1995 Code but eliminates much of its helpful commentary and analysis. Thus, for example, both codes require that the lawyer's statement of account clearly and separately detail fees and disbursements (Ch. 13 R4; Rule 2.06(3)). But the new Code provides only limited guidance as to what that might require. By contrast, the 1995 Code defined disbursements ("charges levied by a third party and paid by a lawyer on a client's behalf"), set out whether a disbursement may be billed prior to being paid and what it means for an account to be clear:

> A lawyer's statement of account may not mislead or confuse the client and must conform as possible with information previously provided to the client. Consequently, items that are unusual or arbitrary warrant prior disclosure to the client. For example, a fee for opening a file, calling up a closed file or performing any other normal administrative function is unlikely to be anticipated by the client and should therefore be discussed with the client beforehand.
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> A lawyer's duty to provide as much information as possible respecting fees and disbursements (see Rule #2 and accompanying commentary) will normally require itemization or disbursements on an account and the provision of some detail as to the services provided. The amount of detail will depend on the circumstances of each case, including the extent to which the client was kept informed on an ongoing basis while the matter was current. At a minimum, a lawyer should communicate a willingness to provide further elaboration of the lawyer's charges upon request.

Under lawyer competence the definition of competence remains largely the same (Ch. 2, Comm. G1; Rule 2.01(1)) but the detailed explanation of what makes up the aspects of competence is gone. The new Code states that a lawyer should know "general legal principles and procedures and the substantive law and procedure for the areas in which the lawyer practises" (Rule 2.01(1)(a)) but does not provide the 1995 Code's explanation of what that means:

> Lack of legal knowledge in a particular area will not always prevent a lawyer from acting since it may be possible to acquire the requisite knowledge within a reasonable time at no undue expense to the client. However, the lawyer must also consider whether other circumstances, such as lack of experience or skill, would make it unwise to agree to act despite the lawyer's ability to become technically knowledgeable in the area.

The new Code also reduces some of the more practical direction on competence given by the 1995 Code, such as setting out the steps that must normally be completed in order to provide competent service (Ch. 2, Comm. G3) and the necessary components of law office management and organization (Ch. 2, Comm. G1(e)), although these are referenced in the commentary to Rule 2.02(1).

Although many additional examples could be noted, a final one will suffice. Important ethical duties arise for lawyers in the context of withdrawing from a representation, since while a lawyer has discretion as to which cases to accept, the lawyer has only limited discretion to withdraw from a retainer once it has been accepted. Those basic principles are set out in the new rules (Rule 2.07); however the detailed guidance is again eliminated. Thus, for example, in the 1995 Code the rules made clear that withdrawal for non-payment of fees was only justified where the fees were fair and reasonable and also stated that while non-payment did justify withdrawal, "a lawyer ought to seriously consider continuing to act if the extent of the client's default is minor; if the amount of work left to be done is minimal; if non-payment is due to the client's inability to pay; or if the client would be placed in peril as a result of withdrawal" (Ch. 14, R 1, Comm. C1a). The 1995 Code also set out what is meant by a lack of cooperation from the client (Ch. 14, R 1, Comm. C1c) and when a client could be considered to be requesting that a lawyer breach her professional ethics (Ch. 14, R2, Comm. C2a). It also made sure to connect the withdrawal requirements to other parts of the Code, noting that if the lawyer is going to be in a conflict that the lawyer must withdraw (Ch. 14, R2(d)).

In sum, the 1995 Code provided a clear and comprehensive guide to any lawyer in practice, both with respect to what was required to avoid acting unethically or unlawfully, and also as to what was required to fulfill one's professional duties as a lawyer. While of course a lawyer should be aware of applicable case law about her obligations, and reference secondary sources such as textbooks where helpful, in my view a lawyer could simply follow the rules and precepts of the 1995 Code and be confident that his practice was ethically and professionally solid.

Why it was lost

To my knowledge there was no dissatisfaction with the 1995 Code amongst Alberta lawyers and regulators; if anything, it was a source of pride. Its death was simply a consequence of the move towards national regulatory standards, and the practical impossibility of any national initiative adopting a code of conduct invented in Alberta. The model code of the Federation of Law Societies is, in substance, very close to the code of conduct used by the Law Society of Upper Canada, and the conversations I have had with various people involved have been to the effect that that fact was a political necessity if a national initiative was to succeed. The vast majority of Canada's common law lawyers practice in Ontario and, for both good and ill, the regulatory agenda in Canada has been greatly influenced by the Law Society of Upper Canada.

It may also be that the kind of clarity that the 1995 Code contained could not be replicated on a national level. As I noted in the Introduction, the more people and constituencies involved in making a decision, the harder it can be for that decision to be bold and brave, taking a stand on

the specific nature of lawyer's obligations. It's not that the nature of lawyer's obligations are largely in dispute – although of course they are in some areas, like conflicts of interest – it is that people can agree much more readily at the level of generality than at the level of specificity. We may all agree that a lawyer should provide a clear statement of account; we are much less likely to agree about what constitutes clarity in such a statement.

This observation may suggest that a degree of caution should exist before embracing national regulatory initiatives. Undoubtedly there are good reasons for ensuring that all Canadian lawyers operate under common ethical standards. On the other hand, the wider the regulatory landscape the less rigorous and clear those standards may end up being, a result that imposes a real cost to be weighed against the benefit that national regulation may provide.

What to do with it

So now what? Should people like me just continue to be sad and vaguely disappointed – dreams of the everyday law professor? I think there is an opportunity for more than that, and I write this elegiac blog not only for mourning, but also in a spirit of hope. The nature of the commentaries to the 1995 Code are such that, with only a modest amount of reworking, they could be republished as a companion ethical guide, issued alongside the current Code. Those aspects of the 1995 Code that have perhaps been eliminated by the new Code – e.g., the discussion of a lawyer's duties when a client threatens suicide (Ch. 7, Rule 8(e), Comm.) – should not be retained. But the many instances where the 1995 Code explains and clarifies the obligations set out in the new Code could helpfully be set out in a practice guide for law students, students-at-law and lawyers, whether new or more experienced. To simply allow the 1995 Code to fade into history would be a tremendous, and unnecessary, loss.