Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Perspectives on Transparency

by Richard Steinecke
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A regional session of the Council on Licensure, Enforcement and Regulation (CLEAR) was held early this month in Toronto on the topic of transparency by regulators. The well-attended event examined transparency from two perspectives: transparency of process (e.g., when making rules) and openness of information about individual practitioners.

Dr. Michael Salvatori, CEO and Registrar of the hosting Ontario College of Teachers, discussed the reasons why transparency was essential for regulators, including:

- to honour the public's interest and right to information,
- to educate the public,
- to share practices and invite feedback,
- to help the regulator become aware of issues that might not otherwise have been apparent, and,
- to increase accountability.

He outlined the Ontario College of Teacher's commitment to transparency and provided examples of how it:

- held open Council meetings, consultations, focus groups, and received deputations and presentations,
- provided access to information in person and on the website about individual registrants including on its public register,
- made available information about its regulatory process such as on timelines for certification, accreditation, and discipline, and
- used technology to help achieve its goals such as a College app, a members' area on its website and social media.

Bruce Matthews, an experienced regulator and one of the principal organizers of the event, began with his best Jack Nicholson imitation to ask whether the public "could handle the truth". In a deliberately provocative presentation, he argued that there was no such thing as too much transparency when it came to a regulator's procedures and processes. Regulators benefit from informed participants and transparency fosters continuous improvement. He suggested that transparency does not create new risks or aggravate existing risks.

Openness about individual practitioners is more difficult. After all, the whole reason that professions are regulated is because the public is not in a position to protect itself. As such, the regulator has to perform a risk assessment of the benefits and harm that can result from the disclosure including:

- How might this information assist the public?
- What is the risk that the information will be misinterpreted?
- How might this information be abused?
- Can the information be used unfairly?

Having said that, regulators need to be transparent about the risk assessment it performs on openness.

Lawyer Debbie Tarshis asked whether recent events have altered the landscape that informs the

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transparency discussion. She told the story of the Toronto Star's series of articles, beginning in January of 2013, on the kinds of information that regulators do not make public. She outlined the response of both government and regulators to the resulting discussion. As an illustration she described the eight principles developed by a group of Ontario health regulators establishing criteria for making decisions on openness. For example, principle #3 states:

> Any information provided should enhance the public's ability to make decisions or hold the regulator accountable. This information needs to be relevant, credible and accurate.

She also described some of the decisions that flowed from this analysis by these regulators including determinations that significant remedial outcomes from the complaints and investigation processes, such as formal cautions or remedial directions, should become publicly available.

I provided the final formal presentation in two parts. The first dealt with high level legal principles that informed the transparency discussion such as:

- regulators are creatures of statute and thus have to begin by examining what their enabling legislation requires and permits,
- courts recognize that in some circumstances privacy is valued and in some circumstances public access is valued,
- courts recognize that members of closely regulated professions give up some of their privacy rights when joining the profession, and
- courts consider the impact of the disclosure when evaluating its legality.

The second part of the presentation applied risk management principles to both policy and process transparency and to the idea of releasing more information about individual practitioners. Some of the positive (i.e., opportunities, such as members of the profession altering their conduct to avoid having a remedial direction against them entered on the public register) and negative risks (e.g., a temptation on a screening committee to avoid issuing remedial directions that will become publicly available) were outlined.

Methods for analyzing those risks (e.g., the frequency and impact of them) were discussed to suggest some treatments of those risks (e.g., ensure that information made to the public is explained to the reader; exploit the opportunity for regulators to become more relevant to the public). Finally, I concluded with some suggestions of how the success of implementing transparency initiatives could be measured and monitored (e.g., do publicly available remedial directions result in fewer future complaints than confidential remedial directions have in the past?).

The formal presentations were followed by a vigorous question period. For example, a number of questions were asked about whether the current analysis of cutting-edge transparency practices might look restrictive and stale in a relatively short period of time. CLEAR is conducting a similar session in Raleigh, North Carolina next month.