

October 31, 2017

Ontario's Law Society: Orwell's Big Brother or Fuller's Rex?

By: Alice Woolley

On September 13, 2017 Ontario's Law Society with no name sent a now infamous e-mail to its licensees stating:

You will need to create and abide by an individual Statement of Principles that acknowledges your obligation to promote equality, diversity and inclusion generally, and in your behaviour towards colleagues, employees, clients and the public. You will be asked to report on the creation and implementation of a Statement of Principles in your 2017 Annual Report.

While some have defended the Statement (see Omar Ha-Redeye here on [SLAW](#) and Renatta Austin's comments on [The Current](#)) most commentary has been harshly critical. Bruce Pardy on [The Current](#) called it "the most egregious kind of violation of freedom of speech...this is the authorities requiring you to say what it is that they want to hear". In an editorial in the [National Post](#) Pardy described it as "[f]orced speech" of the type that would be imposed in North Korea. In his view the Statement "effectively prohibits Ontario lawyers from engaging in...debate" around the "contours of anti-discrimination laws". In an equally histrionic [editorial](#) in the [Globe and Mail](#), Arthur Cockfield described the Statement's "chilling Orwellian language" and claimed that it would prevent lawyers from representing certain types of clients, like a person who was charged criminally after calling for the imposition of *sharia* law. And even [Conrad Black](#) saw fit to unleash a [polysyllabic spree](#) against the Law Society's initiative, decrying the Law Society for taking "unto itself the totalitarian power to exclude or otherwise punish anyone who declines to declare total fealty to principles enunciated by the professional self-regulator". Black went on to condemn the whole lot of us as "a largely venal association of self-serving gougers riveted on the back of society and dispensing a hideously bloated service on a defenceless public as the lawyers jubilate in their 360-degree cartel."

This post comes not to praise the Law Society's e-mail, but to bury it.

To do so I propose and defend the following:

1. Despite Pardy and Cockfield's free speech hysteria, a law society can indeed require lawyers to acknowledge and abide by obligations it has lawfully created. Doing so is a legitimate and appropriate exercise of regulatory authority, and is essential for law societies as they move towards compliance-based regulation;
2. A law society can legitimately impose obligations on its members that involve moral assessments about what is "right" and "good".

3. The obligations a regulator requires a lawyer to acknowledge must have legal authority – i.e., the law society can only legitimately require lawyers to commit to and acknowledge obligations it has actually created.
4. In this case, the problem with the Law Society’s approach was not that it required lawyers to acknowledge and abide by obligations that incorporated a particular moral perspective or point of view with which some members may disagree (see Propositions 1 and 2). The problem with the Law Society’s approach is that they want licensees to acknowledge an obligation they do not as yet appear to have created (as required per Proposition 3).
5. Canadian law societies should embrace compliance-based regulation, including entity regulation. Doing so could, amongst other things, help to address inequality, exclusion and racism in the profession. The deficiencies in the Law Society’s approach here should not prevent it and other Canadian law societies from exploring these approaches.

They *can* make you say that

The law regularly requires people to acknowledge their legal duties, and does so without much regard for the accuracy of that acknowledgement. I regularly click “Agree” to confirm my “understanding and acceptance” of terms and conditions I have never read, let alone understood and accepted.

Why do we do that? What is the point of requiring people to say things we know are not true and that they do not believe?

My guess is that, most of the time, it is to prevent people from later denying the thing they have acknowledged to be true, however insincere that original acknowledgement. If I challenge the validity of Apple’s Terms and Conditions, they will remind me of my original decision to click Agree to get that app or movie or TV show or song or device that I wanted enough to lie for. Similarly, once a lawyer acknowledges the existence of her legal duties to a regulator – her duty of competence, to avoid conflicts of interest, or to maintain confidentiality – then it will not lie in her mouth to claim that she did not know she had those duties or that she did not understand them. The duties existed and the fact that the lawyer acknowledged their existence, however insincerely, forestalls any argument based on ignorance or innocent misunderstanding.

In addition, however, regulators need to bring legal obligations and requirements to the attention of licensees. They need to do so to ensure that licensees do not lose sight of regulatory obligations in the scramble of keeping a practice running. A system of acknowledgments helps with that objective. Requiring a licensee to acknowledge, for example, that he has an obligation not to represent two clients whose legal interests are directly adverse, even in an unrelated matter, helps ensure that licensee remembers that the bright line rule exists.

Acknowledgements also help regulators to ensure that licensees keep up to date with emerging practice issues and challenges. Requiring a licensee to acknowledge, for example, the need to protect client confidentiality and privilege when crossing the border into the United States, or when storing documents in the cloud, will alert a licensee to those new but crucial obligations, and encourage the licensee to identify means for accomplishing them.

Finally, any regulator who wants to move to compliance-based regulation, and away from the reactive complaint/discipline model that has traditionally been used, needs to use an acknowledgement system. Compliance-based regulation depends on regulated parties – and in particular on regulated entities – acknowledging regulatory obligations, creating strategies for accomplishing those obligations and reporting on the success of those strategies. Compliance-based regulation aims not to punish lawyers for doing things wrong, but to help lawyers create structures and strategies for getting it right. Doing that requires lawyers acknowledging what they need to do, creating strategies for doing it, and monitoring how those strategies work.

In short, regulators have legitimate reasons to require licensees to acknowledge their obligations, and whether a licensee is a compliant but insincere Holmesian bad man, or a compliant and sincere adopter of Hart's internal point of view, makes no difference.

Regulation involves value judgments

My sense from reading some of the criticism directed at the Law Society is that the critics are uncomfortable with the Law Society imposing moral values on its licensees: because the value and parameters of inclusion, equality and diversity are contested and unclear, the Law Society ought not to require its members to acknowledge a duty to promote them.

In my view, decisions about the content of law and regulation, and in particular the duties and obligations of lawyers, necessarily involve moral judgments. Indeed, the duties of Canadian lawyers are rife with them:

- A lawyer may (*not* must) disclose an imminent threat of serious bodily harm or death to an identifiable person or group even where that threat is otherwise confidential and privileged.
- We do not include financial fraud, however serious, within that permission to disclose
- A lawyer must treat a court with civility
- A lawyer must be shown to be of “good character”
- A lawyer must withdraw when a client insists on committing perjury, even where the lawyer's knowledge of that perjury is confidential and privileged.

A number of those duties are ones with which I do not agree, or would have stated differently. But I do not dispute the propriety of a legal regulator making those moral judgments. Indeed, how could they avoid them? Lawyers have duties such as confidentiality, and law societies and courts have to decide what falls within that duty, and where it ends. They have to consider the rights of clients, but also the interests of others – of, for example, the person a client has threatened to harm. Balancing those varied rights and interests requires the regulator to make a value judgment with which some people will agree, and some will not. Indeed, that's what law always is and does – it allows us to peacefully resolve our disagreements about the right way to live. It answers moral questions and resolves moral disputes. A legal regulator is charged with making value judgments on difficult moral questions; it cannot both discharge its mandate and be value neutral.

Regulators can make you acknowledge what is, but not what they wish to be

Given what I have argued to this point, a regulator can make a licensee acknowledge and agree to comply with obligations with which the licensee disagrees. The Law Society of Alberta could make me acknowledge and agree to comply with the duty of civility. It could make me acknowledge and agree to comply with a duty to withdraw when a client has committed perjury. It could do so, even though I do not necessarily agree that, in all cases, that's what my duties should be.

On the other hand, it surely goes without saying that no state actor can make a person agree to abide by legal rules that it has not created. The most basic principle of the rule of law is that the state cannot impose duties or exact sanctions without legal authority to do so. So, for example, the Law Society of Alberta could make me acknowledge that I have a duty to “encourage public respect for and try to improve the administration of justice” (since Rule 5.6-1 imposes that duty). It could also make me acknowledge that I have a duty “not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations”. But it could *not* make me acknowledge a duty to “never criticize a court or tribunal” since the Commentary to Rule 5.6-1 also says “Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers”. The first two acknowledgements have legal foundation. The third one doesn't. And it is only that which is an existing legal duty that I can be required to acknowledge.

The Problem with the Statement of Principles

Given all of this, what about the Law Society's requirement that licensees acknowledge an obligation to promote equality, diversity and inclusion, and create a statement of principles reflecting how they will do so? Provided there is in fact a legally established duty on Ontario lawyers to promote equality, diversity and inclusion, then there is no reason whatsoever why licensees cannot be required to acknowledge that duty, and identify strategies for accomplishing it. That the scope of equality, diversity and inclusion are contested doesn't matter – it would be a legitimate regulatory strategy to accomplish an existing regulatory obligation. Further, requiring a licensee to identify strategies that will “promote” equality, diversity and inclusion does not require a licensee to make public statements in favour of the duty to promote, or even in favour of equality, diversity and inclusion. It does not force speech beyond acknowledgement of the existence of the duty to promote. Rather, it requires a licensee to identify ways that he can take steps to make the profession more equal, diverse and inclusive. What the licensee identifies is, within those parameters, up to him.

The problem, however, as Anne Vespry cogently argued on our legal ethics listserv (and “Bob Smith” also noted in comments on Omar Ha-Redeye's SLAW column), is that it is not clear that there is a legal basis for claiming that Ontario lawyers have a duty to *promote* equality, diversity and inclusion understood as a requirement to take active steps toward making the profession more equal, diverse and inclusive. Or, to be more precise, the Law Society has yet to satisfactorily identify the source for the stated obligation, and a review of the Rules of Professional Conduct does not provide a clear basis for imposing it.

Rule 2.1-1 of the Law Society’s Rules of Professional Conduct requires a lawyer “to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity” and Commentary 4.1 to that Rule imposes “special responsibility to *recognize* the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario. [emphasis added]”

Rule 6.3.1-1 imposes on Ontario lawyers

a special responsibility to *respect* the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person [emphasis added].

The commentary goes on to require a lawyer to take “reasonable steps to *prevent or stop* discrimination” (Commentary 13) and also “*acknowledges* the diversity of the community in Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination” (Commentary 1) [emphasis added].

All of those duties are, however, either passive (recognize and acknowledge) or negative (prevent, stop, respect). None of them seem sufficient as a basis for claiming that lawyers have a positive duty to advance equality, diversity and inclusion. Lawyers perhaps should have that duty, but unless they have it already the legal basis for requiring lawyers to acknowledge that they have it just doesn’t seem to be there. The Law Society’s mistake, therefore, was not in requiring an acknowledgement of an obligation to pursue a contested moral question. Its mistake was requiring an acknowledgement of an obligation it has yet to create or, at least, the source of which it has yet to satisfactorily identify.

Don’t Give Up

I really hope, though, that the problems with what the Law Society did here do not prevent it from exploring and embracing compliance-based regulation. The traditional model of regulating lawyers – create rules and then punish lawyers who break them – has obvious deficiencies. It focuses only on a narrow range of misconduct by a narrow sector of the bar (As I’ve written about [here](#)). It reacts to bad behaviour, without providing useful guidance on how to accomplish good behaviour. By contrast, compliance-based regulation creates the opportunity to encourage legal entities and institutions, as well as individual lawyers, to identify and acknowledge their regulatory obligations and to adopt (in conjunction with the regulator and best practices) strategies for achieving those obligations. It aims to achieve and support good practices, rather than occasionally and haphazardly punishing the bad.

Compliance-based regulation can look like what the law society did here, in which a licensee is required to acknowledge an obligation and identify a strategy to accomplish that obligation. But compliance-based regulation focuses on obligations that exist. It also tends to focus on entities and organizations, not on individual lawyers (unless that lawyer is in sole practice). Some obligations need to be imposed on individuals – because a lawyer is in sole practice, or because of the nature of the obligation (e.g., an obligation not to mislead the court) – but much of the time ensuring good practices occurs on an institutional level not an individual one. Imagine that individual lawyers did have a duty to promote equality, inclusion and diversity. What would that look like for that lawyer? Individual lawyers make relatively few hiring decisions. They do not control entry to the profession. They do not impose standards of practice. What they do is represent clients within the boundaries of the law. While it is easy to see how an individual lawyer can be required to ensure that he does not discriminate, it is much more difficult to see the efforts of any individual lawyer meaningfully promoting equality, inclusion and diversity. That’s not to say that the choices of individual lawyers are irrelevant, or that there is nothing to be said for asking individual lawyers to reflect on problems of inequality and exclusion and on their own role in contributing to it. It is only to say that strategies to promote equality, diversity and inclusion are much more likely to be at effective at the institutional level than the individual.

Further, as Anne Vespry also pointed out, why should a lawyer who belongs to a racialized minority, who has to deal with the burdens of inequality and exclusion every day, have to further sign on to an additional responsibility to promote equality, diversity and inclusion? How is that fair or sensible?

Far more useful would be requiring law firms, organizations, and corporations to have that positive obligation to promote equality, diversity and inclusion. Under a system of compliance-based regulation, in which that obligation was enacted, those entities could be required to acknowledge that duty, and come up with a strategy to achieve it and maybe – just maybe – some positive change could result.

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