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Stepping Up for Diversity: Law Societies Must Begin to Address the Challenges Faced by Racialized Lawyers and Paralegals

by Adam Dodek

Law Societies have a lot on their plates these days: ABS, access to justice, advertising, articling . . . and that's only the first letter of the alphabet! It is critical that the work of the Law Society of Upper Canada's Working Group on the Challenges Faced by Racialized Licensees not get lost in all this regulatory alphabet soup. The report is important. It is groundbreaking. It is also controversial. And it is necessary. This report will be debated by Ontario's benchers on December 2nd. The Law Society of Upper Canada has a real opportunity to exercise strong leadership on diversity in the profession.

The report is relatively short by Law Society standards (less than 40 pages) and contains a mere 13 recommendations. My uOttawa colleague Professor Joanne St. Lewis made the strong case for moving forward on the recommendations in her *Slaw* column here. I won't repeat her arguments but only highlight a number of important elements of the report.

Some of the recommendations should not be particularly controversial: reviewing the Rules of Professional Conduct and amending it if necessary to reinforce the professional obligations of all lawyers and paralegals to recognize, acknowledge and promote principles of equality, diversity and inclusion consistent with the requirements under human rights legislation and the special responsibility of lawyers and paralegals (Recommendation 1); and develop model policies and resources to address challenges faced by racialized lawyers and paralegals (Recommendation 2);

What seems to sticking in some Ontario lawyers' craw is the recommendation that every lawyer and paralegal will be required to adopt and to abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally and in their behavior towards colleagues, employees, clients and the public. I am not sure why some lawyers oppose this (other than a knee jerk reaction against being told by the Law Society to do anything).

I am told that some lawyers or benchers have raised "free speech" concerns. This seems a bit far-fetched to me. The proposed statement of principles can be taken to be nothing more than a positive affirmation to abide by specific Rules of Professional Conduct and by the law. To the extent that it goes beyond this, the Supreme Court has clearly stated that Law Societies may validly regulate "negative speech" by lawyers. In *Doré*, the Supreme Court specified that when regulating lawyers, Law Societies had to consider "Charter values" like freedom of expression. In the case of the proposed statement of principles, Law Society regulation would involve the promotion of a countervailing *Charter* value: equality.

Perhaps the most exciting part of the report is the recommendation that the Law Society require law firms with 25 or more lawyers or paralegals to provide diversity information which the Law Society will then publish in order to measure progress. Every four years the Law Society will develop and publish an inclusion index. If you don't track diversity, you can't monitor progress.

The final recommendation rightly looks inward and recommends measures that the Law Society itself should take.

There are many fair criticisms of the report. For example, the County of Carleton Law Association expressed concern that the report does not focus enough on racialized licensees as smalls and soles. This is a valid concern.

But we cannot let the perfect be the enemy of the good. This is more than a good report. It is visionary and it is necessary. It is time to move forward with stronger concrete steps to promote diversity within the profession. The Working Group on the Challenges Faced by Racialized Licensees has provided the path forward. It is time to start walking down that path.

Comments

Bob Tarantino
November 28th, 2016 at 9:55 am

Hi Adam

Perhaps I can speak to your comments on Recommendation 3 (that the Law Society will "require every licensee to adopt and to abide by a statement of principles acknowledging
their obligation to promote equality, diversity and inclusion generally, and in their behaviour
towards colleagues, employees, clients and the public"). I haven't spoken to other lawyers who have expressed concern about this recommendation, so I'm not sure what their concerns are based on – but I'll describe what animated my concerns about the Recommendation and why I think I'm ultimately satisfied that, in time, my concerns will be addressed.

To frame my comment, it needs to be noted how the Report envisions Recommendation 3 being implemented: it contemplates that "the 2017 Lawyer Annual Report and Paralegal Annual Report, … and every annual report thereafter, would ask licensees to indicate whether or not they have adopted, and are abiding by, a statement of principles". In short, the Report contemplates that lawyers will (a) adopt a statement of principles, and (b) attest annually that they have abided by that statement.

(I'm going to bracket technical concerns about the implementation of the Recommendation, which really reduce to drafting matters – e.g., presumably the statement of principles will be drafted in such a way that it does not conflict with lawyers' duties to their clients (for example, presumably a criminal defence lawyer will not be put in a position where their representation of a client charged with or convicted of a hate crime is somehow a breach of the statement of principles).)

(I'm also going to bracket discussion about Dore and free expression considerations generally – I think that the caselaw on compelled speech would be of relevance here, rather than caselaw on restrictions on speech.)

To get to my point: the incongruity of the Recommendation is what raised my eyebrows when I read it – by that I mean that, in its envisioned implementation, the Recommendation seems to prioritize the ED&I statement of principles above other obligations to which lawyers are subject. Put differently: there is no other Rule, principle or statement in respect of which all lawyers are required annually to attest to their compliance. The annual LSUC filing does not require lawyers to attest that they have abided by the terms of the oath they swore when they were called to the bar, it does not require them to attest that they have generally complied with the Rules of Professional Conduct, nor does it require them to attest that they have sought to advance any other principles or goals (e.g., justice, access to justice, fairness, quality client service, etc.). As mentioned, it seems incongruous that out of all the things which the Law Society wants to make sure lawyers are doing, the *only* thing they will be required to attest to on an annual basis is their adoption and compliance with an ED&I statement. (I note that the LSUC Annual Report does require *some* lawyers, particularly those who engage in real estate practice and those who manage trust accounts, to make general statements about their compliance with particular Rules and policies – but that just highlights the incongruity for me.)

So, that said, how have I gotten comfortable with the Recommendation? Because it is my understanding that, in moving towards a compliance-based regulatory model, these sorts of adoption/attestation approaches will become the norm, rather than the exception. So at some point I imagine we'll see that lawyers *are* required to attest to their compliance with the Rules generally, *including* the ED&I statement of principles. That makes much more sense to me than having the ED&I attestation hanging out there alone.

Bob Smith
November 28th, 2016 at 12:57 pm

"To the extent that it goes beyond this, the Supreme Court has clearly stated that Law Societies may validly regulate "negative speech" by lawyers."

No, no it didn't. It upheld the constitutionality of the Barreau's action in certain, very narrow, circumstances. There is a clear difference between sanctioning a lawyer for calling a judge a "coward" (a-la-Dore) in order to uphold the integrity of the profession and sanctioning a lawyer for refusing to adopt an ill-defined "statement of principles" – which, as you characterize it, merely restates their obligation to comply with the law.

Moreover, think of all the things you've assumed away. To adopt a "statement of principles" you have to develop one. That takes time and effort (well, at least if one takes the exercise seriously). And what does that "statement of principles" have to say? Will the LSUC establish guidelines as to what is a compliant "statement of principles"? What if I disagree with their guidelines (as we see in the LSUC v. TWU bun fight, the concepts of "diversity", "inclusion" and "equality" are contestable, with both sides claiming, on reasonable grounds in light of the split decisions at the provincial courts of appeal, to embrace them)? What if my "statement of principles" isn't compliant? Will the "statement of principles" be reviewed by the law society? What if I'm considered to have not complied with my "statement of principles"? All for the purpose of restating to our existing legal obligations which, from lawyers, should be presumed.

On top of which, I'm somewhat taken aback by the casualness with which you dismiss "free speech" (and you use "air quotes" to describe this rather fundamental Charter right, why?) and normalize compelled speech. Even if such a violation can be upheld, it's still a violation. Surely to god we can promote diversity without violating the Charter.

Mike
November 28th, 2016 at 1:11 pm

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http://www.theglobeandmail.com/news/alberta/law-society-accepts-ezra-levant-resignation/article28994060/

http://news.nationalpost.com/full-comment/barbara-kay-kafqaesque-kangaroo-justice-at-the-law-society

Anne
November 28th, 2016 at 10:26 pm

Often when I hear the call to not let perfect be enemy of good, the actual contest seems more about not allowing due diligence to properly inspect the shoddy and sub-optimal.

In this particular instance, Mr. Tarantino and Mr. Smith have provided adequate reasoning for why Recommendation #3 avoids being reprehensible only by being both ridiculous and unenforceable.

It is instructive to look at some of the other proposed "good" embedded in potentially more harmful recommendations such as Recommendation #4 that provides statistical data from licensees annual reports back to their firm (as long as it includes 25 licensees or more). That data was historically collected on the basis of it being only used by the LSUC as aggregated information. Should Recommendation #4 pass, there will undoubtedly be firms where the managing partner who receives the data back from the LSUC looks around the firm and finds that his or her tally of *visible* diversity doesn't match the declared information.

Option #1, managing partner resolves that next year the firm should put more pressure on anyone who might be able to put a check-mark in one of the diversity categories on the Annual Report, so that the firm's diversity profile looks better.

Option #2, invisible differences — religion, orientation, disability, and in some cases race — are not a problem until the firm receives a report from the LSUC saying that there are licensees there who were willing to be counted by the regulator but not by their firm. It is naive to think that this would not result in some licensees being targeted or badgered to "come out" in whichever way.

There is undoubtedly some good amidst the dross, almost certainly a baby or two struggling in the bath of effluent flowing through the recommendations. For the benefit of the profession, and of the individual licensees facing discrimination, the Convocation needs to engage in critical debate and –if necessary– amendment of the Recommendations. Before adopting new policy, Convocation must ensure that unintended negative consequences are minimized, and barriers facing racialized licensees actually will be diminished as a result.