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A National Code of Conduct?

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I like the Federation of Law Societies' Model Code of Conduct. It's not perfect. But it represents the culmination of considerable effort and reflection by intelligent and thoughtful lawyers. It provides meaningful guidance on a number of issues that lawyers face, particularly in relation to conflicts of interest. It provides a vehicle for national discussion and for work on emerging issues and on areas requiring reform. The Federation has done some truly great things with the Code, such as having a Standing Committee to update and revise the Code on an ongoing basis, and creating an interactive website where the provisions of the Federation's Code can be cross-referenced with similar provisions applicable in every Canadian province.

But here is what I do not like. I do not like the extent to which provincial law societies have simultaneously adopted the Federation's Model Code and undermined its ability to create national standards governing lawyer behaviour.

What do I mean by that? I do not mean that law societies have acted improperly or in bad faith. What I mean is that benchers, staff and volunteers at law societies – including me! – have put their own beliefs on how provisions in codes of conduct should be expressed ahead of the maintenance of a national approach. And they have done so at a cost that outweighs the benefits.

Most of the provincial codes of conduct contain variances from the Federation's Code. Some of those variances are useful – providing greater clarity around issues on which the Federation is silent (e.g., AB Rule 2.02(3) which speaks to when a lawyer ought to obtain instructions, or Ontario Sections 3.2-7.1-7.3 which clarify lawyer obligations in relation to client dishonesty). But other variations are unnecessary, unhelpful or both.

Consider these examples:

In Alberta, the Code of Conduct uses a different numbering scheme than that of the Federation's Model Code. The numbers of the rules do not match, and Alberta does not number its commentaries. This difference has no evident advantages, and some costs; a lawyer from Alberta who knows her own code cannot look up provisions in another provincial Code simply by number. Plus the Federation's numbering is better – not numbering the commentaries is just annoying, particularly when you are trying to have a conversation with someone else about a particular commentary. Why do it?

In Ontario, in a number of places where the Federation Code uses the word "must", the Law Society of Upper Canada uses the word "shall". For example, the Federation Code says "A lawyer at all times **must** hold in strict confidence all information…"; the Law Society of Upper Canada Code says "A lawyer at all times **shall** hold in strict confidence all information…". This

difference is worse than annoying. In ordinary usage *must* and *shall* mean the same thing– setting out something you have to do (and check out this argument for must over shall). But a lawyer comparing the codes now has to worry that *the different usage in Ontario means something*. So the difference is at once both inconsequential (they mean the same thing) and troubling (it makes a reader worry that they *don't* actually mean the same thing). Why make being an ethical lawyer harder for no benefit or apparent reason?

The final example is with respect to the obligations of lawyers who end up in possession of inculpatory evidence of a crime. In 2014 the Federation amended the Model Code to address this issue, and the risk evidenced by the experiences of the lawyer for Paul Bernardo, who was charged with obstruction of justice after failing to provide the Crown with videotapes showing his client sexual assaulting a number of victims (*R v Murray*, [2000] OJ No 2182, 48 OR (3d) 544 (ON SCJ)). The Federation Code provides in Rule 5.1-2A that "A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice," and then adds a number of commentaries clarifying and addressing some of the complexities that can arise for a lawyer who receives such evidence.

The Federation's amendment was adopted in Alberta, Manitoba, Saskatchewan and the Yukon. Ontario adopted the rule and commentary, but amended the commentary so that it suggests that the lawyer consider retaining independent counsel and is more open-ended about the role to be played by that counsel. Newfoundland and Nova Scotia incorporated the Federation's commentaries, but not the governing rule, stating instead that a lawyer should apply to a court if uncertain who is "the proper person to receive a client's property". British Columbia's code remains silent on the issue.

Presumably lawyers at the law societies in Nova Scotia and Newfoundland disagreed with the Federation's governing rule. In Ontario they thought the rule could be improved by amending how it is drafted. In BC they may have disagreed even more strongly, or may just not have concluded their process (perhaps because it's contentious).

I can understand disagreement and slow processes. But here's the thing: lawyers who mishandle physical evidence risk criminal prosecution. The Federation's approach may not be perfect – it may not even be very good, objectively speaking (although it looks fine to me). But it reflects the considered and thoughtful opinion of people who know a lot about lawyers' ethical obligations. It provides clarity on a significant issue with a great deal at stake for the lawyer and the client. Differences have costs as well as benefits – it's not enough that a change makes the code better, it has to make it better enough that it warrants the cost to consensus and clarity (does Ontario's change really make any difference to what a lawyer would do? Both codes recognize a role for independent counsel.). The Federation's opinion may not be the only defensible one available, but it is defensible, it's helpful on an issue where a great deal is at stake, changes to it have a real cost, and it's certainly better than nothing at all.

I get where the provincial law societies are coming from in not simply "going along" with the Federation's Code. I certainly advocated for significant variations from the Federation's approach to the Law Society of Alberta. But I think I was wrong, and I think they are wrong too. Get involved with the Federation's Standing Committee. Participate actively in the process for creating and amending the Model Code. Ensure that one province does not dictate the outcome. As a participant in the process, be open to new ideas or other ways of doing things – try to write the right rule not simply to get your jurisdiction's rules adopted nationally. Get enough people from your law society involved early on so that useful changes are nationally adopted (I do think the Ontario language is better – it would be nice if the Federation Code incorporated it). But once the Federation has agreed upon a rule, adopt it unless there is some tangible, regional specific difference that prevents doing so; adopt an attitude of deference to Federation decision-making. And if you are going to have a difference in rule or approach, explain what it means – what difference it makes for lawyers in your jurisdiction relative to lawyers elsewhere.

And Alberta and Ontario: change your numbering and replace *shall* with *must*. Please – just do that, for everyone's sake.

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